

Joint
Legislative Subcommittee & Public Policy Subcommittee

Right to Know Advisory Committee
October 3, 2013
Meeting Summary

Convened 10:12 a.m., Room 126, State House, Augusta

Present:	Absent:
Chris Parr, Co-Chair	Mal Leary
Judy Meyer, Co-Chair	
Fred Hastings	
Harry Pringle	
Suzanne Goucher	
Luke Rossignol	
Linda Pistner	
Perry Antone	
Joe Brown	
Sen. Linda Valentino	
Garrett Corbin, for Richard Flewelling	

Staff:
Henry Fouts
Peggy Reinsch

Convening, Introductions

Judy Meyer and Chris Parr, respective chairs of the Legislative Subcommittee and Public Policy Subcommittee, called the meeting to order and asked the members and staff to introduce themselves.

Encryption

The issue of the encryption of emergency responder radio communications was added to the agenda, carried over from the morning's prior meeting of the Legislative Subcommittee. Judy Meyer gave the subcommittee a brief history of how the issue had come to the Right to Know Advisory Committee, and how it had progressed to the current state.

Perry Antone provided clarification on the issue, noting that there had been some confusion in the public around the conversion of law enforcement and emergency medical services radio communications from analog to digital signals. This change was mandated by the Federal government in order to free up more air waves for analog signals. Because of the switch in signals to the digital type, the analog radio monitoring equipment traditionally used does not adequately receive these digital signals.

Encryption, on the other hand, is the intentional scrambling of a signal to keep communications private. This is done currently only with law enforcement tactical and special operations. There are downsides to encryption that make it unlikely to be used by law enforcement for regular transmissions: it breaks down inter-operability between agencies (because different law enforcement agencies would be unable to communicate) and would be cost-prohibitive for most local law enforcement agencies.

The Maine Chiefs of Police Association are in opposition to legislation regarding radio encryption because this would be legislation where there really is no issue. Additionally, the Maine Chiefs of Police Association position is that even though the public can hear live radio transmissions, there is no FOAA right to this information. There is often protected private information (for example, juvenile information, social security numbers, etc.) that is transmitted over the radio that the agency cannot redact as it would be able to with written public records. There are also issues with the transmissions of emergency medical services, for example HIPAA confidentiality issues.

A representative for emergency medical services noted that he had not heard of any discussions in which emergency medical services organizations were interested in encryption. He noted how important it is for ambulance services to communicate, which is difficult with encryption.

After brief discussion, where the question was raised whether the issue was properly before the Right to Know Advisory Committee and some members expressed satisfaction that the cost barrier alone ensures that encryption will not be an immediate issue, the joint subcommittees unanimously voted to take no action on this issue.

Public records versus public information

The joint subcommittees discussed whether FOAA applies to information or just records, and how to clarify the Public Access Ombudsman's task to track "information" requests directed to public agencies. One member stated that the entire FOAA scheme is set up in the context of public records, so LD 1511 should only be interpreted as applying to requests for records. The idea was posited that the Public Ombudsman should only track written requests, and that tracking verbal requests would be unnecessary. Another member disagreed with this distinction between oral or written requests. The idea of amending the law passed in LD 1511 was raised, but was dismissed by Brenda Kielty, the Public Access Ombudsman, because it would still not address the issue of what the scope of a FOAA request may include.

The joint subcommittee decided, together with Ms. Kielty, that she would create a draft tracking form to be used by the various agencies when FOAA requests are made, get feedback from various public access officers, and bring the form back to the subcommittees for guidance.

Compliance with new law (LD 1216, PL 2013, c. 350)

LD 1216 created a new deadline for public agencies to respond within 5 working days of receiving a FOAA request with an acknowledgement of having received the request, and also providing a denial of the request if appropriate. If an agency fails to make its timely response, the request is treated as if it were denied and the requesting individual may appeal the denial through the court system.

The discussion began around the idea of whether this deadline was enough time for agencies to comply with the law. Linda Pistner of the Attorney General's Office noted that her office has suggest amendments to the law: 1) allowing agencies to respond that they "expect to deny" the request; 2) limiting where an appeal to the courts may be taken to certain areas (in conformance with venue rules); and 3) allowing the public agency to respond to a legal complaint with a "statement of position" instead of a detailed legal answer. There was concern voiced about what extra useful information would be provided to the court in a "statement of position". It was also opined that this change would be helpful to the court and would also save costs to the State in responding to FOAA appeals, due to what are sometimes multiple irrelevant allegations of plaintiffs. There was discussion around limiting FOAA appeals to courts in the locality of the "principal office" of the agency involved.

The discussion went back to the new 5-day deadline – 10 days was offered as an alternative. Also, the idea of a grace period was introduced, where an agency would have to acknowledge the request within 5 days, but would have more time in which to issue a denial. The subcommittees agreed there needed to be some kind of "hammer" – a deadline type mechanism for FOAA enforcement. Garrett Corbin, proxy for Richard Flewelling, representing municipal interests, noted that the statute doesn't define "receipt" of a FOAA request, and suggested the statute be amended to clarify this.

The joint subcommittees and Linda Pistner agreed that Ms. Pistner would come back to the subcommittees with draft legislation to amend LD 1216 (PL 2013, c. 350), specifically in regards to creating a grace period for FOAA denials, describing the responsibilities in a court action and better defining when "receipt" of a FOAA request is considered to occur.

Should government records containing personal information about private citizens be generally protected from public disclosure (or protect just the personal information in public records)?

If personal information is collected by the State, what are the State's duties in regards to that information? It was noted that every time a new aspect of public records is deemed confidential, it requires additional review and redaction of documents by public agencies, which increases the costs to that agency to comply with FOAA requests. It was pointed out that the complexity of the Federal Privacy Act shows what a hard issue this is.

Mr. Parr asked staff if there were other state statutes that attempted to address this issue. Staff replied that the Federal Privacy Act was the best model out there, as they were not aware of any good models on the state level yet. Staff noted there are several places in Maine statutes where private information is collected that the agency is not precluded from disclosing. Some members of the subcommittees were uncomfortable restricting public access to documents, even when they do contain some of this personal information; if there is a definite and specific need for security, then the law should be changed to address that concern narrowly – not with a blanket policy.

The discussion shifted to the specific issue of the Registers of Deeds wanting to redact personal information in public records they supply to the public, currently not permitted by statute, and the desire of some of the public (e.g., banks) to have continued access to this personal information. Two Registers of Deeds addresses the joint subcommittees. They noted that this is a huge issue, especially in regards to bulk sales, with people in the public requesting entire databases of records. The Registers of Deeds have serious concerns with providing

official records with personal information to the public. They asked for a law that would allow the Registers to reject a document for filing if it contains personal information. Ms. Meyer asked if the law were changed to allow the Registers to redact Social Security Numbers, it would be feasible and affordable to implement. The Registers noted there would be costs, but thought it would be feasible and affordable, and that this change would address at least some of their concern.

The joint subcommittees unanimously agreed to draft legislation to authorize the Registers of Deeds to redact Social Security Numbers when they supply records to the public.

Break for lunch at 12:20, reconvened at 1:04pm.

“Abuse” of the Freedom of Access Act (FOAA)

Mr. Parr began the conversation, noting that the issue of abuse of FOAA should be of concern. From a practical standpoint, time spent on frivolous or repetitious FOAA requests is time taken away from the staff to focus on other duties as well as on other FOAA requests, creating delayed responses.

The question was posed: Who makes the determination of what an “abuse” is? Some members expressed the view that this decision must be made by a judge, not an agency. Staff provided draft legislation and examples of other states’ statutes that address FOAA-type abuses.

A member posited that there should perhaps be an intermediary between the public agency denying the request and a judge – perhaps a system where a formal ombudsman or other official in the Attorney General’s Office would review an agency’s denial of records requests. The Public Access Ombudsman, Brenda Kiely, noted that under current law the ombudsman did not have this authority, and that there was currently no formal structure in place to allow this. Linda Pistner of the Attorney General’s Office noted that an issue here is who needs to go to court. Or, would the agency be able to go somewhere else for relief? Mr. Brown requested more information on how the process worked in those states that allowed an agency to deny a FOAA-type request under defined “abusive” conditions – is the burden on the requestor to go to the courts?

The subcommittees discussed whether current “harassment” law could provide an agency relief. After discussion, it seemed to most members this was not an adequate remedy.

Mr. Pringle noted that judges apparently don’t have the power to enjoin abusive FOAA requests currently, and that the issues facing the subcommittees were: 1) Should any additional limits on “abusive” FOAA requests into law; 2) If so, what is the standard?; and 3) Whether the burden should be on the agency or requesting member of the public to file for an injunction with the court. He continued that a judge should be given similar authority to a judge in legal discovery disputes; there should be a high standard for denying an “abusive” FOAA request, and it should be decided by a judge. The idea was introduced that both the agency and a denied requestor should have the ability to bring a lawsuit regarding denied records for “abusive” requests. Several members agreed that the burden to bring a lawsuit for an injunction should be on the agency wishing to stop the FOAA requests – the court could then decide how, or if, to limit the agency’s duty to respond to the request.

A member noted that abusive requests can involve separate requests from the same individual, not just repeated requests for the same information – would this drafted language address that? Would this apply to individual requests, or the requestor? Several members

thought the drafted language would cover both situations. It was noted that it was unlikely a judge would ever eliminate an individual's right to request documents through FOAA, but would perhaps limit the frequency of the individual's requests. It was also posited that if the subcommittees wish to go down this road, it may be helpful to provide more specificity in the language to give a court more guidance and help ensure that the intent of the provision is being carried out.

The joint subcommittees unanimously agreed to move forward on developing this legislation and to table the discussion until the next meeting.

Future meetings

The Public Policy Subcommittee will meet jointly with the Legislative Subcommittee at 10:00 a.m. on Tuesday, November 12th.

The full Advisory Committee will meet later that day at 1:00 pm.

All meetings will be held in Room 438 (Judiciary Committee Room) at the State House.

The meeting was adjourned at 1:54pm.

Respectfully submitted,

Henry Fouts and Peggy Reinsch