

Right to Know Advisory Committee
September 23, 2009
Meeting Summary

Convened 12:45 p.m., Room 438, State House, Augusta

Present:

Sen. Barry Hobbins, Chair
Rep. Dawn Hill
Karla Black
Shenna Bellows
Robert Devlin
Richard Flewelling
Mal Leary
Judy Meyer
Linda Pistner
Harry Pringle
Chris Spruce

| Absent:

Sheriff Mark Dion
Ted Glessner
Suzanne Goucher

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Sen. Barry Hobbins convened the Advisory Committee, welcomed everyone and had the members introduce themselves.

NEW ISSUE: Proposed legislation, Rep. Stacy Dostie (Sabattus)

Sen. Hobbins invited Rep. Stacy Dostie to address the Advisory Committee out of order because of her schedule conflicts later in the day. Rep. Dostie provided copies of a rough draft of legislation and an article about action being taken in serialized e-mail, rather than a public proceeding. Rep. Dostie has submitted legislation to be considered in the Second Regular Session that would specifically prohibit public entities from taking action through the use of serialized e-mail. The draft legislation, based on California law, is in response to actions taken by the Sabattus Selectmen that apparently resulted in the resignation of the town manager. Mal Leary, who mentioned that the article incorrectly listed him as a spokesman for the Advisory Committee rather than the Maine Freedom of Information Coalition, expressed his concern about selectmen taking such action, and would like the Advisory Committee to review the proposed language. He stated that technology is outrunning the Legislature. Harry Pringle referenced a Law Court decision holding that discussions between board members outside of public meetings were not unlawful, and asserted that there are constitutional free speech issues raised by this proposal. He also mentioned that there is a long-tradition in Maine of allowing representatives of the people to talk with each other. Rep. Dawn Hill raised the issue of enforcement of the law should the proposal pass, and wondered whether it is better for municipalities to set their own policies. Judy Meyer remarked that the occurrence mentioned by Rep. Dostie is not an isolated instance, and expressed concern about serialized consensus building, in which the decision is made before the public meeting, but the action is taken in public without discussion. She does not believe reliance on municipal policies is appropriate because that would place confidence in the very people engaging in the non-public processes. Richard Flewelling mentioned that it is more than a municipal issue, and suggested that it would be worthwhile to look at how other

states deal with the concern. Mr. Pringle recommended that the Legislative Subcommittee take on the issue. Linda Pistner agreed, and raised the concern that it includes inherently political speech, so care must be taken. Anytime there are majority and minority factions on a board, the minority often feels they are being shut out. Shenna Bellows also cautioned about First Amendment issues, and suggested that the focus be on action taken in the public eye. The Advisory Committee voted unanimously to send the proposal to the Legislative Subcommittee for review and recommendations.

SUBCOMMITTEE REPORTS

※ Legislative Subcommittee

Subcommittee Chair Chris Spruce presented the recommendations of the Legislative Subcommittee.

1. Transparency of information related to State Government contracts and spending: website an example of open government? Resource questions

Mr. Spruce explained that this topic was raised by Mr. Leary: that the State should take advantage of the momentum of putting all ARRA contracts and spending online, and include all State contracts and spending online. The Legislative Subcommittee supports the idea, and wondered what the resource commitment would be. The Subcommittee invited Chief Information Officer Richard Thompson to address the Advisory Committee on the issue.

Mr. Thompson said that the resources necessary to create and maintain the Transparency website make up a significant component. The funding for the work and the tools was part of the administrative costs, and the tools will belong to the State and can be used in other applications. Some of the data now collected is done on a manual basis. Including all data points may be expensive, but many pieces are readily available now. All contracts that go through Purchases and Controls can be posted going forward, while the ARRA data must go back to February. Mr. Thompson recommended that members look at Maine.gov, and check out the “data share” - more data than ever before is available to review. Once it is posted for the first time, it can be repeated and updated on an appropriate basis.

Mr. Leary asked whether it would be appropriate to pass a statute to make sure that at least this level of transparency is maintained by future administrations. Mr. Thompson understood the concern, but indicated there would be a fiscal note if a law required all information be made public by a certain date. Mr. Thompson’s office is doing the best they can, using ARRA and InforME funding. Rep. Hill asked for a description of the plan, including a time frame, and Mr. Thompson agreed to report back to the Advisory Committee.

2. LD 1353, An Act Regarding Salary Information for Public Employees

The Judiciary Committee requested that the Advisory Committee review concerns raised about the release of salary information when linked to specific public employees’ names. Mr. Spruce explained the Subcommittee’s process, and mentioned that the three options

drafted for the meeting were a result of the Subcommittee not reaching consensus on who needs the protection of confidentiality, and how to provide that protection. The existing Address Confidentiality Program, administered by the Secretary of State's Office, protects victims of domestic violence and stalking by providing a safe State House Station mailing address for all correspondence. Some members felt tying the protections to the ACP was appropriate because it is an existing program with clear standards. Other members were concerned that the population covered by the ACP may not necessarily be a close fit to those who may need confidentiality protection as envisioned by the Judiciary Committee. The members could identify situations in which a person would not be part of the ACP but could benefit from the confidentiality to the same extent. Some members felt that a general "safety" criterion was too broad. The proposed language provided three different options, two specifically linking to those protected by the ACP, and one modeled on the voter confidentiality provisions, but relying on a public employee's employer being satisfied with the employee's safety concern to lead to confidentiality of the employee's name. Ms. Pistner stated that she does not believe that many people would actually take advantage of the protection afforded by any of the proposals. Mr. Spruce recognized the issue, and asserted that it needs to be carefully drafted so it does not shield people who do not need it. Rep. Hill asked if there was another program to which this could be connected, such as protection from abuse orders, or other court judgments. Mr. Pringle mentioned his personal experience witnessing workplace violence, and he understands the need to protect victims' locations. Ms. Black reiterated the Judiciary Committee's concern about protection of undercover law enforcement officers. Mr. Pringle suggested that it either has to be written just right, or it shouldn't be done. Mr. Spruce agreed, and recommended that the Advisory Committee report back to the Judiciary Committee by recognizing the issue, but also recognizing that the devil is in the details. The Advisory Committee agreed not to recommend any change to the law, but to include in the report the concerns mentioned.

3. LD 757, An Act To Improve the Transparency of Certain Hospitals

Mr. Spruce explained the testimony received by the Subcommittee and the discussion among the members and some of the interested parties. The majority of the members do not support the application of the public meetings law to hospitals and others providing medical services (if they received public money). There was concern about extending the law to all nonprofits eventually. The Subcommittee minority thought the idea could be appropriately applied to nonprofits that perform a public function, especially when a public-private partnership is involved; but no specific proposal was recommended. The Subcommittee did agree that people seeking specific information should identify those requests and move forward on a more focused basis.

The Advisory Committee reviewed the draft letter to the Health and Human Services Committee explaining the process and the recommendation against enactment of LD 757. There was general agreement that the health care system should be more transparent, but the Freedom of Access laws should not be applied to make that happen. The Advisory Committee authorized Senator Hobbins to sign the letter on behalf of the Advisory Committee.

4. LD 1271, An Act To Generate Savings by Changing Public Notice Requirements

The Legislative Subcommittee reviewed the changes to the law put in place by LD 1271, Public Law 2009, chapter 256. The Maine Press Association had requested the Right to Know Advisory Committee to review the changes from the perspective of public access as oppose to saving money, which was the main impetus behind LD 1271. Mr. Spruce indicated that the changes made by c. 256 were relatively limited, but the Subcommittee recognized that there is a need to have more than only web access for information. Chipping away at what is published as public notices in the newspapers will continue to be proposed. Sen. Hobbins agreed that it is a bad idea to make publication decisions based solely on the fiscal aspects. He was concerned that perhaps the State has gone beyond bare bones in the papers. Mr. Spruce reminded the Advisory Committee that there is still a significant portion of the population that does not have access to information on the Internet. Judy Meyer suggested that the report include a statement that the State has gone as far as possible in reducing what must be printed as public notices. Mr. Pringle said he was comfortable with not recommending action as requested by the Maine Press Association, but he could not agree that we should not look at the issue again to make further reductions. Mr. Flewelling recommended that the report reflect the current technological context and the concerns for broad public access to information. The Advisory Committee agreed to not recommend any changes at this time.

※ Ongoing Issues Subcommittee

Ongoing Issues Subcommittee Chair Mal Leary presented the recommendations of the Subcommittee.

1. Meetings using technology

Because current law does not specifically authorize a public body to conduct meetings without the members physically in attendance, the FOA laws are usually interpreted as prohibiting such activity. There are a few Maine statutes that specifically authorize such meetings in certain circumstances, such authorizing the Ethics Commission to meet within 28 days of an election within 24 hours of the filing of any complaint or questions with the Commission (21-A MRSA §1002, sub-§2). The Ongoing Issues Subcommittee reported draft language to explicitly address meetings via technology. Subcommittee Chair Mal Leary explained that the purpose is to expand the ability of public bodies to use technology, while not diminishing public access to meetings. The draft authorizes members of a public body to participate in a public meeting via telephone, audio and video or other form of communication if a quorum is physically present, and if all those in attendance, including members of the public, can hear the member's participation. Mr. Leary explained that the draft wasn't final, but was presented to have the Advisory Committee determine whether to continue working on the concept. Richard Flewelling questioned the separate notice language, and whether it creates a conflict with existing notice provisions, as well as with the exceptions for meetings during declared emergencies. Mr. Pringle raised the question whether the members beyond a quorum can just not bother to attend meetings in person, as long as a quorum does.

The Advisory Committee agreed to table the draft pending new language to be drafted by staff.

2. Social Security Numbers

Subcommittee Chair Mal Leary explained that the Subcommittee's goal is to take an overall approach toward protecting Social Security numbers that are held by public entities. SSNs are scattered throughout State government. Because of the issues involved with making public entities protect all SSNs already located in public records, the Subcommittee recommends designating SSNs as exceptions to public records (currently law excepts SSNs in the possession of the Department of Inland Fisheries and Wildlife from the definition of "public records"), and prohibiting release of SSNs collected after January 1, 2011. The draft also directs that agencies collecting SSNs must do so only if authorized and the SSNs must be collected in a way to keep them separate from information in records that are otherwise public.

Mr. Pringle agreed with the proposed amendment to the definition of "public record," but expressed his surprise that the Legislature would enact a law that authorizes the Department of Education to collect SSNs from students. (Education Commissioner Gendron will address the Advisory Committee about PL 2009, c. 448 at a future meeting.) Rep. Hill questioned whether the exception for law enforcement investigations was too broad. Ms. Pistner suggested bringing in the definition of law enforcement agency from the Criminal History Record Information Act.

The Advisory Committee tabled the draft pending new language to be prepared by staff.

3. Minutes/Records of public meetings

Subcommittee Chair Leary explained that because a lot of public bodies already keep meeting records, this draft defines the minimum that must be included in the record. This draft requires that a record be made of each public meeting. Mr. Flewelling pointed out that a similar bill was proposed and soundly defeated by the Legislature this year. He reminded the Advisory Committee that the proposal is an unfunded mandate. Ms. Meyer is willing to make the argument that pencil and paper that would be necessary to comply with the requirement do not constitute a mandate. Mr. Pringle wanted to make sure that this requirement would not result in a change for those entities that already keep meeting records. Mr. Spruce expressed his opinion that this is the most supportable proposal, which goes to the public's right to know by making sure a record is created.

The Advisory Committee tabled the draft pending new language, to be prepared by staff, that clarifies that the record may be a written record or an audio record.

4. Records of ad hoc internal review

Subcommittee Chair Leary explained that the purpose of the proposed draft is to make public specific records related to an internal review of agency conduct. If the review were done by public employees, most of the records of the review would be public. The proposal is to ensure that the same type of review done by persons outside the agency at the direction of the agency head results in the same public access. The draft requires a report to be produced in such an activity, and the report must be public. The proposed

draft requires the report to include the findings, recommendations and conclusions, as well as the process of the review, the list of persons interviewed and the list of records reviewed. Mr. Leary asked whether the idea is something the Advisory Committee wants to pursue.

Mr. Pringle stated that he is not in favor of overturning Abbott v. Moore. Mr. Leary took the opposite position that the Law Court would say that policy-making is for the Legislature, and the Legislature’s role is to change the law to reach policy goals. He believes an entity reviewing a public entity’s conduct should be public.

The Advisory Committee tabled the draft, pending more research and possibly more drafting by staff to address personnel file confidentiality issues.

※ Public Records Exceptions Subcommittee

Public Records Exceptions Subcommittee Chair Shenna Bellows presented the report of the Subcommittee.

Ms. Bellows explained that the Subcommittee reviewed 13 public records exceptions, and tabled six for more information. Seven of the existing public records exceptions were accepted by the Subcommittee, although not all were unanimous votes. Amendments were prepared for four, based on the Subcommittee’s standard requirement that the starting point for all records is that they are public, and then confidentiality protections should be narrowly tailored to cover what needs to be protected. The Subcommittee has not yet reviewed the Criminal History Record Information (staff is working with the Attorney General’s Office to prepare a draft), the standard language for protecting information submitted in applications seeking financial or technical support (such as to FAME), and the system review panels confidentiality (such as protection for the Homicide Review Panel’s records).

The recommendations from the Subcommittee:

10	945-J		Title 10, section 945-J, relating to the Maine International Trade Center	AMEND; draft approved 3-0 vote
10	975-A	2, 3	Title 10, section 975-A, subsections 2 and 3, relating to the Finance Authority of Maine	TABLED for more information, discussion
12	550-B	6	Title 12, section 550-B, subsection 6, relating to water well information collected by the Department of Conservation, Bureau of Geology and Natural Areas	TABLED for more information, discussion; prepare draft amendment

12	549-B	5	Title 12, section 549-B, subsection 5, paragraph D, relating to investigatory and exploratory work reported under a mining permit to the Bureau of Geology and Natural areas	TABLED for more information, discussion
12	6173	1	Title 12, section 6173, subsection 1, relating to marine resources statistics	ACCEPTED; no change 2-1 Vote
12	6445		Title 12, section 6445, relating to logbooks for lobster harvesters	ACCEPTED; no change 2-1 Vote
12	6455	1-A	Title 12, section 6455, subsection 1-A, relating to market studies and promotional plans of the Lobster Promotion Council	AMEND; pending review of draft 3-0 vote
12	6749-S	1	Title 12, section 6749-S, subsection 1 relating to log book for sea urchin buyers and processors	ACCEPTED; no change 2-1 Vote
12	8869	13	Title 12, section 8869, subsection 13, relating to forest policy experimental areas	AMEND; pending review of draft 2-1 vote
12	8884	3	Title 12, section 8884, subsection 3, relating to landowner and wood processor reporting requirements concerning volume information	ACCEPTED; no change 2-1 Vote
14	1254-A	7	Title 14, section 1254-A, subsection 7, relating to names of prospective jurors and contents of juror qualification forms	ACCEPTED; no change 3-0 vote
14	1254-A	8	Title 14, section 1254-A, subsection 8, relating to names of jury pool during the period of service of jurors and prospective jurors	ACCEPTED; no change 3-0 vote
14	1254-B	2	Title 14, section 1254-B, subsection 2, relating to juror selection records and information	ACCEPTED; no change 3-0 vote

16			Title 16, Chapter 3, Subchapter 8: Criminal History Record Information Act	TABLED for more information, discussion
16	614	2 1-A	Title 16, section 614, subsection 2 1-A, relating to personally identifying information of persons who report cruelty to animals to the Department of Agriculture, Food and Rural Resources	TABLED for more information, discussion
19-A	4013	4	Title 19-A, section 4013, subsection 4, relating to the Domestic Abuse Homicide Review Panel	TABLED for more information, discussion
20-A	13004	2-A	Title 20-A, section 13004, subsection 2- A, relating to complaint, charges and accusations concerning certification and registration of teachers (amended PL 2007, c. 666)	AMEND-reflect PL 2009, c. 331 3-0 vote

Mr. Leary requested that the Subcommittee reconsider the jury secrecy laws. He recommended that the presumption for the information be reversed to be consistent with other Maine statutes: that the information is presumed public and confidentiality protections narrowly tailored to address specific concerns.

The Subcommittee recommended that the education credentialing draft be reconsidered by the full Advisory Committee. The Advisory Committee's recommendation was not considered by the Judiciary Committee and the Legislature in the First regular Session on the assumption that a related bill referred to the Education Committee would address the same issues, which it did not.

The Advisory Committee voted to table the recommendations concerning public records exceptions pending further review by the Subcommittee. The education confidentiality was tabled until the next Advisory Committee meeting on October 21st.

NEW ISSUES

- Bob Devlin updated the Advisory Committee on the Hancock County Registry of Deeds case. Although the Superior Court has issued an opinion requiring the Registry of Deeds to provide MacImage with electronic records without charging the \$1.50 per page as approved by the County Commissioners, the parties have asked the court for a clarification of the ruling. Even though the case focuses on what is a "reasonable fee," it has implications with regard to bulk sales of information and maintaining the integrity of information. It points out that when the original FOA laws were put into place, no one envisioned the depth of the technology to come. Ms. Meyer has a different perspective on the case, seeing this as a Freedom of Access win, citing reasons why bulk sales are good for individuals as well as the public. She said it is clear that documents from MacImage are not official documents to be used for legal proceedings, so that the registries will still be asked to produce certified

documents in those instances. Ms. Pistner said that this situation raises a legitimate policy question: if a public entity invests in making information more accessible by implementing technology, to what extent can the public entity recoup the investment that has resulted in a benefit from the entity's forward thinking?

- Chris Parr, Staff Attorney for the Maine State Police, Department of Public Safety spoke to the Advisory Committee about concerns related to requests for bulk data from the Maine Accident Reporting System. He distributed copies of the blank form to explain the information that must be provided by individuals involved in motor vehicle accidents, including driver's license numbers, dates of birth and insurance information. It is a crime to NOT fill out the form. Any person can go online and purchase a copy of a report for \$10, \$1.50 of which goes to InforME, and \$8.50 of which goes to the State Police. Similarly, a person can purchase a driver's license report for \$7.00, of which \$2.00 goes to InforME and \$5.00 is deposited in the Highway Fund. Sales of these reports provide significant revenue. A law firm has requested receiving a copy of the crash data base on an ongoing basis. It has been determined that the data is public and the State Police must comply. Mr. Parr raised concerns about the revenue streams, but noted that the greater concern is privacy, because of the significant amount of personal information included in the database. He knows of at least one instance in which a person's driver's license number was used by an imposter, which affected the person's ability to cash a check. Lt. Chris Grotton added his remarks about the utility of the data being in electronic format, but spoke about his concerns about the ethical questions surrounding the commercial use of the data, and the State Police's inability to maintain the integrity of the data once it leaves their possession. Both Mr. Parr and Lt. Grotton noted that the debate goes to the heart of Freedom of Access: the State collects the information, and people are compelled to provide the information; so is the purpose the creation of an information bank that anyone can access, or the means for citizens to exercise their right and responsibility to know what government is doing. Dick Thompson, the Chief Information Officer, added his comments. The State has the data in that format because that is how the system was set up for the purposes of running the programs. If the purpose had been to provide the public with information, the design may have been different. The data is most valuable because it is in aggregate form. Mr. Leary mentioned that other states have contrasted individual needs with commercial purposes, but Ms. Meyer was reluctant to go down the road of commercial vs. noncommercial use, and gave examples of public benefit from broad access to data. She also noted that these requests represent entrepreneurial creativity, which we generally applaud.

The Advisory Committee referred the subject matter to the Legislative Subcommittee. Mr. Thompson will provide in-progress drafts of the Office of Information Technology's project to address the bulk data request question as it applies across State government.

- The Advisory Committee reviewed an e-mail request concerning release of investigative and intelligence information in an ongoing case, and tabled the matter.

The meeting was adjourned at 3:56 p.m.

Future Meetings

The Advisory Committee expects to meet at least 2 more times before the end of the year. The Advisory Committee has so far scheduled one meeting to be held on:

- **Wednesday, October 21st at 12:30 p.m.**

The Public Records Exceptions Subcommittee is scheduled to meet:

- **Tuesday, October 13th at 12:30 p.m.**

The Legislative Subcommittee is scheduled to meet:

- **Tuesday, October 13th at 10:30 a.m.**

Prepared by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff