

Right to Know Advisory Committee
Ongoing FOA Issues Subcommittee
Meeting Summary
Tuesday, July 28, 2009

Convened 1:10 p.m. in Room 438, State House, Augusta

Present:

Mal Leary, chair
Karla Black
Ted Glessner
Judy Meyer
Linda Pistner

Staff:

Heidi Pushard, former extern
Peggy Reinsch

Ongoing Issues Subcommittee Chair Mal Leary convened the meeting and members introduced themselves. Upon the Chair's invitation, the members discussed their priorities of the four issues referred to the subcommittee by the Advisory Committee: Social Security numbers, use of technology in public proceedings, taking and keeping minutes/records of public proceedings and classification of records of advisory panels conducting reviews of internal activities of public agencies or officials. The members agreed that all four topics should be discussed, but that addressing issues concerning Social Security numbers is the most important task.

Social Security Numbers

Chair Leary welcomed Heidi Pushard, a third-year law student at the University of Maine School of Law, who recently completed her externship with the Right to Know Advisory Committee. Ms. Pushard presented one of her work products from the externship: a memo on Social Security Number Confidentiality. The memo outlines findings in the GAO reports: that State freedom of information laws are cited as the primary reason for making available records that may contain Social Security numbers; and that there is concern about the practice of companies sending public records data for processing to at least two countries (India and the Philippines).

Ms. Pushard's memo described solutions adopted by other states:

- some states will truncate Social Security numbers starting now and going forward
- some states will truncate or delete Social security numbers going forward, but also a few years back in time
- California charges a new fee for each record filed to pay for redaction back 20 years
- In some states, an individual can request redaction - burden is on the individual

- Indiana prohibits disclosure of SSNs for most reasons

Ms. Beverly Bustin Hathaway, Register of Deeds for Kennebec County, was in attendance and provided additional information to the Subcommittee about Freddie Mac and Fannie Mae requiring that Social Security numbers be truncated. The Kennebec County Registry of Deeds is now digitized. Original documents filed are kept on the system, but what is available on the website has Social Security numbers redacted. Other states have faced significant costs: Florida was mandated to review all documents in the deed registries and redact Social Security numbers; only 2% included SSNs, but the cost was great because all documents were reviewed.

Mr. Leary related his experience at a conference a couple of years ago during which bankers and lenders were adamant about the need to have Social Security numbers available to track financial transaction. The Subcommittee recognized that a public discussion about Social Security numbers must include bankers and other lenders.

Mr. Leary mentioned that birthdates are also an important piece of information. Ms. Pushard agreed, citing information that to a thief, although a Social Security number alone may be worth \$1, the date-of-birth and the SSN together are worth \$5, and the name, date-of-birth and SSN together are very valuable. Ms. Pushard was not aware of any cost-benefit analysis of truncating Social Security numbers currently in the possession of public entities. More input from the Probate Courts would be helpful, also.

Ted Glessner indicated that the issue has two prongs. First, the policy question of whether Social Security numbers should be confidential? If the answer is yes – and the Federal Privacy Act amendments of 1990 direct the adoption of regulations to carry out such confidential treatment (although no regulations have been adopted) – then the next question is how do we make that happen? It can be dealt with incrementally; restrictions can be applied going forward; for past records, documents can be reviewed as requested and SSNs redacted as necessary. Do we need a policy to make it more difficult for someone to collect Social Security numbers from State and other public records?

There is no official Maine policy on Social Security numbers, and Ms. Pushard explained that provisions addressing the collection and treatment of SSNs are interspersed throughout the statutes. Mr. Glessner asked whether statutory construction rules provide that if some statutes designate Social Security numbers confidential, but other statutes are silent as to confidentiality, then the SSN are not confidential where the statute is silent. Linda Pistner asserted that there will never be one policy for collecting Social Security numbers, but that the State can have a single policy on disclosure.

Information requests for next meeting:

- What limitations do the 1990 Privacy Act amendments impose on the State? (Request to Attorney General)
- Identify statutes in which collection of Social Security numbers is authorized; treatment once collected?
- Ask State FOA contacts about collection of Social Security numbers

Use of technology for public proceedings

Both Karla Black and Ms. Pistner noted that agencies and boards and commissions bodies ask their respective offices for advice on whether meetings can be conducted online, as teleconferences or through other use of technology. It is important that the spirit of the law be maintained. Ms. Pistner noted that if the body is not required to be in one place, the synergy of meeting together, as well as public interaction, is lost.

Judy Meyer stated that e-mail meetings are a bigger problem. She said some town officials believe that if it is not prohibited on the books, then it is assumed to be permitted. A mayor told her that until there is an opinion that says it is illegal, they will continue to use e-mail to make decisions.

Mr. Glessner noted that technology provides great opportunities, but also creates more potential for abuse. The courts aren't cutting edge, but they do video arraignments; the court room is open to the public, and the public sees what the judge sees. The video arraignments help reduce safety concerns, and address travel when the court is not in the same place as where the person is being held. Technology can provide real opportunities to enhance the ability of the public to observe and participate.

Ms. Black related an incident in which a board member was ill, but the legal advice was that the member could not participate by telephone. In another situation, an entire board wanted to vote by telephone. Ms. Black said she had no experience with the e-mail traffic Ms. Meyer mentioned.

Mr. Leary raised the possibility of requiring a "phone bridge" or other means of allowing the public to participate in meetings in which public participation is invited. Both Ms. Black and Mr. Leary mentioned the manner in which the Board of Corrections holds public meetings and provides for public participation. There was discussion about when access must be provided to members of the public who are not in attendance. Ms. Pistner stated that there is a difference between a board member and a member of the public; a board member has responsibility to attend and vote. To extend remote access to the public is not practical, especially from a cost perspective. Although there was interest in providing more access for the public, Mr. Leary agreed that consensus was limited to requiring that a quorum be physically present, and with remote participation of members be limited to emergency situations. Ms. Meyer said it was important to define what constitutes an emergency – poor planning should not be considered an emergency.

Draft legislation for next meeting:

The Subcommittee agreed that the statute should be amended to provide limitations on holding public proceedings using different means. Staff will draft language to:

- Require that a quorum be physically present
- Allow for emergency exception (would exception used in public health emergencies work?)

Ms. Meyer proposed that the statute be amended to prohibit serial e-mails taking the place of public proceedings. The statute must be extremely precise; look at California law. Mr. Leary suggested no votes by e-mail or phone, with emergency exceptions. Ms. Meyer noted that there was such concern in Falmouth that they adopted a town policy (see below); it may be a good model. Mr. Leary noted that restrictions may approach First Amendment ground – when does communication between and among members become communication of the body? And how are restrictions enforced?

Ms. Black suggested looking at other state statutes and opinions about restrictions on e-mail.

Information requests for next meeting:

- Other state statutes restricting e-mail use
- Court and AG opinions on restricting e-mail use

Falmouth

Policy One: Use of Electronic Mail (E-mail)

A. Three or more Councilors or three or more members of any Volunteer Board or Committee shall avoid the use of e-mail for deliberation, discussion, or for voting on matters properly confined to public meetings; email should be used for non-substantive matters such as scheduling meetings, dissemination of information and reports, and developing agendas for future meetings.

B. In the event this policy is not followed, or if there is a question whether substantive matters properly confined to public meetings were discussed or deliberated on via e-mail by three or more members of any Town body, those emails in question should be printed and disclosed to the public at the next public meeting of the Town body.

C. Under Maine's Freedom of Access ("Right to Know") law, all e-mail and email attachments received or prepared for use in matters concerning Town business or containing information relating to Town business are likely to be regarded as public records which may be inspected by any person upon request, unless otherwise made confidential by law.

D. The Town Council Chair shall acknowledge email messages that come to all Council members at once. While the Chair is not empowered to discuss substantive matters on behalf of the Council in these acknowledgements, he or she may supply pertinent information regarding how the Council will proceed with the issue, if applicable (for example, upcoming public hearings, information available through the Town of Falmouth website, and so on). The Chair and individual Councilors remain free to reply to such messages as individuals, but shall refrain from engaging more than one other Councilor in the electronic discussion.

Minutes

Mr. Leary noted that it is clear that minutes of public proceedings are public records. The question is whether all public bodies should be required to keep minutes or records of their public proceedings.

Ms. Pistner noted that Ms. Pushard had pulled together laws from other states concerning minutes. Ms. Pistner also asked what is the problem we are trying to fix. Ms. Meyer voiced her concern about some entities recording good parts of meetings, but turning off the video camera when things get tense. Ms. Meyer recommended that any entity subject to the FOA laws must keep minutes/records of their public proceedings, but that the law should not dictate formats.

Mr. Glessner voiced his reluctance to impose requirements. What is the definition of “minutes”? There needs to be a mechanism to report what happens at public proceedings, and any record must be accessible. Ms. Pistner noted that state boards and commissions (listed in Title 5, chapter 379) are already required to make a record of their meetings. Richard Flewelling’s summary of municipal public proceedings indicates that generally minutes are not required, but that many board meetings and decisions must be recorded. If not already required, though, directing that municipal entities take and keep minutes will be a local mandate, requiring a super majority vote of the Legislature.

Many towns already have recording equipment. Ms. Meyer noted that the statute would not tell municipalities how to record the meeting, but would require that it be done. She did not see a cost to pen and paper.

Mr. Leary recommended that minutes be required, but there is no information about whether this would be a hardship for towns. Ms. Black recommended that the Subcommittee seek input from towns, via the Maine Municipal Association, about what such a requirement would entail. Are there things we aren’t thinking about?

Information requests for next meeting:

- Summary of minutes requirements in other states
- Comments from MMA on requiring minutes – what impact on towns?

“Abbott issues”

The last topic discussed was the issues raised by the Abbot v. Moore, 2008 ME 100: Accessibility of records of a group appointed to review internal conduct of an agency or its employees. The FOA laws make public the proceedings and records of advisory organizations that are established by executive order, law or resolve, but the law is silent as to ad hoc groups established by a public official. It is recognized that there is great public interest in such groups’ activities. In the past, the Advisory Committee has discussed codifying the Abbott factors in the law, but that would not change the treatment of these groups.

Ms. Pistner noted that the problem is coming up with language that does what we want, but is not overbroad. Should it apply to agency heads unless the agency head says otherwise? The question is how to define. Ms. Meyer agreed it is a complicated area, and especially difficult if motives are considered. Mr. Glessner believes that the Supreme Judicial Court got it exactly right.

Mr. Leary asserted that anyone who is providing advice to a public body or official should be public. He has seen some major issues decided by advisory groups outside of the public eye.

The Subcommittee discussed the three main categories of records that such an ad hoc advisory group may use. First, whatever records the official appointing the group provides for the group to review. Second, the notes and working papers of the group. Third, the final report, assuming it is in writing, back to the appointing official. Ms. Meyer mentioned Mr. Pringle's earlier remarks that if all working papers are made public, you will never get qualified persons to participate; their personal and professional work may be implicated, which may include the participant's law firm, etc.

Draft legislation for next meeting:

- Use Ms. Pistner's earlier draft as starting point
- Specific records public, but not proceedings
- Report should be public, including
 - Conclusions
 - Description of people talked to and records reviewed
 - Narrative about how that conclusion was reached

Next Meeting

Thursday, August 27, 2009, 1:00 p.m.
Room 438, State House

Adjourned, 3:30 p.m.

Respectfully submitted

Peggy Reinsch and Colleen McCarthy Reid