

Legislative Subcommittee of the Right to Know Advisory Committee
July 12, 2010
Meeting Summary

Convened 1:06 p.m., Room 438, State House, Augusta

Present:

Chris Spruce, Chair
Robert Devlin
Richard Flewelling
Mal Leary
Judy Meyer
Linda Pistner
Harry Pringle
Kelly Morgan
Karla Black

Absent:

Shenna Bellows

Staff:

Peggy Reinsch
Marion Hylan Barr

Legislative Subcommittee Chair, Chris Spruce, convened the meeting of the Legislative Subcommittee of the Right to Know Advisory Committee at 1:06 p.m. and asked the members to introduce themselves.

Issues from June 28, 2010 meeting

The Legislative Subcommittee continued discussion regarding whether e-mail addresses should be public records and ensuring that decisions are made in proceedings that are open and accessible to the public. Draft legislation was also reviewed regarding protection of private information contained in e-mail and other forms of communications between elected public officials and their constituents and regarding the use of technology by members attending meetings

• **Should e-mail addresses be public records**

At the Legislative Subcommittee's request, representatives from the Office of Information Technology and the Department of Inland Fisheries and Wildlife were asked to attend the meeting and share their thoughts on the practical implications of imposing a state-wide policy making e-mail addresses confidential, including concerns, costs, and implementation. Staff distinguished the difference between distribution lists and e-mail addresses found in e-mail chains.

Greg McNeal, Chief Information Officer and Paul Sandlin, Manager of eGovernment Services expressed their thoughts that e-mail addresses present a tough issue. E-mail is usually used as a communication channel, and is usually associated with a password.

After an e-mail transaction, how long should an e-mail address be maintained? They explained as a rule OIT does not release e-mail addresses but when another State agency receives a freedom of information request for that information, OIT administers the other agencies response. (OIT is the technical arm that maintains the data.) Mr. McNeal and Mr. Sandlin noted that some people care if their address is released, some do not; and some people have no idea that their addresses are collected. They believe that most people don't expect their e-mail addresses to be used or sold for commercial purposes. E-mail policies can make that clear.

Mr. McNeal said they looked at other states' sites, and noted that North Dakota includes opt-in/opt-out boxes, but there is no explanation of uses. When questioned, he said he views e-mail addresses the same as any other address. Mr. Sandlin also mentioned that e-mail addresses are often used as a type of credential for signing into an account on a website, such as Amazon, or gmail. He described the evolving nature of identity over the Internet, including the large number of applications that use e-mail addresses as the User ID.

Paul Jacques, Deputy Commissioner, and Bill Swan, Director of Licensing and Registration, of the Department of Inland Fisheries and Wildlife, explained the transition of much of the Department's licensing and permitting activities to electronic communications, which has allowed the Department to reduce staff and save costs. The e-mail traffic has increase from 30,000 a year to over 100,000 a year. They discussed an opt-out option, but if the e-mail addresses were maintained in any form, they would still be FOIA-able, even if an addressee opted out.

When the e-mail addresses were requested, a backlash was anticipated. The Department posted that the e-mail addresses had been requested and released, and once it was clear that the name identity of the requestor was also public, that information was posted, too. Reputable companies would comply with request by a consumer to opt out, but it would still be public. Mr. Swan noted that the Department keeps the e-mail list as a public service. All the Department's funding is through licensing, and the list is a great marketing tool for the Department.

Mr. Swan pointed out that an e-mail address is very different from a mailing address because of the ease and cost savings in the sender using e-mail. He also believes that e-mail is much more intrusive than regular mail; it is more like a phone call, in that you have to respond to it in some manner.

Mr. Swan noted that other states have imposed limitations on distribution of e-mail addresses. Mr. Jacques described the situation in Idaho in which people opposed to a new wolf hunt requested the e-mail addresses of all wolf license applicants; the Idaho Legislature is considering legislation to make the information confidential to prevent harassment of hunters by opponents.

The Department's best idea to address the e-mail issue is to give the person the option to not have the e-mail address become public information but still be able to communicate

by e-mail with the department. The Department has been selling its lists (not including e-mail addresses) for years. Mr. Swan did not think preventing the sale of the list after it is released would be helpful.

Mal Leary asked how to draw a distinction between the Department's commercial purpose in using the information and someone else doing business? Mr. Spruce saw the Department as trying to elevate e-mail addresses to the same level as Social Security Numbers in their need for protection, and he said he hadn't reached that point yet. Linda Pistner noted that for whatever reason, people are unhappy with the distribution of their e-mail addresses. Many people do not understand computers, and e-mail also can bring in spyware and viruses. Harry Pringle suggested that this issue may be quaint in 10 years as technology and society change. He suggested that there are two options: 1) the Texas model in which all e-mail addresses are confidential – this leads to expensive redaction efforts; and 2) allow the e-mail to be treated like any other identifier. Mr. Spruce said it is important to make it clear that when anyone is doing business with the State, it will be public; if you are uncomfortable with that, use a different form of communication. Mr. Spruce is not interested in the Texas model. Kelly Morgan suggested the safe behavior of using a separate e-mail address for all online ordering and other commercial transactions. Richard Flewelling agreed that anything other than a black and white policy will be enormously complicated to administer. Karla Black noted her surprise that the reaction to the IF&W release of e-mail addresses was so strong, and she believed we should be responsive to the public concerns, although she didn't know what the solution is. Mr. Leary did not think the number of complaints was that significant and cited a Pew Foundation study that indicated that most people treat their e-mail address like their mailing address.

Christopher Parr, Staff Attorney to the Maine State Police, Department of Public Safety, said if he had been on the list, he would have complained to IF& W about its release. He also asked how distributing his e-mail address supports open government; does it give information about what the government does? Isn't the discussion really about context? A mailing address is not always given out, such as when interviewing crime suspects or victims; however, if the State makes e-mail addresses in general confidential, the effort required to redact that information from everything would create a huge burden on government.

Mr. Pringle asked staff to create a draft to protect lists of e-mail addresses compiled by government to allow citizens to do business with the government and differentiate those from e-mail addresses that appear in e-mail addresses. Ms. Morgan asked why it is okay to sell mailing lists but not e-mail lists, and Mr. Pringle agreed that if everyone believes they are the same, the discussion ends there. Mr. McNeal noted that there are distinct differences, in that a person's physical address is already available to the public via phonebook, E-911, etc. The only way to get an e-mail address is through a transaction or if a person gives it to you, which is the same with cell phone numbers - no one knows what it is unless the holder gives it out.

- **Proceedings in public**

The Subcommittee reviewed the draft prepared by staff to provide a general policy statement about communications outside of meetings not being prohibited, unless they are intended to circumvent the law, and to provide a definition of “meeting” that includes communication among members outside of being physically present as a quorum. The draft also included a clarification in the wording of the public notice requirement. Subcommittee members disagreed about whether to go forward with the definition of meeting and clarifying §406. Mr. Flewelling thought the definition was helpful for people to better understand the law and conform their behavior accordingly. Mr. Pringle thought it would cause more confusion. The goal is to make clear that decisions cannot be made in secret meetings, but we still want public officials to be well-informed when they do make decisions. If criminal penalties are going to be imposed, it is very important to give accurate guidance. Ms. Pistner did not see that the problem was actually addressed, and the proposal goes against her sense of what a meeting is: people getting together. After more discussion, the Subcommittee decided to go forward with a redraft of the amendment, amending only §401.

- **Protection of information in communications with elected officials**

The Subcommittee reviewed the draft prepared by staff that would protect certain information in communications between constituents and elected officials. Ms. Black was concerned that using the term “personal” did not provide much guidance because everything comes to the Governor’s Office stamped “personal” or confidential; everyone assumes their information is confidential. Mr. Leary thought the draft was too broad, and recommended limiting the exception to information that would be confidential in the hands of an agency. Mr. Parr (State Police) wondered what happens to information forwarded by legislators to an agency. He was also concerned about using the term “information;” he needs to review each record to redact “information” that is not public. He believes that that level of redaction cannot take place because it is just not practical. He will not know if the information is confidential under any other provision of law. Ms. Meyer noted that people should be careful about sharing personal information, and should be aware what communications results in a public record.

The Subcommittee requested staff to redraft the proposal to reflect Mr. Leary’s suggestion.

- **Holding meetings using technology**

The Subcommittee reviewed the draft legislation - an updated version from the proposal prepared last year - and commented on both specific concerns as well as general questions. Mr. Pringle stated that he is not inclined to support a general proposal allowing public bodies to meet with only a quorum present and all other members participating remotely. Ms. Black believes the draft was terribly complicated to just let a person call in to participate. Specific concerns about the draft included the prohibition of a member voting if additional materials are distributed at the meeting, the meaning of when attendance is not “reasonably practical,” and the procedure when an official

emergency has been declared. Mr. Leary agreed with concerns, but reminded the Subcommittee that this is permissive, not required, and that selectmen have asked for some process for a long time. Ms. Morgan agreed it was good for emergencies. Mr. Flewelling noted that subsection 5 was unnecessary and recommended deleting it.

Mr. Leary thought it would be appropriate to make the entities that now have statutory authority to use technology for remote participation in meetings to comply with this statute. Ms. Black thought it was important to hear from them before this is imposed. Ms. Meyer proposed that remote participation be prohibited for public hearings, although Mr. Leary pointed out the Legislature recently amended its own rules to allow it to use the University of Maine System campus connections for a statewide hearing. Mr. Pringle supported a clarification that the change also would not apply to executive sessions.

The Subcommittee directed the staff to revise the draft.

- **Penalties**

The Subcommittee discussed the current penalties available for violations, and reviewed a chart describing the approach by other states. Ms. Pistner clarified that district attorneys do have authority to prosecute violations of the law, which are currently civil violations for which a maximum of \$500 may be imposed against the public entity. Attorneys' fees also are available if the public entity acted in bad faith. There was general agreement not make violations criminal, but Mr. Leary suggested more "teeth" would be appropriate. Ms. Pistner and Ms. Black agreed that education is still the key to ensure understanding of the laws and compliance with them. There are more efforts that can be made to make sure everyone is up to date and understands the law and their responsibilities. Mr. Leary is interested in penalties that can be imposed against the single bad actor, not just the entity. Mr. Pringle was concerned whether anyone would run for office, and wondered whether officials could be insurable. Ms. Meyer would like to explore the fine being paid to the wrong party.

The Subcommittee asked staff to prepare a draft with different options to be considered.

- **Should the law be amended to specifically address caucuses?**

The Subcommittee reviewed materials collected by staff on how political caucuses at the state legislature level are treated in other states. Many state statutes exempt the legislature from the open meeting requirements, and some that do not exempt the legislature carve out an exception for their caucuses. Case law uniformly indicates that courts find challenges to be separation of powers issues, and declare the complaints not justiciable because the legislature has the inherent authority to control its own proceedings. Mr. Devlin noted that county and local governments are often elected on party basis, but they do not enjoy the same deference as at the state level. Mr. Leary

agreed that the courts in Maine would not enforce a requirement that caucuses be open and suggested that effort be spent on issues that can be changed more readily.

- **Scope of public records exceptions review process**

This issue is before the Subcommittee because the Judiciary Committee determined that the review statute did not explicitly require the review of statutes that affect the accessibility of public records. The concern is that a fee structure could be established that is so onerous that it results in constructively closing off records to inspection and copying by the public. The Subcommittee looked at the process conducted by other states that also review public records exceptions.

The Subcommittee directed staff to draft language to include accessibility issues in the review process.

The next Subcommittee meeting is scheduled for Monday, July 19, 2010, starting at 1:00 p.m.

The meeting was adjourned at 3:50 p.m.

Respectfully submitted
Carolyn Russo
Peggy Reinsch
Staff, Right to Know Advisory Committee

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