

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
September 29, 2011
Draft Meeting Summary

Convened 9:09 a.m., Room 438, State House, Augusta

Present:
Shenna Bellows, Chair
Chief Perry Antone
Joe Brown
Ted Glessner
AJ Higgins
Linda Pistner

Absent:
none

Staff:
Peggy Reinsch, Colleen McCarthy Reid

Public Records Exceptions Subcommittee Chair Shenna Bellows convened the meeting and asked the members to introduce themselves.

Review of existing public records exceptions tabled at last meeting

54	22 MRSA §8754: sentinel events
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Renee Guigard, Assistant Attorney General, engaged in a lengthy discussion with the Subcommittee members. She explained the sentinel events reporting program and explained the purpose of the complete confidentiality of the reports to the Sentinel Events Team within DHHS. "Sentinel events" are serious medical errors and must be reported by hospitals; failure to report may result in a fine of up to \$10,000 imposed by DHHS. The purpose of the reporting is to identify individual and systemic problems and to ensure the errors do not occur again. The only situation in which the confidential information is released is when it is determined the information indicates immediate jeopardy, in which case the Sentinel Events Team reports to the DHHS licensing office. The Department submits a report to the Legislature every year. DHHS is concerned that if the reports are not kept confidential, the hospitals will not report the occurrence of sentinel events, "near misses" or other instances which may or may not be sentinel events.

Sentinel event information reported to DHHS is not released to anyone, including law enforcement and family members of affected patients. Patients or their personal representatives may be able to receive specific information from the hospitals themselves, or from other sources. Information about the imposition of fines is not available. The licensing function carried out by DHHS is handled by a completely different office and there is no overlap or sharing of information (except in the case of immediate jeopardy).

Ms. Bellows was concerned that members of the public do not have information about possibly underperforming hospitals, and information that would be useful in making medical and economic decision is not available. Perry Antone understood both sides: there is an accountability factor and if the information is made public, events would not be reported; but after an investigation, there should be some information available that helps people make medical decisions. AJ Higgins mentioned that if people had

known about the long-standing problems at Downeast Community Hospital, maybe they would have made different medical decisions. Linda Pistner agreed that people should have information and pointed out that the need to provide that information is addressed by the Maine Quality Forum that is part of Dirigo Health.

The Subcommittee voted to ask the full Advisory Committee for advice on how to proceed with the review and evaluation of the sentinel events confidentiality provisions.

21	22 MRSA §1828: licensing of medical facilities
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Renee Guigard, Assistant Attorney General explained that some of the information collected in the licensing process is subject to mandatory disclosure and other information is confidential. This provision addresses complaints made to the Department, and is handled on a case-by-case basis. Ms. Pistner pointed out that the statute protects the patient, but allows other disclosures. It is fairly consistent with other licensing statutes.

The Subcommittee agreed to recommend no changes.

66	24 MRSA §2510: professional competence reports
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Randal Manning, the Executive Director of the Board of Medical Licensure, said that the Board thinks of itself on the public's side - the Board's job is to protect the public. The Board collects as much information as possible to regulate the practice of medicine, but many of the records are about individuals. The current statute works well except for one problem. There is interplay between each licensing board's statute and the general regulatory statutes of Title 10. Although Title 24, section 2505 provides that all complaints received by the Board, whether submitted by a physician's colleague or anyone else, are treated as confidential, Title 10 provides generally that once a board makes a decision to prosecute a licensee, the records become public. The Board has received an interpretation that the Title 10 provision requires the release of the records when anyone other than a physician complains about another physician. The Board would like clarification that Title 10 does not apply to any complaints filed under §2505. Mr. Manning asked that 24 §2510 be amended to allow the Board to release the confidential records to appropriate state and federal agencies when the records contain evidence of possible violation of laws enforced by those agencies or other medical issues. Currently, the statute prohibits this sharing of information. Mr. Manning described the open nature of the actions and decisions of the Board. The policy is to give out as much information about physicians' behavior as possible and to protect patients.

The Subcommittee voted to amend 24 §2505 to clarify that the Title 10 general provisions do not apply, and to amend 24 §2510 to allow the Board to share investigative information with enforcement agencies. Staff will work with Mr. Manning and AAG Dennis Smith to draft language for review at the next Subcommittee meeting.

67	24 MRSA §2510-A: professional competence review records
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Mr. Manning explained that 24 MRSA §2506 requires hospitals to report to the Board when a medical provider's privileges have been revoked, suspended, limited or terminated. The Board ensures that reports are complete and compares them with federal reports. Representatives of physicians claim that credentialing and the extension of privileges by hospitals and other entities fall into "peer review" and

are therefore confidential and cannot be shared with the Board. The Board wants to be careful - it does not want to get too deeply into peer review - but the Board believes credentialing and privilege information should be available to the licensing boards. The scope should be restricted to specific investigations of the Board when a complaint is open; the Board is not looking for sentinel events reports.

The Subcommittee asked that Mr. Manning and staff work with the Maine Medical Association and the Maine Hospital Association to develop language for review at the next Subcommittee meeting.

68	24 MRSA §2604: liability claims reports
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Mr. Manning explained that physicians are required to report to the Board any liability claims filed against them when they renew their licenses, so the Board will have this information. The Board has no authority or jurisdiction to provide remedies to a patient. By the time a medical malpractice case makes it to court, the Board should have known of the incident. Criminal convictions of physicians, however, sometimes come as a surprise. Ms. Bellows said the statute was acceptable to her because the information can be introduced through other methods.

The Subcommittee agreed to recommend no changes.

57	23 MRSA §63: MTA and DOT records
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Deputy Commissioner Bruce Van Note spoke on behalf of the Maine Department of Transportation and Dan Morin represented the Maine Turnpike Authority in discussions about old language making confidential certain records of both the DOT and the MTA. Section 63 contains two separate exemptions for two separate public purposes.

1. Appraisals of property. The reason to keep confidential the appraisals of property that the agency wants to acquire is to allow negotiation with the landowner awhile keeping costs to the taxpayer as low as possible. The information is no longer confidential after nine months after the completion date of the project. The Subcommittee discussed the fairness of the process, and Mr. Van Note explained the State's obligation under the federal Uniform Acquisition of Property Act to pay fair market value for land that is acquired. Joe Brown was concerned that offers are not public when made, but only after nine months after completion. Mr. Van Note agreed to research the federal law to see if the information could be released sooner.

The Subcommittee agreed to not change the confidentiality of negotiations for and appraisals of property.

2. Engineering estimates. Mr. Morin and Mr. Van Note explained that the engineering estimates are kept confidential until a bid is awarded, in which case all the information is open to the public. They pointed out that the statute specifically ties the confidentiality to whether the project is "out to bid." Once a bid is accepted - and the project is no longer "out to bid" - both MaineDOT and MTA release the engineering estimates. There was agreement that the current language could be clarified.

The Subcommittee agreed to amend the statute to clarify that engineering estimates are public once a contract is awarded. Staff will redraft and share with MaineDOT and MTA for the next Subcommittee meeting.

61 23 MRSA §4251: public-private transportation projects

Mr. Van Note explained the purpose of 23 §4251, which is only a couple of years old. It allows confidentiality for the project plans of a private company that develops a project proposal for a longstanding transportation need and submits the plans to the Department of Transportation. Until the Department determines that the proposal meets the standards of the Department or until the proposal is rejected, the entire submission is confidential. The idea is to get the private sector involved in developing new or alternative ways to solve transportation needs, such as the Wiscasset bypass. No one will invest the time, effort and money if, as soon as a proposal is submitted to DOT, it must be made public and competitors can copy. There have been no official proposals but a few telephone inquiries have been fielded.

The Subcommittee agreed to recommend no changes.

15 22 MRSA §1555-D: lists of unlicensed tobacco sellers

Ms. Pistner reported that the Office of the Attorney General believes that 23 MRSA §1555-D should be repealed. The statute was enacted to address the purchase of tobacco products by mail by underage buyers. The U. S. Supreme Court ruled in 2007 that the recipient-verification requirement of the law was pre-empted by federal law, and struck down the entire strategy. The statute is not in use.

The Subcommittee agreed to amend the statute to delete the confidentiality provision and to send a letter to the Legislature's Health and Human Services Committee pointing out that the entire law can be repealed.

53 22 MRSA §8707: Maine Health Data Organization, MHCFC records

Staff relayed the information provided by the Maine Health Data Organization concerning information that was treated as confidential by the former Maine Health Care Finance Commission. The information - used to review hospital rates - is no longer maintained and the confidentiality provisions can be repealed. The confidentiality that applies to MHDO information should remain intact.

The Subcommittee agreed to repeal the two sentences that apply to MHCFC information confidentiality.

62 23 MRSA §8115: NNEPRA

Staff provided a copy of redrafted language applicable to the Northern New England Passenger Rail Authority. The existing statute was redrafted to make the confidentiality provisions consistent with current law in similar situations. The NNEPRA staff asked for additional time to review and to answer a question of the existing laws declaration of a lawyer-client privilege.

The Subcommittee agreed to table Exception 62 until the NNEPRA can respond. The Subcommittee indicated general agreement with the redraft (which should be consistent with 23 §63 as well as other laws).

73 24-A MRSA §216: Bureau of Insurance general confidentiality statute

The Subcommittee had delayed taking action on 24-A §216 until the Maine Trial Lawyers had an opportunity to comment. The Subcommittee had found no reason to make changes, and the representative of the MTLA agreed.

The Subcommittee agreed to recommend no changes.

18 and 19 22 MRSA §§1696-D and 1696-F: Community Right to Know Act

Staff reviewed the inconsistent drafting of this section with the Subcommittee, and explained that the program to provide information about toxic and hazardous substances had never been implemented. Other programs have developed that address some of the same concerns, in the Department of Environmental Protection and the Maine Emergency Management Agency's State Emergency Response Commission. Staff is working with the Office of the Attorney General to develop options.

The Subcommittee agreed to table Exceptions 18 and 19 until the Office of the Attorney General and Staff can develop options for proceeding.

37 22 MRSA §3034: Missing persons

Current law prohibits the Chief Medical Examiner from releasing information collected about missing persons except to use to identify deceased persons and to identify persons who are unable to identify themselves. Dr. Greenwald, the Chief Medical Examiner, requested a change in the statute to allow her office to release some information to be used to help locate missing persons. The Department of Justice currently runs a clearinghouse, including a website, that uses information supplied by medical examiners and coroners to help locate missing persons, but Maine's statute prohibits Dr. Greenwald's participation. Staff provided draft language, but requested time for feedback from Dr. Greenwald, the Attorney General and the DOJ.

The Subcommittee agreed to table Exception 37 until comments are received from the Chief Medical Examiner and the Office of the Attorney General.

38 and 39 22 MRSA §3188 and 22 MRSA §3192

The Subcommittee had voted at the September 12th meeting to write to the Health and Human Services Committee about two programs that were never implemented but that are still in statute and contain confidentiality provisions. Title 22, section 3188 establishes the Maine Managed Care Insurance Plan Demonstration Program for uninsured individuals. Title 22, section 3192 describes the Community Health Access Program. The initial thought was to propose repeal of the confidentiality provisions and encourage the Health and Human Services Committee of the Legislature to repeal the programs if they are not going forward. Upon reflection, the Subcommittee decided to not recommend repeal of just the confidentiality provisions - if the information is ever collected, it would be important to protect individual medical and insurance information from public release - but to notify the HHS Committee that DHHS has recommended repeal of both statutes.

The Subcommittee agreed to send a letter to the Legislature's Health and Human Services Committee explaining the Department's recommendation to repeal the programs.

94 24-A MRSA §2393: Workers' Compensation Residual Market Pool

The Subcommittee had originally asked Staff to redraft this section because it was thought the program was obsolete, although there may be records whose confidentiality should continue to be protected. Staff worked with the Bureau of Insurance and determined that although the number of employers to which the section applied is diminishing, the law still has some current applicability. Staff therefore redrafted part of the statute to provide for confidentiality of the records beyond the completion of the program until the records are destroyed. This language is modeled on the confidentiality provisions that apply to the former Baxter Compensation Program records.

The Subcommittee agreed to amend the statute as drafted.

112 24-A MRSA §6807: life settlement/viatical settlement examination reports

Existing law provides for the confidentiality of examination reports of life settlement/viatical settlement companies. These provisions were the product of lengthy legislative negotiations which resulted in confidentiality provisions that are not consistent with other laws concerning other examination reports of the Bureau of Insurance. At the request of the Subcommittee, Staff drafted a letter to the Legislature's Insurance and Financial Affairs Committee to flag the issue for the Committee. Under normal circumstances, the Subcommittee would have recommended amending the law to be consistent with other provisions.

The Subcommittee agreed to send the letter to the Legislature's Insurance and Financial Services Committee, but agreed to recommend no changes. (The Subcommittee was not unanimous; Shenna Bellows had voted in previous meetings to recommend changes to narrow the exception, consistent with her recommendations for similar exceptions.)

The Subcommittee agreed to meet Thursday, October 27, 2011, starting at 9:00 a.m. (Full Right to Know Advisory Committee meets at 1:00 p.m.)

Adjourned 12:08 p.m.

Note that the Right to Know Advisory Committee met at 1:00 p.m. on September 29th, and cancelled its meeting scheduled for October 27th. **The Public Records Exceptions Subcommittee changed its next meeting to October 27, 2011, starting at 1:00 p.m.**

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid