

Right to Know Advisory Committee
Legislative Subcommittee
July 19, 2012
Meeting Summary

Convened 9:08 a.m., Room 438, State House, Augusta

Present:
Judy Meyer
Richard Flewelling
Mal Leary
Bill Logan
Kelly Morgan
Harry Pringle
Linda Pistner

Absent:
Mike Cianchette
Ted Glessner

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

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

Application of FOA laws to Maine Public Broadcasting Network

The Subcommittee discussed the application of the Freedom of Access laws to Maine Public Broadcasting Network. Last year, the Advisory Committee was asked by Mike Brown, a newspaper reporter and columnist, to consider the issue after Maine Public Broadcasting Network, in response to a request for certain financial records, stated that MPBN was only required under the law to make proceedings of its board of directors public and records held by MPBN were not “public” under the FOA laws.

Mark Vogelzang, President and CEO of Maine Public Broadcasting Network, and James Zimpritch, legal counsel to MPBN, gave brief remarks to the Subcommittee explaining that MPBN’s board meetings and materials from those meetings are open to the public and that, under federal law and guidelines, annual tax filings with the Internal Revenue Service and certain donor information are made public. Mr. Vogelzang stated that he believed MPBN has been transparent and open over the years and faithful to the requirements of its enabling Act. The request for job title and salary information about MPBN employees made by Mr. Brown raised concerns about the privacy of employees; although MPBN does receive some public funding, it was specifically established as a private, nonprofit corporation, not a state agency.

Judy Meyer and Harry Pringle asked what the harm was in releasing general information about job titles and salary ranges for employees. Mr. Vogelzang acknowledged that MPBN’s response to Mr. Brown was not as forthcoming or clear as possible, but there were concerns about whether releasing the information would establish a precedent in addition to the belief that MPBN employees have an expectation of privacy. Mr. Zimpritch also expressed concern that broadening

the law to make MPBN's records public would have unintended consequences and again noted the ability of the public to access MPBN's audited financial statements and IRS Form 990.

Mal Leary described the legislative history and debate when MPBN was established by the Legislature and explained that the law required MPBN to have public board meetings because it receives public funding and the Governor has a role in making appointments to the board. Mr. Leary also said that MPBN provided the same information requested by Mr. Brown in previous years. Mr. Leary noted that MPBN's response to Mr. Brown upset folks, but that he doesn't see the need to change the law. Mr. Leary encouraged MPBN to be more open about its salary information in the future.

Mr. Pringle stated that he would not favor changing the statute; a broad change would be problematic for MPBN and other quasi-state agencies. The current law seems to strike a good balance for both MPBN and the public. Linda Pistner expressed the opinion that the current law is ambiguous and it is not clear in its enabling law that MPBN is only subject to the public proceedings part of the FOA laws. Mr. Pringle and Richard Flewelling agreed that the current law is ambiguous, but would not recommend changes to the law at this time.

The Subcommittee voted 5-0, with Kelly Morgan and Ms. Pistner abstaining, that the Subcommittee recommend no change in current law. Ms. Morgan abstained because she was not present for all of the discussion and agreed with the concerns raised above by Ms. Pistner.

Status of email addresses collected by schools and towns

The Subcommittee reviewed the letter from Rep. Nelson requesting that the Advisory Committee clarify the law regarding the confidentiality of parents' email addresses collected by schools. Staff also distributed a news article and other materials related to a request made to the town of Falmouth for email addresses of its residents.

Ms. Meyer commented that government databases include both email addresses and telephone numbers. Given the widespread use of technology, Ms. Meyer stated she believed the Subcommittee should consider the issue. Ms. Pistner wondered if there was a principled way to distinguish parents' email addresses from other email addresses at the state and local level; she indicated her belief that federal law already protects the confidentiality of parent email addresses. Ms. Pistner also raised concern about the potential costs to state and local governments to redact this information when responding to requests if email addresses were designated confidential.

Mr. Pringle disagreed with Ms. Pistner, stating his belief that parents' email can be distinguished from other email addresses because of the unique manner that parents' email addresses are used to access a student's electronic school records. While Mr. Pringle believes that a good argument can be made that federal law (FERPA) may protect a parent's email address because it is linked to a student's record, the federal law does not specifically reference parents' email addresses. Rep. Nelson's position is that parents' email addresses should be designated confidential.

Ms. Meyer asked if there should be a distinction between the purposes for which parents' email addresses are used, e.g. to access student records versus to notify about school soccer games or other events. Mr. Pringle stated he would not make any distinction when the communication is related to a student, but if a parent communicated with a school board member about a pending matter, that would be public information. Bill Logan agreed that parents' email addresses should be confidential and that public policy should err on the side of the privacy of the student and

parent. The issue could be clarified through an opt-out provision for parents wanting confidentiality, but Mr. Logan would prefer protecting the confidentiality of all addresses.

Mr. Leary inquired whether Rep. Nelson had prepared any draft legislation for the Subcommittee to review. Staff responded that they were not aware any draft has been prepared as Rep. Nelson has not yet formally requested a bill. Mr. Pringle offered to prepare a discussion draft for the Subcommittee to review, which would specifically address parents' email addresses collected by schools.

The Subcommittee agreed to table the discussion and to review a discussion draft at the next meeting. Staff will also review existing law and provide examples of statutory exceptions in other areas of law that protect the confidentiality of individual email addresses, e.g. Department of Inland Fisheries and Wildlife licensees.

PL 264: email and other communications of elected/public officials

Staff reviewed Public Law 2011, chapter 264, which directed the Advisory Committee to examine the benefit of public disclosure of elected officials' emails and other records balanced with the availability of technology and other systems to maintain the records and provide public access and to submit its findings and recommendations as part of its 2012 Annual Report. As the Subcommittee and Advisory Committee were not able to complete the project last year, staff inquired whether the Subcommittee was interested in pursuing the project.

Before proceeding further, the Subcommittee agreed that it be useful to have input from the State Archivist. Staff will invite the State Archivist to make a presentation at the next meeting on any best practices and recommended retention policies for elected officials' records.

Use of technology in public proceedings (participation in proceedings from remote locations)

Staff provided copies of the draft legislation developed by the Subcommittee to govern the ability of public bodies to allow the use of technology for remote participation of a member. The draft legislation was previously recommended by the Subcommittee, but has not yet been adopted by the full Advisory Committee because of lingering concerns about the effect of the draft on 4 state agencies currently authorized to conduct meetings through the use of technology.

The Subcommittee agreed to review the draft legislation at the next meeting and directed staff to seek additional input on the draft from state agencies and the Office of Information Technology (OIT).

Templates for drafting specific confidentiality statutes

Staff provided draft templates for drafting specific confidentiality provisions concerning records provided by individuals and businesses to governmental agencies. The templates were developed for the subcommittee by former Law School extern, Sean O'Mara, in response to suggestions originally made by the Judiciary Committee that the Advisory Committee develop standard statutory language for confidentiality statutes when appropriate. The Subcommittee did not make any recommendation to the Advisory Committee on the templates in 2011.

The Subcommittee agreed to review the draft templates at the next meeting and asked staff to solicit comments from state agencies that may be affected by adoption of the standard language.

Other issues

Ms. Meyer told the Subcommittee she had been contacted by Rep. Peggy Rotundo, who raised concerns about state agencies charging the same fees for identical requests for public records when subsequent requests after the initial request would not involve the same amount of time for search, retrieval and compilation of the records. Ms. Meyer asked for comments from the Subcommittee about whether this was a permissible practice under the current law; she noted that the situation was particularly irksome to her as the Sun Journal was one of the parties affected.

Ms. Pistner stated that she believed that current law may prohibit such a practice as agencies are limited by the statute to charging a fee for the “actual cost” of compiling the information. Mr. Pringle agreed with Ms. Pistner that the current law already addressed the issue. Mr. Flewelling noted that this was a perfect example of the type of issue that the Ombudsman could resolve and looked forward to when the position would be filled. Mr. Logan also agreed that the practice should not be permitted under existing law and believed that it would be difficult for the Subcommittee to craft a legislative response to address the equity issue as the initial requester may bear higher costs to access the records than subsequent requesters for the same records.

The Subcommittee agreed to take no action; Ms. Pistner will communicate with the state agency involved and the Assistant Attorneys General representing that agency to clarify the agency’s permissible fees under existing law.

Future Meetings

The Subcommittee agreed to meet next on Thursday, August 23, 2012, starting at 9:00 a.m.

Other scheduled meetings:

The Encryption Subcommittee will meet Wednesday, August 8, 2012, starting at 9:00 a.m.

The Public Records Exception Subcommittee will meet on Wednesday, August 8, 2012, starting at 1:00 p.m.

The Bulk Records Subcommittee will meet on Thursday, August 23, 2012, starting at 11:00 a.m.

The Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Meyer adjourned the meeting at 10:35 a.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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