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Fourth Annual Report of the RIGHT TO KNOW ADVISORY COMMITTEE

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EXECUTIVE SUMMARY

This is the fourth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's Freedom of Access laws. The 16 members are appointed by the Governor, the Chief Justice, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website: http://www.maine.gov/legis/opla/righttoknow.htm. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2009, the Advisory Committee met four times: June 30, September 23, October 21 and December 1. This year, the Advisory Committee reorganized its subcommittee structure and appointed four subcommittees: Education and Training, Legislative, Public Records Exceptions and Ongoing Issues. Three of the subcommittees--- Legislative, Public Records Exceptions and Ongoing Issues---held meetings and made recommendations to the Advisory Committee.

The Advisory Committee serves as the central source and coordinator of information about Maine's Freedom of Access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's Freedom of Access laws. For the third time, this report includes a summary of relevant Maine court decisions.

The report also includes a brief summary of the legislative actions taken since January 2009 in response to the Advisory Committee's recommendations in its third annual report.

For its fourth annual report, the Advisory Committee makes the following recommendations:

- ❑ **Continue, amend and repeal the following existing public records exceptions in Titles 10 to 21-A**

- ❑ **Recommend again that the teacher confidentiality provisions in Title 20-A be amended with regard to the public disclosure of actions taken by the Department of Education on credentials of public school personnel, including the grounds for actions taken**

- ❑ **Defer action on the exceptions contained in the Criminal History Record Information Act, Title 16, chapter 3, subchapter 8, and request that the Criminal Law Advisory Commission review and revise the proposed redraft**

- ❑ **Amend Title 1, chapter 13 to require that a minimum record be kept of all public proceedings**

- ❑ **Add guidance for public officials on the use of email communications outside of public proceedings to the Frequently Asked Questions section of the Freedom of Access website**

- ❑ **Recommend to the Health and Human Services Committee that the Freedom of Access laws not be amended to require hospital board meetings to be open to the public as proposed in LD 757, An Act to Improve the Transparency of Certain Hospitals**

- ❑ **Recommend to the Judiciary Committee that no statutory changes be made relating to the public's access to salary information for public employees as proposed in LD 1353, An Act Concerning Salary Information of Public Employees**

- ❑ **Propose standard statutory language for use by the Judiciary Committee in reviewing proposed exceptions relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities**

- ❑ **Advise the Maine Press Association that the Advisory Committee does not oppose the amendments to the notice requirements for rulemaking by government entities in Public Law 2009, chapter 256**

- ❑ **Continue discussion of the following issues: the use of Social Security Numbers, the use of technology in public proceedings and requests for bulk electronic data**

In 2010, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for the remaining public records exceptions in Titles 10 through 21-A. It will begin the process of reviewing the existing public records exceptions contained in Titles 22 through 25. The Advisory Committee will have assistance during the Second Regular Session of the 124th Legislature from a legal extern, a law student at the University of Maine Law School. The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fourth annual report.

I. INTRODUCTION

This is the fourth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's Freedom of Access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at www.maine.gov/legis/opla/righttoknowreports.htm.

The Right to Know Advisory Committee has 16 members. During 2009, two members were appointed to fill vacancies on the Advisory Committee: Kelly Morgan was appointed to represent newspapers and other press interests and A.J. Higgins was appointed to represent broadcasting interests. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. Barry Hobbins Chair	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Rep. Dawn Hill	*House member of Judiciary Committee, appointed by the Speaker of the House*
Shenna Bellows	*Representing the public, appointed by the President of the Senate*
Karla Black	*Representing State Government interests, appointed by the Governor*
Judy Meyer	*Representing newspaper publishers, appointed by the Speaker of the House*
Robert Devlin	*Representing county or regional interests, appointed by the President of the Senate*
Sheriff Mark Dion	*Representing law enforcement interests, appointed by the President of the Senate*
Richard Flewelling	*Representing municipal interests, appointed by the Governor*
James T. Glessner	*Member of the Judicial Branch*
Suzanne Goucher	*Representing broadcasting interests, appointed by the Speaker of the House*
Mal Leary	*Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House*

Kelly Morgan	*Representing newspapers and other press interests, appointed by the President of the Senate*
A.J. Higgins	*Representing broadcasting interests, appointed by the President of the Senate*
Linda Pistner	*Attorney General's designee*
Harry Pringle	*Representing school interests, appointed by the Governor*
Chris Spruce	*Representing the public, appointed by the Speaker of the House*

The complete membership list or the Advisory Committee, including contact information, is included as Appendix B.

By law, the Advisory Committee must meet at least four times per year. During 2009, the Advisory Committee met four times: June 30, September 23, October 21 and December 1. Subcommittee meetings were held on July 28 and 29; August 27; September 9, 16 and 23; October 13 and 21; November 17; and December 1. All of the meetings were held in the Judiciary Committee Room of the State House in Augusta and open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage. The Advisory Committee also established a webpage which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas and summaries of the meetings are included on the webpage.

II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's Freedom of Access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's Freedom of Access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's Freedom of Access laws;

- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's Freedom of Access laws and the public's access to public proceedings and records;

- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;

- Examining inconsistencies in statutory language and proposing clarifying standard language; and

- Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the Freedom of Access laws.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's Freedom of Access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's Freedom of Access laws. During 2009, the Advisory Committee identified the following court decisions on Freedom of Access issues.

2009 Maine Court Opinions involving Maine's Freedom of Access laws

- Maine Health Care Association Workers' Compensation Fund v. Superintendent of Insurance et al., 2009 ME 5. Former members of group self-insured workers' compensation fund requested an administrative hearing to challenge the fund's methodology for calculating supplemental assessments imposed on them upon termination. The Superintendent of Insurance ordered the fund to disclose documents including financial records of current members. The fund appealed the decision and sought declaratory and injunctive relief. The Superior Court upheld the decision to disclose the records to the former members of the fund, and the Supreme Judicial Court affirmed. The challenged order of the Superintendent of Insurance did not violate the statute governing confidentiality of records filed with the Superintendent by self-insurers; the order prevented public disclosure of the records, limited access to the records to

counsel and experts and left open the opportunity for the fund to identify information that was competitively sensitive between the current and former members. The statute (39-A MRSA § 403, sub-§ 15) protects the records from requests made pursuant to the Freedom of Access laws, but does not provide guidance with regard to discovery requests between private litigants.

- MacImage of Maine LLC. v. Hancock County, et al., (Me. Super. Ct., Cumb. Cty., May 11, 2009, May 20, 2009 and September 1, 2009) (Warren, J.) MacImage of Maine LLC, Inc., had asked the court to make Hancock County provide electronic copies of its deed database, through the Freedom of Access law. The Superior Court determined that the database maintained by the Hancock Country Registry of Deeds is an "electronic data compilation" that falls under the definition of "public records" contained in Title 1, section 402, subsection 3. The court interpreted the law as requiring the county to allow MacImage to copy the database and not just individual records. The court also noted that companies requesting public records for commercial purposes have just as much right to invoke the Freedom of Access law as citizens seeking governmental information. In the September order, the court determined that Title 1, section 408, which allows a governmental entity to charge a "reasonable fee to cover the cost of copying," does not support the $1.50 per page fee Hancock County proposed to charge for the electronic records. The county was not authorized under Title 33, section 751, subsection 14, to consider county costs beyond the operation of the registry of deeds when establishing a "reasonable fee" for copying costs.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities and the nature of the requests received from the Legislature, the Advisory Committee reorganized its subcommittee structure in 2009. Four subcommittees were appointed: 1) Education and Training; 2) Legislative; 3) Public Records Exceptions; and 4) Ongoing Issues. The Chair and Vice-chair of the Advisory Committee are ex officio members of each subcommittee.

Education and Training Subcommittee. The Education and Training Subcommittee's focus is to serve as a central source and coordinator of information about Maine's Freedom of Access laws; to serve as a resource to support training and education about Maine's Freedom of Access laws; and to support the provision of information about public access to records and proceedings via the Internet. Judy Meyer is the chair the subcommittee, and the following serve as members: Karla Black, Richard Flewelling, Sheriff Mark Dion, Mal Leary, Linda Pistner and Harry Pringle.

The Education and Training Subcommittee did not have any meetings in 2009.

Legislative Subcommittee. The Legislative Subcommittee's focus is to serve as an adviser to the Legislature when legislation affecting public access is proposed and to respond to requests from the Legislature or others to consider issues affecting public records and public access.

Christopher Spruce is chair of the subcommittee and the following serve as members: Karla Black, Robert Devlin, Suzanne Goucher, Linda Pistner and Harry Pringle.

During 2009, the Legislative Subcommittee had five meetings. The subcommittee reviewed issues related to the following bills considered in the First Regular Session of the 124th Legislature: LD 757, An Act to Improve the Transparency of Certain Hospitals; LD 1353, An Act Regarding Salary Information for Public Employees; and LD 1271, An Act To Generate Savings by Changing Public Notice Requirements (enacted as Public Law 209, chapter 256). At the request of Rep. Stacey Dostie, the subcommittee also reviewed proposed legislation sponsored by Rep. Dostie related to serialized email communications by elected officials outside of public proceedings. Other issues referred to the subcommittee included the transparency of information related to State Government contracts and spending, the protection of Social Security Numbers contained in public records and requests for bulk electronic data. See discussion of Advisory Committee recommendations in Section VI.

Public Records Exceptions Subcommittee. The Public Records Exception Subcommittee's focus is to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; and to examine inconsistencies in statutory language and to propose clarifying standard language. Shenna Bellows is the chair of the subcommittee and the following serve as members: Christopher Spruce, Suzanne Goucher, Linda Pistner and Harry Pringle.

During 2009, the Public Records Exception Subcommittee had four meetings. The subcommittee reviewed the remaining public records exceptions in Titles 10 through 21-A for which action was deferred in 2008. By request, the subcommittee also considered the development of appropriate standard statutory language for protected information provided in applications for government funding or technical assistance and appropriate standard language for records and information of advisory panels. See discussion of Advisory Committee recommendations in Section VI.

Ongoing Issues Subcommittee. The Ongoing Issues Subcommittee's focus is to provide guidance on ongoing and long-range issues identified by the Advisory Committee. Mal Leary is the chair of the subcommittee and the following serve as members: James T. Glessner, Judy Meyer, Karla Black and Linda Pistner.

During 2009, the Ongoing Issues Subcommittee had 3 meetings. The subcommittee considered the following issues: the use of technology in public proceedings; the taking/keeping of minutes of public proceedings; the collection and protection of Social Security Numbers; and the classification of records of advisory panels conducting reviews of internal activities of public agencies or officials. See discussion of Advisory Committee recommendations in Section VI.

V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN THIRD ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its third annual report. The actions taken in 2009 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Continue, amend and repeal existing public records exceptions in Titles 10 - 21-A	As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 10 through Title 21-A. The Advisory Committee made recommendations for each exception in the following categories: continue exceptions without change; make statutory amendments to the exceptions; and refer for further discussion and review by Judiciary Committee. The Advisory Committee submitted draft legislation to the Judiciary Committee to make the recommended statutory changes, and retained several exceptions for further consideration by the Advisory Committee in 2009. LD 1199, An Act To Implement the Recommendations of the Right To Know Advisory Committee, was reported out as a bill by the Judiciary Committee and later enacted. See Public Law 2009, chapter 240. (It included all the Advisory Committee's recommendations except the recommendation concerning confidentiality of education disciplinary decisions.)
Recommendation:	**Action:**
Reenact the teacher confidentiality provisions in Title 20-A to provide for release certain information about disciplinary action by the Commissioner of Education	The Advisory Committee recommended that the Legislature reenact the teacher confidentiality provisions in Title 20-A to clearly codify Department of Education policy with regard to the release of information related to disciplinary actions taken by the Commissioner of Education with regard to credentials of public school personnel. In addition, the Advisory Committee requested that the Judiciary Committee consider whether the reasons for the actions taken should be disclosed publicly. The Judiciary Committee deleted the recommendation from LD 1199 because the Education Committee was considering LD 1191, An Act To Improve Teacher Confidentiality Laws, now Public Law 2009, chapter 331, which proposed to permit access to confidential information on denials, revocations and suspensions of teacher certification to the extent that the information is needed by a national association of state directors of teacher education and certification, in aid of an investigation by other jurisdictions investigating qualifications for certification or considering reciprocal disciplinary action or by law enforcement agencies in aid of an investigation. Chapter 331

	also authorizes the Department of Education to disseminate as public information statistical summaries of complaints and dispositions as long as the dissemination does not jeopardize the confidentiality of individually identifiable information.
Recommendation: Request that the Judiciary Committee review certain exceptions in Title 12 relating to marine resources fisheries statistics	**Action:** The Advisory Committee recommended that the Judiciary Committee consider whether the circumstances of the industry (marine resources fisheries landings) may have the effect of limiting public disclosure of aggregate information relating to marine resources statistics and logbook information from lobster harvesters and sea urchin buyers and processors. The Judiciary Committee did not take action on these exceptions during the Legislative session, but referred them back to the Advisory Committee for review. The Advisory Committee has recommended that the exceptions be continued without change. See discussion of Advisory Committee recommendations in Section VI.
Recommendation: Implement technical changes to Title 1, chapter 13 after review of suggested revisions submitted by Christopher Parr, Staff Attorney Maine State Police	**Action:** The Advisory Committee recommended several technical, but not substantive, changes. The recommendations were included in LD 1199, An Act To Implement the Recommendations of the Right To Know Advisory Committee, which was reported out as a bill by the Judiciary Committee and later enacted. See Public Law 2009, chapter 240.
Recommendation: Defer action on the following proposed exceptions to public records laws and request that the exceptions be introduced before relevant policy committees:	After discussion, the Advisory Committee determined that its primary role is as an advisor to the Judiciary Committee and the Legislature on proposed exceptions or changes to existing exceptions to public records laws. The Advisory Committee did not take action or make recommendations on these exceptions, but instead, suggested that each proposal be introduced before the relevant policy committees and follow the process set forth for review of proposed exceptions in Title 1, section 434.
• Records relating to engineering estimates and negotiations for and appraisals of real property held by the Department of Transportation and	**Action:** LD 432, An Act To Ensure That the Maine Turnpike Authority Conducts Public Hearings for Construction and Reconstruction Projects and That All Public Records of the Maine Turnpike Authority Are Open for Inspection (sponsored by Rep. Hill) was referred to the Transportation Committee. The Committee voted Ought Not To Pass. The Right to Know Advisory Committee will be reviewing

Maine Turnpike Authority	the existing public records exception during the 125th Legislature.
• Security plans for state and county correctional facilities;	**Action:** LD 59, An Act To Amend the Laws Governing the Confidentiality of Correctional Facility Plans (sponsored by Rep. P. Crockett) was referred to the Criminal Justice and Public Safety Committee. The Judiciary Committee, with input from individual members of the Right to Know Advisory Committee, reviewed the proposed public records exception and made recommendations. The recommendations were included in Public Law 2009, chapter 339.
• Food safety and meat inspections records held by the Department of Agriculture	**Action:** LD 1255, An Act To Amend Certain Laws Related to the Department of Agriculture, Food and Rural Resources (sponsored by Rep. McCabe) was referred to the Agriculture, Conservation and Forestry Committee. The Judiciary Committee, with input from individual members of the Right to Know Advisory Committee, reviewed the proposed public records exceptions and made recommendations. The recommendations were included in Public Law 2009, chapter 393.
• Information shared by Maine service men and women and their families with the Commission to Protect the Lives and Health of Members of the Maine National Guard	**Action:** LD 1327, An Act To Update Department of Defense, Veterans and Emergency Management Laws (sponsored by Rep. Trinward) was referred to the Legal and Veterans' Affairs Committee. The Judiciary Committee, with input from individual members of the Right to Know Advisory Committee, reviewed the proposed public records exception relating to the Case Review Team and made recommendations. The recommendations were included in Public Law 2009, chapter 406.

VI. RECOMMENDATIONS

During 2009, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

❑ Continue, amend and repeal the following existing public records exceptions in Titles 10 to 21-A

As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 10 through Title 21-A which were not completed in 2008. The Advisory Committee's recommendations are summarized below; one Advisory Committee member did not vote in support of the recommendations.

The Advisory Committee recommends that the following exceptions in Title 10 through 21-A be continued without change.

- Title 12 § 6173, sub-§ 1, relating to marine resources statistics
- Title 12 § 6445, relating to logbooks for lobster harvesters
- Title 12 § 6749-S, sub-§ 1, relating to sea urchin buyers and processors
- Title 12 § 8884, sub-§ 3, relating to landowner and wood processor reports of volume information
- Title 19-A § 4013, sub-§ 4, relating to Domestic Abuse Homicide Review Panel

The Advisory Committee recommended statutory changes to the following public records exceptions. See draft legislation in Appendix C.

- Title 10 § 945-J, relating to the Maine International Trade Center
- Title 10 § 975-A, §§ 2 and 3, relating to the Finance Authority of Maine
- Title 12 § 550-B, sub-§ 6, relating to water well information collected by Maine Geological Survey
- Title 12 § 549-B, sub-§ 5, relating to investigatory and exploratory mining work on public lands
- Title 12 § 6455, sub-§ 1-A, relating to market studies and promotional plans of the Lobster Promotion Council
- Title 12 § 8669, sub-§ 13, relating to forest policy experimental areas

The Advisory Committee took no action on the divided report of the subcommittee on the following exceptions.

- Title 14 § 1254-A, sub-§ 7, relating to names of prospective jurors and questionnaire forms
- Title 14 § 1254-A, sub-§ 8, relating to names of jury pool
- Title 14 § 1254-B, sub-§ 2, relating to juror selection records

The Advisory Committee tabled consideration of the following exceptions. See discussion of recommendation # 3 below.

- Title 16, chapter 3, subchapter 8: Criminal History Record Information Act
- Title 16 § 614, sub-§ 1-A, relating to personally identifying information of persons who report cruelty to animals to the Department of Agriculture, Food and Rural Resources

❑ **Recommend again that the teacher confidentiality provisions in Title 20-A be amended with regard to the public disclosure of actions taken by the Department of Education on credentials of public school personnel, including the grounds for actions taken**

The Advisory Committee agreed to re-recommend the revision of the law providing confidentiality for disciplinary actions taken by the Commissioner of Education with respect to education personnel. This is the same recommendation made last year and included in the Judiciary Committee's bill, but it was deleted without consideration by the Judiciary Committee because another bill (LD 1191, An Act To Improve Teacher Confidentiality Laws, now PL 2009, c. 331) was being considered by the Education and Cultural Affairs Committee. Because Public Law 2009, chapter 331 does not reflect the changes recommended last year, the Advisory Committee recommends that the policy issue be put before the Legislature again. As drafted by the Advisory Committee, the proposed language explicitly designates as public certain information concerning individuals whose certifications (intended to cover all credentials issued by the Department of Education) are denied, revoked, suspended or surrendered. The information designated as public includes the name of the person, the type of action taken, the grounds for the action taken, the relevant dates of the action, the type of certification and endorsements held, including relevant dates, the schools where the person was or is employed and the dates of employment. See draft legislation included as Appendix C.

- ❑ **Defer action on the exceptions contained in the Criminal History Record Information Act, Title 16, chapter 3, subchapter 8, and request that the Criminal Law Advisory Commission review and revise the proposed redraft**

The Advisory Committee accepted the recommendation of the Public Records Exception Subcommittee that the review of the Criminal History Record Information Act (CHRIA) be deferred so that the Criminal Law Advisory Commission (CLAC) may review Act and suggest appropriate revisions with regard to the criminal justice aspects of the law. Because several of the provisions in the CHRIA identified as needing revision are not within the Advisory Committee's jurisdiction, the Advisory Committee believes that these issues, including concerns about definitions and the structure of the Act, are better addressed by active participants in the criminal justice process. Once CLAC has reviewed the proposed redraft of the Act, the Advisory Committee will review the confidentiality provisions.

- ❑ **Amend Title 1, chapter 13 to require that a minimum record be kept of all public proceedings**

The Advisory Committee recommends that Title 1, chapter 13 be amended to require that a minimum record be kept of all public proceedings and made available to the public. The draft legislation was developed by the Ongoing Issues Subcommittee with the intent that all government entities make a basic record of their actions. As drafted, the proposed language would require that a record be made of all public proceedings for which public notice is required. The record must be made within a reasonable period of time and, at a minimum, include: the date, time and place of the public proceeding; the members of the body recorded as either present or absent; the general substance of all matters proposed, discussed or decided; and a record of all motions and votes taken, by individual members if there is a roll call. See draft legislation included as Appendix D. The Advisory Committee does acknowledge the potential for the proposal to be considered a municipal mandate, but agreed that the Legislature is the proper body to consider whether this has an impact on the proposed legislation.

❑ **Add guidance for public officials on the use of email communications outside of public proceedings to the Frequently Asked Questions section of the Freedom of Access website**

The Advisory Committee recommends that guidance on the use of email communications outside of public proceedings be added to the Freedom of Access website. The guidance, developed by the Legislative Subcommittee, advises public officials about the use of e-mail and other forms of communication when the subject of the communication is the transaction of public business. The discussion about communications among members of a governmental body, when those communications occur outside of public proceedings, was triggered by the proposed legislation by Rep. Stacy Dostie that will be considered in the Second Regular Session. Rep. Dostie presented her proposal to prohibit communications outside of public proceedings and explained that it was prompted by e-mail communications among selectmen that resulted in the termination of the employment of the town manager. The Advisory Committee decided not to make a recommendation on Rep. Dostie's bill because it believes that that taking action outside of public proceedings is already prohibited by law; the Advisory Committee instead chose to focus on providing guidance to public officials about the use of e-mail and other forms of communication when the subject is the transaction of public business. The guidance in the form of a new Frequently Asked Question was added to the Freedom of Access website on December 8, 2009.

❑ **Recommend to the Health and Human Services Committee that the Freedom of Access laws not be amended to require hospital board meetings to be open to the public as proposed in LD 757, An Act to Improve the Transparency of Certain Hospitals**

The majority of the Advisory Committee does not recommend a change in the Freedom of Access laws as proposed by LD 757. The Freedom of Access laws, in the opinion the Advisory Committee, are meant to apply to public entities, not private nonprofit entities. Although hospitals serve the public, it is not appropriate for nonprofit entities to be subject to the same requirements for open meetings and open records as governmental entities created by legislative action. Further, the majority does not believe that there is a compelling reason to make hospital and health care organization board meetings open to the public; hospitals and other nonprofit health care organizations are already required by other provisions in State law to make financial information, health care cost data and other records accessible to the public. A minority of the advisory committee agrees with the majority recommendation that LD 757, as drafted, should not be enacted, but suggests that the legislation may present an opportunity to consider whether the Freedom of Access laws should be applied to nonprofit organizations, including hospitals, that serve a public purpose and receive public funds.

❑ **Recommend to the Judiciary Committee that no statutory changes be made relating to the public's access to salary information for public employees as proposed in LD 1353, An Act Concerning Salary Information of Public Employees**

The Advisory Committee does not recommend a change in the Freedom of Access laws as proposed by LD 1353 because it was unable to reach consensus on appropriate legislation. Current law does not provide any confidentiality protection for salary information of public

employees; salary information related to public employees is a matter of public record. LD 1353 was proposed in response to the posting of names, positions and salary information of public employees on a private organization's website. Concerns were raised about the personal privacy of employees as well as safety concerns about the release of personal information for certain law enforcement officers or victims of domestic violence. The Advisory Committee recognized the safety concerns and discussed three proposed legislative options to protect the confidentiality of certain employees: two options specifically linking to those public employees who may be participants in the existing Address Confidentiality Program for victims of domestic violence and stalking and one option relying on a public employee's employer being satisfied with the employee's safety concern to lead to confidentiality of the employee's name. The Advisory Committee could not agree on which employees need the protection of confidentiality, and how to provide that protection. Members also expressed doubt that many people would take advantage of the protection afforded by any of the legislative proposals under discussion. The Advisory Committee concluded that a legislative proposal to address the issues raised by LD 1353 must be written precisely or not done at all. As the members were not able to resolve the concerns associated with the three legislative proposals under consideration, the Advisory Committee agreed not to recommend any change to the law.

- ❑ **Propose standard statutory language for use by the Judiciary Committee in reviewing proposed exceptions relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities**

The Advisory Committee, with assistance and guidance from the Public Records Exception Subcommittee, developed draft standard statutory language for use by the Judiciary Committee when reviewing existing or proposed public records exceptions relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities. The discussion of standard language was triggered by the Judiciary Committee's concerns about the breadth of language in current law used to protect information from individuals and businesses applying for financial or other technical assistance from government entities. The Advisory Committee agrees that it is important to develop and maintain consistency among government entities in the treatment and protection of similar information. After a review of the provisions identified in current law, the Advisory Committee noted that more confidentiality protection is provided for information or records provided to government entities by individuals applying for financial assistance than to information or records provided by businesses. The Advisory Committee believes that it is appropriate to provide greater confidentiality protection for information from individuals. Accordingly, the Advisory Committee has developed two suggested models for statutory language---one relating to the treatment and protection of information submitted by individuals and one relating to the treatment and protection of information submitted by businesses. The drafts are intended as templates to provide consistency in the statutory language and to encourage similar treatment for certain records across state and local government and are based on existing confidentiality provisions included in current law.

Because many of the provisions identified in current law have been recently reviewed by the Advisory Committee and the Legislature, the Advisory Committee recommends that the draft

model language be used as guidance for the Judiciary Committee in reviewing future proposed exceptions; at this time, the Advisory Committee does not recommend that all of the existing provisions be amended as needed to reflect the models. See draft templates included as Appendix E.

- ❑ **Advise the Maine Press Association that the Advisory Committee does not oppose the amendments to the notice requirements for rulemaking by government entities in Public Law 2009, chapter 256**

The Advisory Committee supports public notice requirements in newspapers and, at this time, would not support legislation that would eliminate or further shorten the statutory requirement for public notices in newspapers. As Public Law 2009, chapter 256 makes only limited changes to the notice requirements (and does not eliminate them), the Advisory Committee believes the enacted law is a reasonable compromise to provide appropriate information to the public in the rule-making process and would not recommend changes. However, the Advisory Committee is not commenting or taking a position on any legislation that may be proposed in the future related to this issue; the Advisory Committee will consider and evaluate proposed legislation at the time it is introduced.

- ❑ **Continue discussion of the following issues: the use of Social Security Numbers, the use of technology in public proceedings and requests for bulk electronic data**

The Advisory Committee has identified three issues that need further review and discussion: the use of Social Security Numbers, the use of technology in public proceedings and requests for bulk electronic data. The Advisory Committee will consider these issues during its 2010 meetings.

One issue under consideration is the development of draft legislation to protect Social Security Numbers. The Advisory Committee circulated the draft widely among state agencies and interested parties; substantial comments were received as well as suggestions for changes to the draft. The Advisory Committee doesn't believe the draft is ready to be presented to the Legislature for consideration. During 2010, the Advisory Committee will continue discussion of the draft legislation and review other state's approaches.

The second issue relates to requests for bulk electronic data. The Legislative Subcommittee has begun work on this issue but has not yet formulated any recommendations. The Advisory Committee accepted the Legislative Subcommittee's suggestion that the Law School Extern be asked to research this issue during the externship. The Advisory Committee is aware that legislation will be proposed in the next legislative session to address some of the issues identified in the litigation involving MacImage of Maine, LLC and Hancock and other counties. The Advisory Committee and the Legislative Subcommittee will be available to serve as resources to the Judiciary Committee and other committees of the Legislature on this issue.

The third issue is the use of technology to conduct public proceedings. The Advisory Committee has prepared draft legislation to address the issue of participation by members in public meetings through the use of technology, rather than being present in the room. Members of the Advisory

Committee expressed concerns about some of the practical aspects of complying with the draft proposal and whether criteria should be included to determine when attendance at a meeting using technology would be permitted. Since the Advisory Committee could not identify a pressing need to have the draft become law at the present time, the Advisory Committee agreed to table the issue for further consideration.

VII. FUTURE PLANS

In 2010, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 10 through 21-A. It will begin the process of reviewing the existing public records exceptions contained in Titles 22 through 25. The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fourth annual report.

APPENDIX A

Authorizing Legislation, 1 MRSA §411

CURRENT LAW GOVERNING RIGHT TO KNOW ADVISORY COMMITTEE

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and

M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

A. Except as provided in paragraph B, members are appointed for terms of 3 years.

B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the

advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

APPENDIX B

Membership list, Right to Know Advisory Committee

Right to Know Advisory Committee
1 MRSA § 411

Appointments by the Governor

Karla Black
161 Pleasant Street
Richmond, ME 04357

Representing State Government Interests

Richard Flewelling
P.O. Box 244
Freeport, ME 04102

Representing Municipal Interests

Harry Pringle
44 Neal Street
Portland, ME 04102

Representing School Interests

Appointments by the President

Sen. Barry J. Hobbins
110 Main Street
Suite 1508
Saco, ME 04072

Senate Member of the Judiciary Committee

Shenna Bellows
Maine Civil Liberties Union
401 Cumberland Ave.
Portland, ME 04101

Representing the Public

Robert Devlin
Kennebec County Administrator
125 State Street
Augusta, ME 04330

Representing County or Regional Interests

Mark Dion
Cumberland County Sheriff's Department
36 County Way
Portland, ME 04102

Representing Law Enforcement Interests

Kelly Morgan
90 Loggin Road
Cape Neddick, ME 04072

Representing Newspapers and Press Interests

A.J. Higgins
18 West Street
Manchester, ME 04351

Representing Broadcasting Interests

Appointments by the Speaker of the House

Rep. Dawn Hill
P.O. Box
Cape Neddick, ME 03902

House Member of the Judiciary Committee

Judy Meyer
Lewiston Sun Journal
104 Park Street
Lewiston, ME 04243-4400

Representing Newspaper Publishers

Suzanne Goucher
Maine Association of Broadcasters
69 Sewell Street, Suite 2
Augusta, ME 04330

Representing Broadcasting Interests

Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Representing a Statewide Coalition of Advocates of Freedom of Access

Chris Spruce
c/o Island Housing Trust
P.O. Box 851
Mount Desert, ME 04660

Representing the Public

Attorney General

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333

Designee

Chief Justice

James T. Glessner
State Court Administrator
P.O. Box 4820
Portland, ME 04112

Member of the Judicial Branch

Staff:

Peggy Reinsch & Colleen McCarthy Reid
Office of Policy and Legal Analysis
(207) 287-1670

APPENDIX C

Recommendations for Statutory Changes to Public Records Exceptions, Titles 10 - 21-A

PROPOSED DRAFT LEGISLATION:
Recommendations for Statutory Changes to Exceptions in Titles 10 to 21-A

Sec. 1. 10 MRSA §945-J is amended to read:

10 §945-J. Confidential records

The ~~following~~ records and proceedings of the center are ~~confidential and are not open to~~ public ~~inspection~~ for the purposes of Title 1, chapter 13, except as otherwise provided in this section.

1. Proprietary information; other information. Information provided to or developed by the center and included in a business or marketing plan is ~~confidential so long as~~ public unless the person to whom the information belongs or pertains requests that it be designated as confidential and the center has determined it contains proprietary information ~~if, when made available, the information would allow a person to obtain a business or competitive advantage over another person or would result in significant detriment to the person to whom the information belongs and when the information is not otherwise available in the public domain~~. For the purposes of this subsection, "proprietary information" means information that is a trade secret or production, commercial or financial information the disclosure of which would impair the competitive position of the center or the person submitting the information and would make available information not otherwise publicly available.

2. Tax or financial information. Any financial statement, supporting data or tax return of any person is confidential.

3. Credit assessment. Any record obtained by the center that contains an assessment of the credit worthiness, credit rating or financial condition of any person is confidential.

This section does not prohibit the disclosure of information that is otherwise available in the public domain.

Sec. 2. 10 MRSA § 975-A is repealed.

Sec. 3. 10 MRSA § 975-B is enacted to read:

§ 975-B. Freedom of access; confidentiality of records

The records of the authority are subject to the freedom of access laws, Title 1, chapter 13, except as specifically provided in this section.

1. Confidential records. The following records are designated as confidential for purposes of Title 1, section 402, subsection 3, paragraph A:

A. A record obtained or developed by the authority that:

(1) A person, including the authority to whom the record belongs or pertains has requested be designated confidential; and

(2) The authority has determined contains information that gives the owner or a user an opportunity to obtain business or competitive advantage over another person who does not have access to the information, except through the records, or access to which by others would result in a business or competitive disadvantage, loss of business or other significant detriment to any person to whom the record belongs or pertains; and

B. A financial statement or tax return.

The authority shall provide to a legislative committee, on written request signed by the chairs of that committee, any information or records, including information designated confidential under this subsection, specified in the written request. The information or records may be used only for the lawful purposes of the committee and in any action arising out of any investigation conducted by it and may not be released for any other purpose.

2. Exceptions. Notwithstanding subsection 1, the following are not confidential and are public records:

A. Any otherwise confidential information the confidentiality of which the authority determines to have been satisfactorily and effectively waived;

B. Any otherwise confidential information that has already lawfully been made available to the public; and

C. Impersonal, statistical or general information.

3. Disclosure prohibited; further exceptions. A person may not knowingly divulge or disclose records designated confidential by this section, except that the authority , in its discretion and in conformity with legislative freedom of access criteria in Title 1, chapter 13, subchapter 1-A, may make or authorize any disclosure of information of the following types or under the following circumstances:

A. If necessary in connection with processing any application for, obtaining or maintaining financial assistance for any person;

B. To a financing institution or credit reporting service;

C. Information necessary to comply with any federal or state law or rule or with any agreement pertaining to financial assistance;

D. If necessary to ensure collection of any obligation in which the authority has or may have an interest;

E. In any litigation or proceeding in which the authority has appeared, introduction for the record of any information obtained from records designated confidential by this section; and

F. Pursuant to a subpoena, request for production of documents, warrant or other order by competent authority, as long as any such order appears to have first been served on the person to whom the confidential information sought pertains or belongs and as long

as any such order appears on its face or otherwise to have been issued or made upon lawful authority.

Sec. 4. **12 MRSA § 549-B, sub-§ 5, ¶ D** is amended to read:

D. An affidavit of investigatory and exploratory work shall be filed each year with the director of the survey on June 30th. At the time of filing that affidavit, the claimant shall demonstrate to the director that investigatory work has been performed on that claim at a rate of at least $5 per acre during the year ending June 30th. For claims recorded after April 1st and before June 30th, the first affidavit of investigatory and exploratory work shall be filed on the 2nd June 30th following. All work done shall be described in the affidavit and shall include work which tends to reveal such characteristics of the material sought as length, width, depth, thickness, tonnage and mineral or metal content, or, with respect to nonmetallic minerals, other physical characteristics of the deposit relating directly to the commercial exploitation of the deposit and such other information relating to the exploration work as the director of the survey may require. ~~This information may be shared with other governmental agencies, but shall not constitute records available for public inspection or disclosure pursuant to Title 1, section 408, during the period of time in which the claim is in effect.~~ During the period of time in which the claim is in effect, this information is confidential for the purposes of Title 1, section 402, subsection 3, paragraph A and may not be disclosed, except that the information may be shared with other governmental agencies.

Sec. 5. **12 MRSA § 549-B, sub-§ 13** is amended to read:

13. Annual reports. Any person with a mining lease engaged in mine development or mining under this subchapter shall, in the month of June following the year the operation was carried on, pay all applicable fees, rentals and royalties and file an annual report with the director of the survey and director of the agency having jurisdiction over the state-owned land setting forth:

A. The location of the operation;

B. The quality and grade of mineral products or ores produced;

C. The amount of royalty which has accrued on material extracted;

D. The number of persons ordinarily employed at operation below ground and above ground; and

E. Any other information, relating to the mining lease, mine development or mining, the director of the bureau and the director of the agency having jurisdiction over the state-owned lands may require by regulation.

~~This information may be shared with other government agencies, but shall not constitute records available for public inspection or disclosure pursuant to Title 1, section 408.~~ This information is confidential for the purposes of Title 1, section 402, subsection 3, paragraph A and may not be disclosed, except that the information may be shared with other governmental agencies.

Sec. 6. **12 MRSA § 550-B** is amended to read:

§550-B. Water well information

1. Definitions. As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

A. "Well" means any hole constructed by any method for the purpose of extracting water from below the ground.

B.

C. "Well drilling company" means a person, firm, partnership or corporation that owns or otherwise operates any mechanical equipment used to drill, drive or bore water wells.

2. Exemptions. Wells for which data reports are already required by any state agency are exempt from the reporting requirements of this chapter.

3. Water well information documentation. Completion reports shall be filed according to this subsection.

A. Within 30 days after completion of any well or dry hole, or the enlarging or deepening of an existing well, a well drilling company shall submit a report to the Bureau of Geology and Natural Areas, on forms designed and provided by the Bureau of Geology and Natural Areas. The report must contain information as may be required by the Bureau of Geology and Natural Areas, including, but not limited to, location, construction and well yield.

B. Any well drilling company that has engaged in the construction of water wells, but who has not submitted well completion reports on a timely basis as required by this chapter, is in violation of this chapter.

4. Compliance with other laws and rules. Notwithstanding the provisions set forth in this chapter, all wells are to be constructed and maintained in accordance with all other laws and rules in effect.

5. Penalties. A well drilling company that violates any standard or provision of this chapter, commits a civil violation for which a forfeiture of not more than $500 may be adjudged. In addition to other civil remedies, the court may issue an injunction.

6. Information use. Information collected by the Bureau of Geology and Natural Areas, Maine Geological Survey under this section ~~chapter~~ is ~~exempt from~~ subject to Title 1, chapter 13, subchapter I unless the well drilling company to whom the information belongs or pertains requests that it be designated as confidential and the bureau has determined it contains proprietary information. For the purposes of this subsection, "proprietary information" means information that is a trade secret or production, commercial or financial information the disclosure of which would impair the competitive position of the person submitting the information and would make available information not otherwise publicly available. The Bureau of Geology and Natural Areas, Maine Geological Survey shall make information collected under this chapter available to any federal, state or municipal entity or authorized agent of such entity.

Sec. 7. **12 MRSA §6455, sub-§ 1-A** is amended to read:

1-A. Council is a public instrumentality. The council is established as a public instrumentality serving a public purpose. As a public instrumentality:

A. Employees of the council may not be construed to be state employees for any purpose, including the state civil service provisions of Title 5, Part 2 and Title 5, chapter 372 and the state retirement system provisions of Title 5, Part 20;

B. The council may not be construed to be a state agency for any purposes, including the budget, accounts and control, auditing, purchasing or other provisions of Title 5, Part 4; and

C. Notwithstanding any provisions of paragraphs A and B:

(1) All meetings and records of the council are subject to the provisions of Title 1, chapter 13, subchapter I, except as provided in subsection 1-B~~that, by majority vote of the members, the council may designate market studies or promotional plans developed or funded by the council as confidential~~. The commissioner and those members of the Legislature appointed to serve on the joint standing committee of the Legislature having jurisdiction over marine resource matters have access to all material designated confidential by the council;

(2) Except as required by subsection 2, members of the council are governed by the conflict of interest provisions set forth in Title 5, section 18; and

(3) For the purposes of the Maine Tort Claims Act, the council is a "governmental entity" and its employees are "employees" as those terms are defined in Title 14, section 8102.

Sec. 8. **12 MRSA § 6455, sub-§ 1-B** is enacted to read:

1-B. Market studies and promotional plans; proprietary information. Information provided to or developed by the council and included in a promotional plan or market study is public unless the council determines that it contains proprietary information. For the purposes of this subsection, "proprietary information" means information that is a trade secret or production, commercial or financial information the disclosure of which would impair the competitive position of the council or the person submitting the information and would make available information not otherwise publicly available.

Sec. 9. **12 MRSA § 8869, sub-§ 13** is amended to read:

13. Confidential information. Information provided to the bureau voluntarily or to fulfill reporting requirements for the purposes of establishing and monitoring outcome-based forest policy experimental areas, as created pursuant to section 8003, subsection 3, paragraph Q, is public unless the person to whom the information belongs or pertains requests that it be designated as confidential for the purposes of Title 1, section 402, subsection 3, paragraph A and the bureau has determined it contains proprietary information For the purposes of this subsection, "proprietary information" means information that is a trade secret or production, commercial or financial information the disclosure of which would impair the competitive position of the person submitting the information and would make available information not otherwise publicly available.

~~designated as confidential if the bureau has determined that failure to designate the information as confidential would provide competitors an opportunity to obtain business or competitive advantage over the person to whom the information belongs or pertains or would result in loss or other significant detriment to that person.~~ The bureau, working with the landowner and the panel of technical experts appointed under subsection 3-A, may publish reports as long as those reports do not reveal confidential information. This subsection is repealed July 1, 2012.

Sec. 10. 20-A MRSA §13004, sub-§ 2-A, as repealed and replaced by PL 2009, c. 331, is amended to read:

2-A. Confidentiality. The provisions of this subsection govern confidentiality. For the purposes of this subsection, the term "certification" means certification, authorization or approval under this chapter and chapter 502.

A. Complaints and responses pursuant to section 13020 and any other information or materials that may result in an action to deny, revoke or suspend certification are confidential, except when submitted in court proceedings to revoke or suspend certification.

B. Except for information designated confidential under section 6101 or section 6103, information designated confidential under paragraph A may be released or used by the department as necessary to:

(1) Complete its own investigations;

(2) Provide information to a national association of state directors of teacher education and certification to which the State belongs;

(3) Assist other public authorities to investigate the same teacher's certification in another jurisdiction;

(4) Report or prevent criminal misconduct or assist law enforcement agencies in their investigations; or

(5) Report child abuse or neglect under Title 22, section 4011-A.

C. The department may publish and release as public information statistical summaries of complaints and dispositions as long as the release of such information does not jeopardize the confidentiality of individually identifiable information.

D. Notwithstanding paragraph A, the following information concerning final written decisions relating to disciplinary action taken by the commissioner against persons holding certifications are public records:

(1) Name of the person;

(2) The type of action taken, consisting of denial, revocation, suspension, surrender or reinstatement;

(3) The grounds for the action taken;

(4) The relevant dates of the action;

(5) The type of certification and endorsements held, including relevant dates;

(6) The schools where the person was or is employed; and

(7) The dates of employment.

APPENDIX D

Recommended Draft Legislation Relating to Record of Public Proceedings

PROPOSED DRAFT LEGISLATION:
Record/Minutes of Public Proceedings

Sec. 1. **1 MRSA § 403** is repealed and the following enacted in its place:

§403. Meetings to be open to public; record of meetings

1. Open to public. Except as otherwise provided by statute or by section 405, all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law must be made within a reasonable period of time after the proceeding and must be open to public inspection.

2. Record of public proceedings. Unless otherwise provided by law, a record of all public proceedings for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and be open to public inspection. At a minimum, the record must include:

A. The date, time and place of the public proceeding;

B. The members of the body recorded as either present or absent;

C. The general substance of all matters proposed, discussed or decided; and

D. A record of all motions and votes taken, by individual members if there is a roll call.

3. Audio or video recording. An audio, video or other electronic recording of a public proceeding satisfies the requirements of subsection 2.

APPENDIX E

Recommended Template to Judiciary Committee to Protect Information from Individuals and Businesses Applying for Financial or Technical Assistance from Government Entities

HON. BARRY J. HOBBINS, CHAIR
HON. DAWN HILL
SHENNA BELLOWS
KARLA BLACK
ROBERT DEVLIN
MARK DION
RICHARD FLEWELLING
JAMES T. GLESSNER

SUZANNE GOUCHER
A.J. HIGGINS
MAL LEARY
JUDY MEYER
KELLY MORGAN
LINDA PISTNER
HARRY PRINGLE
CHRIS SPRUCE

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December 2, 2009

Senator Lawrence S. Bliss
Representative Charles R. Priest
Joint Standing Committee on Judiciary
100 State House Station
Augusta, Maine 04333-0100

Dear Sen. Bliss and Rep. Priest,

In response to concerns raised by members of the Judiciary Committee about the breadth of language in current law used to protect information from individuals and businesses applying for financial or other technical assistance from government entities, I am writing to convey the comments of the Right to Know Advisory Committee. In accordance with the process developed by the Advisory Committee, our Public Records Exception Subcommittee initially held 3 subcommittee meetings to review and discuss this issue. The Public Records Exception Subcommittee then made its recommendation to the full Advisory Committee on December 1, 2009. After discussion of the issues and the subcommittee's recommendations, the Advisory Committee makes the following comments.

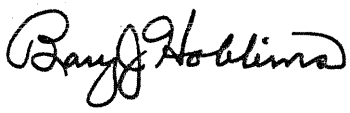
The Advisory Committee agrees that it is important to develop and maintain consistency among government entities in the treatment and protection of similar information. After a review of the provisions identified in current law, the Advisory Committee noted that more confidentiality protection is provided for information or records provided to government entities by individuals applying for financial assistance than to information or records provided by businesses. The Advisory Committee believes that it is appropriate to provide greater confidentiality protection for information from individuals. Accordingly, the Advisory Committee has developed two suggested models for statutory language---one relating to the treatment and protection of information submitted by individuals and one relating to the treatment and protection of information submitted by businesses. The attached drafts are intended as templates to provide consistency in the statutory language and to encourage similar treatment for certain records across state and local government and are based on existing confidentiality provisions included in current law.

Because many of the provisions identified in current law have been recently reviewed by the Advisory Committee and the Legislature, the Advisory Committee recommends that the draft model language be used as guidance for the Judiciary Committee in reviewing future proposed exceptions; at this time, the Advisory Committee does not recommend that all of the existing provisions be amended as needed to

reflect the models. However, since one of the existing exceptions falls within our current review of exceptions in Titles 10 through 21-A, the Advisory Committee will recommend that the exception in Title 10, section 975-A relating to the Finance Authority of Maine be amended to be consistent with the model language.

I hope you find the Advisory Committee's templates for model language helpful in your further consideration of proposed public records exceptions. Please contact me or our staff if you have any questions.

Sincerely,



Sen. Barry J. Hobbins
Chair, Right to Know Advisory Committee

RIGHT TO KNOW ADVISORY COMMITTEE
Standard statutory language relating to confidentiality of information
submitted to State agencies in applications
for technical or financial assistance from businesses

§. . Freedom of access; confidentiality of records

The records of the *[board, agency, authority, etc.]* are subject to the freedom of access laws, Title 1, chapter 13, except as specifically provided in this section.

1. Confidential records. The following records are designated as confidential for purposes of Title 1, section 402, subsection 3, paragraph A:

A. A record obtained or developed by the *[board, agency, authority, etc.]* that:

(1) A person, including the *[board, agency, authority, etc.]* to whom the record belongs or pertains has requested be designated confidential; and

(2) The board has determined contains information that gives the owner or a user an opportunity to obtain business or competitive advantage over another person who does not have access to the information, except through the records, or access to which by others would result in a business or competitive disadvantage, loss of business or other significant detriment to any person to whom the record belongs or pertains; and

B. A financial statement or tax return.

The *[board, agency, authority, etc.]* shall provide to a legislative committee, on written request signed by the chairs of that committee, any information or records, including information designated confidential under this subsection, specified in the written request. The information or records may be used only for the lawful purposes of the committee and in any action arising out of any investigation conducted by it and may not be released for any other purpose.

2. Exceptions. Notwithstanding subsection 1, the following are not confidential and are public records:

A. Any otherwise confidential information the confidentiality of which the *[board, agency, authority, etc.]* determines to have been satisfactorily and effectively waived;

B. Any otherwise confidential information that has already lawfully been made available to the public; and

C. Impersonal, statistical or general information.

3. Disclosure prohibited; further exceptions. A person may not knowingly divulge or disclose records designated confidential by this section, except that the *[board, agency, authority, etc.]*, in its discretion and in conformity with legislative freedom of access criteria in Title 1, chapter 13, subchapter 1-A, may make or authorize any disclosure of information of the following types or under the following circumstances:

RIGHT TO KNOW ADVISORY COMMITTEE
Standard statutory language relating to confidentiality of information submitted to State agencies in applications for technical or financial assistance from businesses

A. If necessary in connection with processing any application for, obtaining or maintaining financial assistance for any person;

B. To a financing institution or credit reporting service;

C. Information necessary to comply with any federal or state law or rule or with any agreement pertaining to financial assistance;

D. If necessary to ensure collection of any obligation in which the *[board, agency, authority, etc.]* has or may have an interest;

E. In any litigation or proceeding in which the *[board, agency, authority, etc.]* has appeared, introduction for the record of any information obtained from records designated confidential by this section; and

F. Pursuant to a subpoena, request for production of documents, warrant or other order by competent authority, as long as any such order appears to have first been served on the person to whom the confidential information sought pertains or belongs and as long as any such order appears on its face or otherwise to have been issued or made upon lawful authority.

RIGHT TO KNOW ADVISORY COMMITTEE
Standard statutory language relating to confidentiality of information submitted to State agencies in applications for technical or financial assistance from individuals

§_____. **Freedom of access; confidentiality of records**

The records of the *[board, agency, authority, etc.]* are subject to the freedom of access laws, Title 1, chapter 13, except as specifically provided in this section.

1. Confidential information. Records containing any information acquired by the *[board, agency, authority, etc.]* or a member, officer, employee or agent of the *[board, agency, authority, etc.]* from an applicant for or recipient of financial assistance provided pursuant to a program administered or established by the *[board, agency, authority, etc.]* is confidential for purposes of Title 1, section 402, subsection 3, paragraph A if the applicant or recipient is an individual.

2. Wrongful disclosure prohibited. A member, officer, employee, agent, other representative of the *[board, agency, authority, etc.]* or other person may not knowingly divulge or disclose records declared confidential by this section, except that the *[board, agency, authority, etc.]* may, in its discretion, make or authorize any disclosure of information of the following types or under the following circumstances:

A. Impersonal, statistical or general information;

B. If necessary in connection with processing any application for, obtaining or maintaining financial assistance for any person or in connection with acquiring, maintaining or disposing of property;

C. To a financial institution or credit reporting service;

D. Information necessary to comply with any federal or state law or rule or with any agreement pertaining to financial assistance;

E. Information to the extent the *[board, agency, authority, etc.]* deems the disclosure necessary to the sale or transfer of its bonds;

F. If necessary to assure collection of any obligation in which it has or may have an interest;

G. In any litigation or proceeding in which the *[board, agency, authority, etc.]* has appeared, introduction for the record of any information obtained from records declared confidential by this section; and

H. Pursuant to a subpoena, request for production of documents, warrant or other order by competent authority, provided that any such order appears to have first been served on the person to whom confidential information sought pertains or belongs and provided that any such order appears on its face or otherwise to have been issued or made upon lawful authority.

APPENDIX F

Correspondence from Right to Know Advisory Committee

HON. BARRY J. HOBBINS, CHAIR
HON. DAWN HILL
SHENNA BELLOWS
KARLA BLACK
ROBERT DEVLIN
MARK DION
RICHARD FLEWELLING

JAMES T. GLESSNER
SUZANNE GOUCHER
MAL LEARY
JUDY MEYER
LINDA PISTNER
HARRY PRINGLE
CHRIS SPRUCE

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

September 28, 2009

Senator Joseph C. Brannigan
Representative Anne C. Perry
Joint Standing Committee on Health and Human Services
100 State House Station
Augusta, Maine 04333-0100

Dear Sen. Brannigan and Rep. Perry,

As you requested in your June 1, 2009 memorandum, I am writing to convey the recommendations and comments of the Right to Know Advisory Committee on LD 757, An Act to Improve the Transparency of Certain Hospitals. In accordance with the process developed by the Advisory Committee, our Legislative Subcommittee held 2 subcommittee meetings to review and discuss LD 757. At its first meeting, the Legislative Subcommittee invited comment from interested parties, including the bill's sponsor, proponent, hospital representatives and others. The Legislative Subcommittee made its report on LD 757 to the full Advisory Committee on September 23, 2009. After discussion of the subcommittee's report, the Advisory Committee makes the following recommendations and comments on LD 757.

The majority of the Advisory Committee does not recommend a change in the Freedom of Access laws as proposed by LD 757. The Freedom of Access laws, in the opinion the Advisory Committee, are meant to apply to public entities, not private nonprofit entities. Although hospitals serve the public, it is not appropriate for nonprofit entities to be subject to the same requirements for open meetings and open records as governmental entities created by legislative action. Further, the majority does not believe that there is a compelling reason to make hospital and health care organization board meetings open to the public; hospitals and other nonprofit health care organizations are already required by other provisions in State law to make financial information, health care cost data and other records accessible to the public. It was suggested that proponents of LD 757 identify certain information they believe should be released publicly that is not now disclosed and use that as a basis for establishing specific reporting requirements in law. Concerns were also expressed that demands for access would be made to broaden the Freedom of Access laws beyond the proposal in LD 757 to include other types of nonprofit organizations. The majority believes nonprofit organizations of all types have a long history in Maine and make invaluable contributions to the welfare of the State. The majority of the Advisory Committee is not in favor of legislation to expand the application of the Freedom of Access laws to board meetings of a nonprofit organization, including a hospital or other health care provider.

A minority of the advisory committee agrees with the majority recommendation that LD 757, as drafted, should not be enacted, but suggests that the legislation may present an opportunity to consider whether the Freedom of Access laws should be applied to nonprofit organizations, including hospitals, that serve a public purpose and receive public funds. Although the minority does not recommend any specific legislative proposal, it does want to note that the public has a legitimate interest in the activities of those nonprofit organizations operating as public-private partnerships under contracts with government agencies and, perhaps, with public officials serving as board members.

I hope you find the Advisory Committee's majority and minority recommendations helpful in your further consideration of LD 757. Thank you for your consideration of our comments.

Sincerely,

Sen. Barry J. Hobbins
Chair, Right to Know Advisory Committee

HON. BARRY J. HOBBINS, CHAIR
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STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December 1, 2009

Daniel W. Walker
Preti Flaherty Beliveau & Pachios LLP
45 Memorial Circle
Augusta, Maine 04330

Dear Attorney Walker,

As you requested in your June 29, 2009 letter, I am writing to convey the comments of the Right to Know Advisory Committee related to Public Law 2009, chapter 256, An Act to Generate Savings by Changing Public Notice Requirements (LD 1271) and the issue of posting of public notices in newspapers. In accordance with the process developed by the Advisory Committee, this issue was first reviewed by our Legislative Subcommittee. The Legislative Subcommittee made its report to the full Advisory Committee on September 23, 2009. After discussion of the subcommittee's report, the Advisory Committee makes the following comments.

The Advisory Committee supports public notice requirements in newspapers and, at this time, would not support legislation that would eliminate or further shorten the statutory requirement for public notices in newspapers. As Public Law 2009, chapter 256 makes only limited changes to the notice requirements (and does not eliminate them), the Advisory Committee believes the enacted law is a reasonable compromise to provide appropriate information to the public in the rule-making process and would not recommend changes. However, we are not commenting or taking a position on any legislation that may be proposed in the future related to this issue; the Advisory Committee will consider and evaluate proposed legislation at the time it is introduced.

Thank you for your consideration of our comments.

Sincerely,

Sen. Barry J. Hobbins
Chair, Right to Know Advisory Committee

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STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December 1, 2009

Senator Lawrence S. Bliss
Representative Charles R. Priest
Joint Standing Committee on Judiciary
100 State House Station
Augusta, Maine 04333-0100

Dear Sen. Bliss and Rep. Priest,

As you requested in your June 11, 2009 memorandum, I am writing to convey the recommendations and comments of the Right to Know Advisory Committee on LD 1353, An Act Concerning Salary Information of Public Employees. In accordance with the process developed by the Advisory Committee, our Legislative Subcommittee held 2 subcommittee meetings to review and discuss LD 1353. At its first meeting, the Legislative Subcommittee invited comment from interested parties, including the bill's sponsor, the Maine State Employees Association-SEIU, the Maine Heritage Policy Center and others. The Legislative Subcommittee made its report on LD 1353 to the full Advisory Committee on September 23, 2009. After discussion of the subcommittee's report and the issues raised by LD 1353, the Advisory Committee makes the following comments.

The Advisory Committee does not recommend a change in the Freedom of Access laws as proposed by LD 1353 because it was unable to reach consensus on appropriate legislation. As you know, current law does not provide any confidentiality protection for salary information of public employees; salary information related to public employees is a matter of public record. LD 1353 was proposed in response to the posting of names, positions and salary information of public employees on a private organization's website. Concerns were raised about the personal privacy of employees as well as safety concerns about the release of personal information for certain law enforcement officers or victims of domestic violence. The Advisory Committee recognized the safety concerns and discussed three proposed legislative options to protect the confidentiality of certain employees: two options specifically linking to those public employees who may be participants in the existing Address Confidentiality Program for victims of domestic violence and stalking and one option relying on a public employee's employer being satisfied with the employee's safety concern to lead to confidentiality of the employee's name.

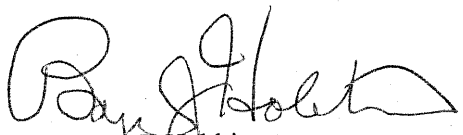
The Advisory Committee could not agree on which employees need the protection of confidentiality, and how to provide that protection. Some members felt tying the protections to the Address Confidentiality Program criteria was appropriate because it is an existing program with clear standards. Other members were concerned that the population covered by the Address Confidentiality Program would not be a close

fit to those employees who may need confidentiality protection. The members could identify situations in which a person would not be part of the Address Confidentiality Program but could benefit from the confidentiality to the same extent. When discussing the third option based on a determination of the public employer that the employee has a "safety" concern, some members felt that such a standard was too broad and could be interpreted to shield information that is now public about certain employees that do not need that protection. Members also expressed doubt that many people would take advantage of the protection afforded by any of the legislative proposals under discussion.

The Advisory Committee concluded that a legislative proposal to address the issues raised by LD 1353 must be written precisely or not done at all. As the members were not able to resolve the concerns associated with the three legislative proposals under consideration, the Advisory Committee agreed not to recommend any change to the law.

I hope you find the Advisory Committee's comments helpful in your further consideration of these issues.

Sincerely,



Sen. Barry J. Hobbins
Chair, Right to Know Advisory Committee

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CHRIS SPRUCE

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December 1, 2009

John Pelletier, Chair
Criminal Law Advisory Commission

Re: Criminal History Record Information Act

Dear Mr. Pelletier:

The Right to Know Advisory Committee was established to serve as a resource and advisor about Maine's Freedom of Access Laws. The Advisory Committee consists of 16 members from various constituencies, and we are working to provide training and other resources for public officials to assist them in complying with the laws governing proceedings and records.

One of the underlying premises of Maine's Freedom of Access laws is that records in the hands of public officials and agencies are public records to which the public has a right of access, unless the law provides that certain records should be treated differently. In addition to responsibilities that assist both the public and public officials and agencies, the Advisory Committee is charged with helping the Joint Standing Committee on Judiciary review and evaluate these statutory provisions that except records from the definition of "public record". Pursuant to Title 1, sections 431 - 433, the Judiciary Committee will review public records exceptions in Titles 10, 11, 12, 13, 13-B, 13-C, 14, 15, 16, 17, 17-A, 18-A, 18-B, 19-A, 20-A and 21-A during the 124th Legislature. (The list of exceptions to be reviewed is posted on our website: http://www.maine.gov/legis/opla/righttoknow.htm.) The Advisory Committee will be providing background information and advice to the Judiciary Committee with regard to these exceptions.

The Criminal History Record Information Act (CHRIA) prohibits the general dissemination of some criminal history information, and provides for the release of investigative and intelligence information in certain circumstances. The Advisory Committee identified

provisions as requiring review under Title 1, chapter 13, subchapter 1-A, and staff sought comments on the CHRIA from parties who deal with CHRIA on a regular basis. Using the relevant comments received, and the specific comments of Special Assistant Attorney General Charles Leadbetter, staff developed a preliminary redraft of the CHRIA. That preliminary draft has been circulated again, and we have received comments from several interested parties. We appreciate the thoughtfulness of the responses and the proposed revisions. Significant concerns have been raised about provisions that are not directly related to whether information should be shielded from public disclosure, which is our fundamental concern.

Because the basic CHRIA issues identified as needing revision are not within our jurisdiction; at least not initially, we believe that the concerns about definitions and the structure of the Act are better addressed by active participants in the criminal justice process. We think the Criminal Law Advisory Commission is the appropriate entity to carry out the review and revision of the CHRIA.

The Advisory Committee will therefore include as a recommendation in our 2010 report that the Criminal Law Advisory Commission review the Criminal History Record Information Act and suggest appropriate revisions. The Right to Know Advisory Committee is the proper entity to review the confidentiality provisions of any revision, and we would be happy to undertake that task for any redraft that CLAC is able to complete.

We hope that you agree that CLAC is the correct entity to undertake a comprehensive review of the Criminal History Record Information Act. Although we are providing a preliminary draft, we realize that your review of the Act may result in an entirely different approach. Our only request is that the Advisory Committee be given the opportunity to review and comment the public records exceptions contained in the redrafts before the work is completed.

We look forward to working with you. Please contact the Advisory Committee members or our staff if you have any questions.

Sincerely,

Senator Barry Hobbins
Chair

enclosures
c: Charles K. Leadbetter