

Right to Know Advisory Committee
Legislative Subcommittee
September 1, 2011
Meeting Summary

Convened 1:00 p.m., Room 438, State House, Augusta

Present:

Judy Meyer, Chair
Joe Brown
Mike Cianchette
Richard Flewelling
Mal Leary
Kelly Morgan
Harry Pringle

Absent:

Shenna Bellows
Ted Glessner
Linda Pistner

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Judy Meyer, subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Letter from Dwight Hines Regarding Participation of Maine Municipal Association

Ms. Meyer noted the letter received from Dwight Hines objecting to the participation of any representative from the Maine Municipal Association on the RTKAC and its subcommittees. For the record, on behalf of Sen. Hastings, Ms. Meyer stated that this issue will not be taken up at the full committee or subcommittee level as the RTKAC member representing municipalities has been duly appointed pursuant to law by the Governor. Richard Flewelling, who currently represents the Maine Municipal Association on the RTKAC, stated on the record that the association does not have any bias on the Freedom of Access Act, but noted that the association does have a legislative perspective on issues affecting municipalities.

Progress Report on Criminal History Record Information Act Revision

Staff reminded the subcommittee of past discussions of the Advisory Committee related to public records exceptions contained in the Criminal History Record Information Act, Title 16, chapter 3, subchapter 8. The Advisory Committee delayed its recommendations on the exceptions to the Judiciary Committee in 2009 to allow the Criminal Law Advisory Commission (CLAC) to propose a draft revision of the entire Act. Special Assistant Attorney General Charles Leadbetter, the primary drafter for the Criminal Law Advisory Commission, presented the draft revision to the subcommittee.

Mr. Leadbetter provided an overview of the revised draft, noting that the terms “public criminal history record information” and “confidential criminal history record information” are used in place of the terms “conviction data” and “nonconviction data” as these terms are more easily understood by criminal justice agencies and the public. He explained that the definition of criminal history record information is clearly defined and is tied to a specific, identifiable person.

In the proposed § 626, the draft revision maintains the provision in current law that public criminal history record information is subject to FOA and recognizes the current interpretation of the law that there is no time limitation on the dissemination of public criminal history record information. However, Mr. Leadbetter noted that the draft includes a new provision that requires Maine criminal justice agencies to query the State Bureau of Identification prior to disseminating public criminal history record information for a noncriminal justice purpose to ensure that the most up-to-date information is being disseminated.

With regard to confidential criminal history record information, Mr. Leadbetter noted that the proposed § 627 authorizes release of confidential criminal history record information only to authorized persons or entities as defined in the provision. He explained that the authorized persons or entities identified in paragraphs A to D are found in current law and that paragraph E recognizes the “citizen who knows too much” and allows a criminal justice agency to respond to a specific inquiry in order to provide accurate information related to a final disposition of a criminal proceeding.

Mr. Leadbetter also pointed out a new provision in paragraph F which is important to CLAC. Paragraph F permits a criminal justice agency to disclose confidential criminal history record information to the public for the purpose of announcing the fact of a specific disposition within 30 days of the date of the disposition (or at any point in time if authorized by the person to whom the disposition relates). Mal Leary asked why the 30-day time limit was included. Mr. Leadbetter responded that CLAC thought a narrow time limit was appropriate but that the Legislature might decide on a different time limit. Judy Meyer noted the difficulties of persons charged with crimes that are later dismissed in finding employment as Internet searches will bring up articles on the charge but not include information on the dismissal of those charges. Mr. Leadbetter explained that paragraph F would permit that person to request the information related to the dismissal of discharges be disclosed.

The second part of the draft revision focuses on intelligence and investigative information. Mr. Leadbetter explained that CLAC has suggested removing the provisions related to intelligence and investigative information outside of the Criminal History Record Information Act subchapter (as in current law) to remove any confusion. As in current law, the definition of intelligence and investigative information includes information that relates to both criminal and civil activities so there are separate definitions included in the proposed revision. He also noted that the definition does not include information related to juvenile matters as that is addressed by the Maine Juvenile Code.

Mr. Leadbetter pointed out that the revision in § 642 includes the same criteria for release of intelligence and investigative information as in current law (Title 16, §614). In § 643, the specific exceptions are listed which permit the dissemination of intelligence and investigative information. Mr. Leadbetter highlighted that current law limits dissemination to Maine entities and that CLAC suggests the Legislature may want to broaden some provisions (but perhaps not subsection 5) to include other states. He also highlighted the alternatives presented for subsection 6 with regard to release of intelligence and investigative information to government entities that license entities or individuals for certain services or occupations. Harry Pringle inquired if CLAC considered whether this information should be released to public employers. Mr. Leadbetter explained that there was not a specific exception but that, under current law and the proposed revision, criminal justice agencies would do an analysis of the criteria under § 642 to determine if information can be released. He further noted that CLAC did not consider adding further exceptions, but agreed that an exception for public employers may be a worthwhile exception for the Legislature to consider.

Ms. Meyer thanked Mr. Leadbetter and CLAC for their work to make the Criminal History Record Information Act more user-friendly with the draft revision. At the next meeting, the subcommittee will review the draft revision and consider recommendations to CLAC relating to the public records exceptions included within the revision.

LD 1465, An Act To Amend the Laws Governing Freedom of Access

At the subcommittee's request, Chris Cinquemani of the Maine Heritage Policy Center (MHPC) provided an overview of LD 1465, An Act to Amend the Laws Governing Freedom of Access. The Maine Heritage Policy Center worked with Sen. Rosen and other stakeholders in drafting LD 1465 but was the leading proponent of the bill before the Legislature. Mr. Cinquemani expressed his appreciation for the sponsorship and support of Sen. Rosen, LD 1465's sponsor, and noted the letter sent by Sen. Rosen to the subcommittee. He also acknowledged the bill's lead cosponsor, Sen. Dawn Hill, the bipartisan group of legislative cosponsors and the other entities supporting the bill, including the Maine Civil Liberties Union and the Maine Press Association. Mr. Cinquemani explained that, in the Maine Heritage Policy Center's view, the current law lacks accountability and LD 1465 has been proposed to add accountability so that the public can have peace of mind related to requests for public information and the response to those requests by government entities. The overview focused on 3 reforms included in LD 1465: timelines, form of requests and public access officers.

Timelines provision in LD 1465. Mr. Cinquemani noted that under current law there are no specific timelines to acknowledge or comply with FOA requests. By example, he used a Maine Heritage Policy Center request to the Maine Turnpike Authority that took 184 days before a response. He explained that LD 1465 proposes timelines, but allows additional time to government agencies to comply with requests when needed. 30 states were identified by MHPC as having timeline in their FOA laws; Maine and Connecticut are the only New England states without a timeline in their statute.

Form of Requests provision in LD 1465. Under current law, there is no specific mention of the form of records provided in response to a FOA request. Mr. Cinquemani highlighted the provisions in LD 1465 that permit a requester to ask for a copy of a record in any form; require the government entity to provide the copy in that form if it can be produced in that manner; allow a requester to pay an agency's cost to purchase and install capability to produce records in requested form; and require agency to identify to requesters every form in which a record can be produced if an agency is not able to produce a record in the form requested. Mr. Cinquemani provided several examples of responses to FOA requests that did not provide the record in the form requested by the requester. Ms. Meyer noted the difficulties that smaller towns and government entities might have with training personnel on specific software needed to respond to FOA requests for records in a certain form. Mr. Cinquemani noted that LD 1465 allows for the full cost of providing the record in the requested form to be charged to the requester, but agreed that this provision and the issues raised by Ms. Meyer may need further discussion. 16 states were identified by MHPC as having statutory provisions allowing requesters to specify the form of the record requested.

Public Access Officers provision in LD 1465. As drafted, LD 1465 proposes to require each government entity to designate an employee as the public access officer for that entity and allows the entity to designate an existing staff person to meet the provision's requirement. It is intended to put someone with FOA expertise in every entity to assist the public. MHPC identified 8 states

with laws that require a designated public access officer with varying responsibilities in each state law.

Mr. Leary inquired whether the timelines are workable for all towns and suggested that there may be a need to identify different categories and timelines depending on the entity. Mr. Cinquemani responded that he believed the timeline in LD 1465 is open-ended and allows flexibility when needed but requires government entities to communicate with a requester and develop a process to respond to a request.

Mr. Pringle asked about the drafting process used to develop the bill and whether the bill is modeled on a particular state law. Mr. Cinquemani explained that the skeleton of the draft was inspired by Texas law but changes were made to make it unique to Maine. He noted that Texas, Mississippi and Idaho are examples of other states with strong FOA laws.

Mr. Pringle also asked whether the current law that requires a response to be provided in a “reasonable” amount of time wasn’t adequate to address the MTA example of 184 days. Did the MHPC consider using the current law’s provision allowing a requester to recover attorneys’ fees? Couldn’t that provision be used to resolve future cases? Mr. Cinquemani responded that MHPC was reluctant to pursue a lawsuit without a specific timeline in the law.

Michael Cianchette expressed his opinion that the issue of “form” of requests may be addressed through the Bulk Records Subcommittee, but stated his concern about the language in LD 1465 as written relating to requiring a record to be made “immediately available” and the difficulties that would place on agencies. Mr. Cinquemani responded that the language was consistent with laws of other states; he reiterated that some records should be immediately available and perhaps public access officers could develop lists of those records. Mr. Cianchette noted that the current policy in State government requires FOA contacts and asked about the specific inclusion of subsection 6 which states that the unavailability of a public access officer may not delay a request. Mr. Cinquemani explained that it is important for all levels of government to have employees responsive to FOA requests and not to impair the public’s access to records.

Richard Flewelling said he believed it was inaccurate to state that current law did not contain a timeline to respond as the current law requires the response with a reasonable amount of time, which in his opinion works well. Mr. Flewelling also stated his belief that the first deadline in LD 1465 that requires a record to be “immediately available” upon request would be very difficult for local governments to implement. Ms. Meyer agreed with the concerns expressed about the burdens on small towns to comply with the timelines and other requirements in LD 1465. Ms. Meyer remarked that a one size fits all approach may not work and suggested that perhaps the provisions in the bill could be separated so those provisions that have more support could move forward. Mr. Cinquemani said MHPC would support the enactment of some of the easier provisions, but reaffirmed the need and importance of timelines in the law as well.

Mr. Leary expressed his support for funding the ombudsman position, which is included in LD 1465, and explained his belief that the ombudsman could be really important in lieu of strict deadlines to make the FOA laws more effective. Mr. Flewelling agreed that the ombudsman may help solve problems but also indicate his support for the public access officer provision rather than fixed deadlines.

Ms. Meyer suggested that the subcommittee revisit LD 1465 at the next meeting, focusing on all of the provisions but the timelines as that provision raises the most concern among subcommittee members. Ms. Meyer also suggested deferring until the next meeting any discussion of the

Governor's letter asking for consideration of 2 issues: 1) the definition of what constitutes a public record...does it include grocery receipts from the Blaine House; and 2) the statutory rate of \$10.00 per hour for staff time responding to FOA requests. Mr. Pringle asked if staff could research the average hourly pay for state employees as a frame of reference when the subcommittee considers this issue.

E-mail Inquiry from Chris Parr, Maine State Police---What is a FOA request?

Chris Parr, Staff Attorney and FOA contact for the Maine State Police in the Department of Public Safety, described the email inquiry he made to the RTKAC asking whether a request for records under FOA must specify that and cite the law. Mr. Parr explained that, if the provisions proposed in LD 1465 move forward that spell out the process for responding to requests, then it would be helpful to know what a FOA request is. Is it any request for a document or information from a government entity or is FOA a special vehicle?

Ms. Meyer stated that the press prefers an informal approach and does not usually cite FOA, but that they are willing to specifically cite FOA when requested. She asked Mr. Parr how many requests are received that invoke FOA. Mr. Parr responded that he didn't know as he does not personally review each request as the FOA contact for the Department of Public Safety, which has 9 bureaus, and that, if LD 1465 moves forward, it would be important to know type of request because compliance would be difficult.

Mr. Leary remarked that all records maintained by government entities are the public's records although the statute makes certain records confidential and that if someone asks for a record, the person should get it without having to cite FOA. Mr. Parr stated he was not advocating any position and agreed that someone should not be required to cite FOA. At present, all requests are considered FOA requests but LD 1465 raises certain implications. Mr. Pringle affirmed that under current law it is not necessary to cite FOA when making a request, but agreed that if LD 1465 were enacted then a requirement to invoke the statute in a request may become more important.

Ms. Meyer stated she had hoped that the subcommittee could address this issue through an FAQ on the website, but suggested that the issues raised by Chris Parr be considered at the next meeting as part of the subcommittee's discussion of LD 1465.

Next meeting

The next meeting was scheduled for Thursday, October 6th at 1:00 pm. After reviewing his calendar, Richard Flewelling asked if the meeting could be rescheduled because of a conflict with a presentation at the Maine Municipal Association convention. To accommodate this request, the time of the meeting on October 6th was changed to 12:00 noon.

Future Scheduled Meetings:

- Monday, September 12, 2011, 9:00 a.m., Bulk Records Subcommittee
- Monday, September 12, 2011, 2:30 p.m., Public Records Exceptions Subcommittee
- Thursday, September 29, 2011, 9:00 a.m., Public Records Exceptions Subcommittee
- Thursday, September 29, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, October 6, 2011, 12:00 pm, Legislative Subcommittee

The meeting was adjourned at 3:12 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid