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Right to Know Advisory Committee
Legislative Subcommittee
June 20, 2008
(Draft) Meeting Summary

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

Present:
Chris Spruce, Chair
Karla Black
Suzanne Goucher
Mal Leary
Linda Pistner
Harry Pringle

| Absent:
Shenna Bellows

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee and welcomed everyone.

Review of Title 23, section 63

As requested at the May 28th meeting of the Advisory Committee, representatives of the Maine Turnpike Authority and the Department of Transportation provided information about the current public records exception contained in Title 23, section 63. Conrad Welzel (MTA Government Relations Manager) and Jonathan Arey (MTA Staff Attorney) provided information on behalf of the MTA; Toni Kemmerle (DOT Chief Counsel) spoke on behalf of the DOT. Rep. Dawn Hill, who had initially requested the early review, was unable to attend the Subcommittee meeting.

Mr. Welzel explained that once a project that the MTA puts out to bid is awarded, the information is shared. The contract is awarded at a meeting of the Turnpike Authority, and the estimate is shared at that time, too. The information is not kept confidential after that, but is before that time because the MTA wants to preserve the integrity of the bid process. Mr. Welzel said the MTA has no problem releasing the information after the contract is awarded. In response to questions about engineering estimates, Mr. Welzel explained that the MTA generally prepares a very specific listing of components and costs. The design criteria are already released and are included in the specifications of the bid. The engineers use the internal cost values to determine if the bids received are reasonable. Mr. Arey explained that the internal cost estimates are not released because it would create an uneven playing field if not all prospective bidders have the information. MTA keeps it confidential to avoid collusion among bidders. If bidders know the costs MTA has determined, the bidders could take turns being the low bidder on projects, but submit bids higher than MTA thinks is reasonable. MTA is not sure why the statute provides for a 9-month delay in releasing information. Mr. Welzel indicated this is not a problem for the MTA because it usually has one paving project per year. The statute has existed as is for years, and the MTA sees no reason to change it. Mr. Arey commented that sometimes even after a project is completed there are ongoing negotiations with landowners, so perhaps the 9 months is intended to accommodate those time frames.

Ms. Kemmerle agreed with the MTA reading and application of Title 23, section 63 on behalf of the DOT. DOT engineering estimates are internal, and give the Department a way to evaluate bids. If released, DOT might not get fair and objective bids. DOT's concern with revealing all the Department's estimates is that it might encourage bidders to try to second-guess how the Department comes up with estimates, and focus on that rather than what must be done. If the DOT is told to release the information, Ms. Kemmerle assured the Subcommittee that the Department would do so. DOT has no problem releasing the actual number, but is concerned about releasing documents about how the Department arrived at those estimates. Ms. Kemmerle confirmed that this is the statute the DOT uses to protect confidential information.

Ms. Kemmerle and Mr. Arey confirmed that neither the DOT nor the MTA construction contracts are covered by the procurement law in Title 5.

Mr. Pringle identified three basic inquiries: 1) What does the statute allow to be kept confidential and for how long? 2) Can the statute be revised to allow release of information that should not be kept confidential? 3) Should the methodology used to produce estimates be kept confidential?

Follow up: Staff will try to provide more legislative history for the provisions of the statute, compare with procurement law and other construction contracts law and develop possible options for further discussion.

Title 20-A, section 13004

As requested at the May 28th meeting of the Advisory Committee, representatives of the Department of Education and the Maine Education Association provided information about the current public records exception contained in Title 20-A, section 13004. Arthur Keenan (DOE Legal Consultant) and Greg Scott (DOE Legislative Liaison) represented the Department of Education and Sean Keenan represented the Maine Education Association. Mr. A. Keenan distributed a packet of information on behalf of the Department.

Mr. A. Keenan explained that when a complaint or allegation against or about a teacher needs to be investigated, the Commissioner works with the appropriate superintendent, and shares only that information that the superintendent needs to help with the investigation. Once the Commissioner reaches a conclusion, the only information given back to the superintendent is the employability of that teacher. On occasion, the investigation must be done quickly, and in those cases the original source of the information is asked to report directly to the Commissioner.

Last year, the Governor had an initiative to make disciplinary action information available to other jurisdictions. The identity of the teacher and the result - whether the person is certified - are public. The relevant dates, the particular certification and the teacher's employment are all public. The reasons behind a decision to suspend, etc. are not public. Mr. Leary noted that during the legislative session, Commissioner Gendron stated that she could not give the Judiciary Committee the number of complaints, whether substantiated or not. Mr. A. Keenan affirmed that, and said that because Title 20-A, section 6103, subsection 3 is so broad, the Department cannot provide information based on criminal history record information. The information the Department has - both criminal and noncriminal - is so mixed together that in order to protect the information that cannot be released, the Department has to protect all the data. Section 6103, subsection 3 protects all criminal history information even if de-identified.

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Mr. Pringle asked how many times the Department revoked certification without a criminal conviction. Mr. A. Keenan explained that revocations are done in the District Court, although a teacher sometimes surrenders his or her certification rather than go through a revocation process. Mr. S. Keenan explained that the Department generally cannot revoke or suspend a certification on its own. The Department can deny a certification, and can decide not to renew a certification. A surrender or lapse of a certification does not require any formal action of the Department or the court. A formal revocation in court would be public. If there is a child abuse conviction in court, the revocation can be part of that judgment and the teacher cannot reapply for five years. If there is a former conviction in another state, the DOE is prohibited from releasing that information if it came through the fingerprint background check process. Mr. A. Keenan identified a narrow area in which the Commissioner can revoke a certification on her own: if the Commissioner has in hand a copy of a conviction of physical or sexual abuse of a child. Mr. Pringle asked how many times the Department has sought a revocation via the court process, and Mr. A. Keenan replied that no actions for revocations have been filed by the Department in District Court for at least 18 years.

Mr. Pringle pointed out that a revocation based on a criminal act could be public because the criminal conviction is public. Also, if the revocation is part of the judgment in a criminal prosecution, that would be public. Mr. A. Keenan stated that there is a lot of public information out there that is not public in the hands of the Department. Those restrictions come from the fingerprinting law: restrictions based on FBI requirements and the FBI audits the Department for compliance. There is concern that changing the confidentiality provisions of the law will jeopardize the ability of the Department to obtain the reports it needs. There is already a lot of disagreement about the need to be fingerprinted.

Mr. S. Keenan stated that even if there is an acquittal in a relevant criminal case, the Department can move for revocation based on evidence (lower standard than criminal conviction). While the Department is processing whether to move for revocation, it is confidential until the Attorney General files in court. The teacher can always voluntarily surrender the certification. But the Department can say only that a teacher is not certified, or not on the list of those certified. Mr. Scott provided that the Department cannot tell the public why the person is not certified, even if it is a matter of public record.

Mr. Leary explained that the Advisory Committee is looking at balancing the public's interest (the right to know what is going on in our schools) with the private interests involved. He asserted that the statistics ought to be public. A lot more information is available in some states.

Mr. S. Keenan expressed that the MEA has no problem with statistics per se, but it is what you do with the statistics that may cause problems. He cited an irresponsible statement included in a newspaper article in which an attorney stated that there is at least one perpetrator in every school. Mr. S. Keenan asserted that if the perpetrator is known, then tell us who he or she is; if you don't know who it is, then don't make that statement. Complaints and allegations should not be public, but the final action taken should be public.

Mr. A. Keenan noted that a policy plan is included in the packet of information provided by the Commissioner to the Subcommittee. The Commissioner can make a finding that the complaint/allegation is unfounded, and never made public. If the Commissioner makes a finding, but it doesn't rise to the level of disciplinary action, that is also not public.

Ms. Pistner asked whether, if there is a criminal conviction and the Commissioner uses her authority to revoke based on the conviction, the revocation is public, and Mr. A. Keenan answered in the affirmative. She then asked whether, if the revocation is based on a conviction from another jurisdiction, the revocation is public, and Mr. A. Keenan replied in the negative. He cited Department of Education rules.

Follow up: Staff will review DOE rules, review FBI requirements with the State Police, review the statutes and how they interact, consult with OPLA analysts conducting staff study pursuant to PL 2007, c. 666, and develop possible options for further discussion.

Comprehensive revisions submitted by Christopher Parr, Attorney for State Police

Chris Parr, Attorney for the State Police, submitted suggested changes to the Freedom of Access laws last year. A couple of his suggestions were included in the Right to Know Advisory Committee's recommendations to the Judiciary Committee. Those changes were incorporated into the Judiciary Committee's amendment to LD 1881, and became part of PL 2007, c. 501. Review of the remaining recommendations was deferred to this year.

The Subcommittee began discussing the proposed definitions for "agency" and "official," recognizing that the Freedom of Access laws use those terms without specific definitions. Ms. Pistner indicated the appropriateness of the distinction between open records and open meetings, that the open records laws apply to everyone, but the open proceedings laws apply only to bodies. She would like to make sure that any changes or additions to definitions do not disrupt that distinction. Mr. Leary noted that there are public and quasi-public entities that are subject to the FOA laws that should not be excluded by the wording of the definition of "agency."

Mr. Pringle indicated that the Subcommittee should look at all of the proposals, and be particularly cognizant of possible unintended consequences. Mr. Spruce agreed, and encouraged a review of the proposal knowing the context and the history of the provisions, and only then engage in deliberations to determine whether the change is appropriate or whether a different resolution of the identified issue would be better. Mr. Parr recognized that unintended consequences are already happening based on different interpretations of current law.

Follow up: All subcommittee members will review and be ready to discuss Mr. Parr's proposals at the next meeting. Staff will review and make notes about issues.

Requirement that bodies subject to the FOA keep "minutes"

Staff prepared a chart containing statutory references to requirements for taking or entering actions into minutes of various public bodies. The chart was prepared by searching the statutes for the term "minutes" so there may be other instances in which a "record" is required to be kept without using the term "minutes." The Subcommittee agreed to seek a better understanding of the concern about keeping minutes, and will discuss the issue further.

The Subcommittee discussed the record keeping requirements of the Legislature, and questioned whether the audio streams could be and should be archived.

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Follow up: Staff will review statutes governing municipalities and counties for record-keeping requirements. Staff will contact Judy Meyer to provide more information about her concern regarding the keeping of minutes.

Existing public records exceptions review process

The Subcommittee briefly discussed the existing public records review process. The members agreed that it is helpful to have representatives of the departments here for discussion, and that the legislative history would be very helpful in many cases. The members agreed that all exceptions in Titles 10 through 21-A must be reviewed, even if they were enacted within the last few years and were subject to the Judiciary Committee's review.

Empty binders were distributed to the Subcommittee members. Staff will mail statutory sections that are being reviewed, and the departments' survey forms when received. The deadline for the departments to return their forms is July 11th.

Follow up: Staff will collect completed surveys and distribute to Subcommittee members ASAP. Subcommittee members will review and be prepared to discuss those completed on July 16th. Staff will review statutes and identify exceptions based on non-standard language. The presumption is that all records are open, and any confidentiality protections are exceptions.

Additional

Mr. Leary requested that the Law Court's decision in Moore v. Abbott be discussed, and that the four-part test be codified in statute.

Follow up: Staff will recommend that issues included in Moore v. Abbott be included on Advisory Committee's agenda for July 30, 2008.

The meeting adjourned at 3:30 p.m.

The next Legislative Subcommittee meeting is scheduled for

- **Wednesday, July 16th at 1:00 pm.**

The Advisory Committee meetings are to be held on:

- **Wednesday, July 30th at 12:00 pm (bring your lunch); and**
- **Wednesday, September 10th at 12:00 pm (bring your lunch).**

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

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