

Right to Know Advisory Committee
December 1, 2009
(Draft) Meeting Summary

Convened 12:33 p.m., Room 438, State House, Augusta

Present:	Absent:
Sen. Barry Hobbins, Chair	Mark Dion
Rep. Dawn Hill	
Shenna Bellows	
Karla Black	
Robert Devlin	
Richard Flewelling	
Ted Glessner	
Suzanne Goucher	
A.J. Higgins	
Mal Leary	
Judy Meyer	
Kelly Morgan	
Linda Pistner	
Harry Pringle	
Chris Spruce	

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Sen. Barry Hobbins convened the Advisory Committee, and asked the members to introduce themselves. Sen. Hobbins welcomed newly-appointed Advisory Committee member Kelly Morgan who has been appointed to represent newspaper publishing interests. Sen. Hobbins also outlined the agenda for the meeting.

Maine Statewide Longitudinal Data System

Department of Education Commissioner Susan Gendron, along with Project Director Bill Hurwitch, attended the meeting at the invitation of the Advisory Committee. Earlier this year, the members of the Advisory Committee were surprised and concerned when they heard about a new authorization to collect and use Social Security Numbers, especially when the Advisory Committee is laboring to develop an appropriate policy on the collection, use and protection of Social Security Numbers by public entities. Commissioner Gendron and Mr. Hurwitch summarized the Statewide Longitudinal Data System that is designed to track student enrollment history and achievement data over time. The program came to the attention of the Right to Know Advisory Committee because of LD 1356, now Public Law 2009, chapter 448: *An Act to Improve the Ability of the Department of Education to Conduct Longitudinal Data Studies*, which authorizes the Commissioner to collect and report individual student Social Security Numbers as a data point supporting the studies. Commissioner Gendron explained that the Department has been involved with the longitudinal data project for several years, and has recently applied for a federal grant to support the program. ARRA stimulus funds are being made available to states to track student achievement and teachers' effectiveness. New requirements mandate connecting

with the Department of Labor to include in the tracking individual earning power and whether employees were appropriately prepared for work through the education system. A goal of the ARRA-based program is to link student achievement data with teachers. (Under the \$5 billion in State Fiscal Stabilization Fund reserved for the U.S. Secretary of Education to make competitive grants, the U.S. Department of Education is conducting a national competition among states for a \$4.35 billion state incentive "Race to the Top" fund to improve education quality and results statewide. The Race to the Top fund will help states drive substantial gains in student achievement by supporting states making dramatic progress on the four reform goals and effectively using other ARRA funds.) In response to questions, Commissioner Gendron said that ARRA does not require collection of Social Security Numbers, but said that it increases the accuracy of the tracking and reporting. She explained that the implementation of chapter 448 has been delayed for a year because of the need to increase awareness about the passage of the law, as well as to provide guidance for its implementation by school systems.

Experience in Maine and in other states, particularly Florida, has shown that use of a student's Social Security Number, although only one of several data points used to identify individuals in longitudinal studies, significantly increases the accuracy of tracking and thus makes the information more useful. Under the new law, parents can refuse to disclose their child's Social Security Number, and students have that choice to make when they turn 18. Social Security Numbers are protected with other personal data under strict requirements of the federal Family Educational Rights and Privacy Act (FERPA). The State is applying for additional funds to be able to cover students from early childhood through adult education. Mr. Hurwitch explained that the Department is working with the Office of Information Technology to develop a table containing different identifiers to be able to track individuals using several identifiers, including SSNs. If a parent elects not to give permission to use the child's Social Security Number, the student can still be tracked. Although about ten states currently collect and use SSNs, he believes that Maine's statute gives the State a competitive advantage in how the SSNs can be collected and used. He assured the Advisory Committee that the longitudinal system is handled all in-house and is not outsourced.

Shenna Bellows questioned whether the use of Social Security Numbers in Florida has resulted in superior outcomes. Commissioner Gendron replied that Florida has been able to expand educational offerings based on the data, and is able to undertake more effective comprehensive planning. For example, Florida has been able to expand its online educational participation from 140,000 participants to 200,000 in one year. Maine's Jobs for Maine Graduates program is a positive example already occurring in this State. The Maine Learning Technology Initiative (school laptop program) will also rely on the data to be collected.

The Executive Summary of the Fordham University School of Law report, *Children's Educational Records And Privacy: A Study Of Elementary And Secondary School State Reporting Systems* (October 28, 2009), had been distributed to the Advisory Committee. Suzanne Goucher asked whether the Department had a chance to look at and address the privacy concerns that were raised in the study. Mr. Hurwitch explained that some of the data, at least from Maine, that was used in the study was outdated and did not reflect current practices. He agreed, however, that every state should examine the concerns raised in the report about privacy, and take appropriate action. Ms. Bellows was concerned about whether the information, particularly disciplinary information, would remain in a permanent record associated with a student. The Department has not determined how long the data will be retained, but will be developing a policy on that issue, which was raised in the Fordham study. Overall, the data will be used in the aggregate and not in ways that would identify individual students.

Transparency of Information Related to State Government Contracts and Spending

Chief Information Officer Dick Thompson updated the Advisory Committee on the State's efforts to make available information on contracts and spending. He provided a memo that summarized the types of information collected and organized to support the delivery of state programs and services. Public data frequently resides on internal systems, has proprietary formatting and is mixed with non-public data. The State generally deals with requests for information on an ad hoc basis. Mr. Thompson noted that two recent actions have demonstrated the advantage and challenges to making more data public as a strategic initiative. One is the requirement that ARRA stimulus funding reporting meet specific federal requirements. The State submitted data as required, but by the time it was posted by the federal government, it was at least 30 days old. Mr. Thompson believes the State can do better with its own posting system, although the myriad of funding sources - rather than simply ARRA-funded contracts and programs - complicates the process. He believes that OIT can build a flexible reporting system prospectively; capturing old data will be more problematic and expensive. Mr. Thompson also noted what he refers to as Maine Data Share, hosted by InforME. State entities can post tables of data for use by anyone. For example, the data used by the Office of Fiscal and Program Review to provide information to the Appropriations Committee and the Legislature around the budget is posted on Maine Data Share. OIT has been able to post transactional data there. Mr. Thompson does not believe he needs enabling legislation to carry out and expand the data-posting project. He is concerned that well-meaning legislation could actually limit the flexibility and creativity that need to be employed in order to provide the best access to information.

Reports of Subcommittees

- **Legislative Subcommittee Report**

Chris Spruce, chair of the Legislative Subcommittee, reported the most recent activities of the Subcommittee, which met on November 17th and immediately before the full Advisory Committee meeting. In its most recent meetings, the Subcommittee focused on two issues: 1) communications outside public meetings; and 2) requests for bulk electronic data.

Mr. Spruce explained that the discussion about communications among members of a governmental body, when those communications occur outside of public proceedings, was triggered by the suggested legislation proposed by Rep. Stacy Dostie. Rep. Dostie spoke with the Advisory Committee and the Subcommittee about the e-mail communications among selectmen that resulted in the termination of the employment of the town manager. She recommended a prohibition on communications outside of public proceedings. Mr. Spruce explained that the Legislative Subcommittee, recognizing that taking action outside of public proceedings is already prohibited by law, 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. Staff explained the new question-and-answer entry proposed to be added to the FAQ page of the State's Freedom of Access website.

Rep. Dostie presented the most recent version of her proposed bill, to be considered in the Second Regular Session, *LR 2130, An Act to Further Regulate the Communications of Members of Public Bodies*. Mr. Spruce noted that the Legislative Subcommittee chose not to propose a legislative fix; members of the Subcommittee knew that the Legislature would be discussing the e-mail issue

as legislation even if the Advisory Committee does not make a legislative recommendation. Linda Pistner added that the Attorney General’s Office gets inquiries about this issue frequently, and it could be addressed in some fashion. Judy Meyer questioned whether the FAQ entry dealt with the issue strongly enough. Bob Devlin noted that the Legislative Subcommittee was concerned about treading on the First Amendment, which prohibiting communications could do. Harry Pringle reminded the Advisory Committee about the big picture relating to this issue: Maine has a long tradition of elected officials conversing with constituents, and everyone having open discussions about problems and potential solutions. The problem to be addressed, he said, is making decisions outside of public meetings, whether by e-mail or in any other form.

Mr. Spruce moved that the Advisory Committee include the draft FAQ as a recommendation. Richard Flewelling seconded the motion. The vote was unanimous. The Advisory Committee thanked Rep. Dostie for her presentation of her legislation, but did not make a recommendation regarding the bill. Karla Black, who has taken on the responsibility of the State’s FOA website, asked whether the FAQ should be added before the Advisory Committee’s report is presented, and there was general support for adding the guidance information as soon as possible.

The second issue the Legislative Subcommittee reported on is requests for bulk electronic data. Mr. Spruce described the subject as having many tentacles, and being very big. The discussions have been largely around the registries of deeds (which are county offices) and state data, including requests for accident reports maintained by the State Police. Mr. Thompson, the State’s Chief Information Officer, provided information and guidance, and has explained the involvement of InforME, the State’s Internet portal. The Legislative Subcommittee has not formulated any recommendations at this time, but has identified the issue as one that could benefit from the attention of the Law School Extern during the Spring Semester of 2010. The Subcommittee is aware that legislation has been proposed to addresses at least some of the issues identified in the litigation involving MacImage of Maine, LLC and Hancock and other counties, so the Legislature will have the opportunity to deal with the questions during the Second Regular Session. Mr. Spruce envisions the Legislative Subcommittee being more active during the legislative session in an effort to serve as a resource to the Judiciary Committee and other committees of the Legislature.

- **Public Records Exceptions Subcommittee Report**

Shenna Bellows, chair of the Public Records Exceptions Subcommittee, thanked Mr. Spruce for chairing the most recent subcommittee meeting in her absence when she was ill. Mr. Spruce asked staff to outline the Subcommittee’s recommendations as recorded in the chart, and explain the recommended amendments provided in draft form.

Description	Subcommittee Recommendation	Advisory Committee Action on Recommendation
Title 10, section 945-J, relating to the Maine International Trade Center	AMEND 3-0 vote	ACCEPTED 12-1 VOTE

Description	Subcommittee Recommendation	Advisory Committee Action on Recommendation
Title 10, section 975-A, subsections 2 and 3, relating to the Finance Authority of Maine	AMEND (use standard language) 3-0 vote	ACCEPTED 12-1 VOTE
Title 12, section 550-B, subsection 6, relating to water well information collected by the Department of Conservation, Bureau of Geology and Natural Areas	AMEND 3-0 vote	ACCEPTED 12-1 VOTE
Title 12, section 549-B, subsection 5, paragraph D, relating to investigatory and exploratory work reported under a mining permit to the Bureau of Geology and Natural areas “shall not constitute records available for public inspection or disclosure”	AMEND 3-0 vote	ACCEPTED 12-1 VOTE
Title 12, section 6173, subsection 1, relating to marine resources statistics	ACCEPTED; no change 2-1 Vote	ACCEPTED 12-1 VOTE
Title 12, section 6445, relating to logbooks for lobster harvesters “disclosure of any data collected under this section is subject to the confidentiality provisions of section 6173”	ACCEPTED; no change 2-1 Vote	ACCEPTED 12-1 VOTE
Title 12, section 6455, subsection 1-A, relating to market studies and promotional plans of the Lobster Promotion Council	AMEND 3-0 vote	ACCEPTED 12-1 VOTE
Title 12, section 6749-S, subsection 1 relating to log book for sea urchin buyers and processors “disclosure of any date collected under this section is subject to the confidentiality provisions of section 6173	ACCEPTED; no change 2-1 Vote	ACCEPTED 12-1 VOTE
Title 12, section 8869, subsection 13, relating to forest policy experimental areas	AMEND 2-1 vote	ACCEPTED 12-1 VOTE
Title 12, section 8884, subsection 3, relating to landowner and wood processor reporting requirements concerning volume information	ACCEPTED; no change 2-1 Vote	ACCEPTED 12-1 VOTE

Description	Subcommittee Recommendation	Advisory Committee Action on Recommendation
Title 14, section 1254-A, subsection 7, relating to names of prospective jurors and contents of juror qualification forms	DIVIDED 2-2 vote 2 voting NO CHANGE ; 2 voting AMEND	MOTION TO AMEND FAILED 5-8 VOTE
Title 14, section 1254-A, subsection 8, relating to names of jury pool during the period of service of jurors and prospective jurors	DIVIDED 2-2 vote 2 voting NO CHANGE ; 2 voting AMEND	MOTION TO AMEND FAILED 5-8 VOTE
Title 14, section 1254-B, subsection 2, relating to juror selection records and information	DIVIDED 2-2 vote 2 voting NO CHANGE ; 2 voting AMEND	MOTION TO AMEND FAILED 5-8 VOTE
Title 16, Chapter 3, Subchapter 8: Criminal History Record Information Act	HOLD; REFER to CLAC for review	ACCEPTED 12-1 VOTE
Title 16, section 614, subsection 2 1-A, relating to personally identifying information of persons who report cruelty to animals to the Department of Agriculture, Food and Rural Resources	HOLD; REFER to CLAC for review	ACCEPTED 12-1 VOTE
Title 19-A, section 4013, subsection 4, relating to the Domestic Abuse Homicide Review Panel	ACCEPTED; no change 4-0 vote	ACCEPTED 12-1 VOTE
Title 20-A, section 13004, subsection 2-A, relating to complaint, charges and accusations concerning certification and registration of teachers (amended PL 2007, c. 666)	AMEND-reflect PL 2009, c. 331 3-0 vote	ACCEPTED AS FURTHER AMENDED 12-1 VOTE

Key discussion points:

- The FAME (10 MRSA §975-A) language should be amended to use the standard language the Public Records Exceptions Subcommittee developed for statutes in which confidential

status is provided for some information when a business or an individual applies for financial or technical assistance. The discussion of standard language was triggered by the Judiciary Committee's request that the Advisory Committee develop appropriate language that the Legislature can use as a model in applicable situations. The Subcommittee recommended two templates, one devoted to confidentiality of information when a business is the applicant, the other for individual applications for technical or financial assistance.

The Advisory Committee unanimously agreed to adopt the templates and respond to the Judiciary Committee as proposed in the draft letter.

- At the most recent meeting of the Public Records Exceptions Subcommittee, the members were evenly split with regard to amending the juror confidentiality provisions (14 MRSA §§1454-A and 1454-B). Two members of the Subcommittee recommended returning to the pre-2003 status of the law, which started with the presumption that all juror information - from the potential-juror questionnaires through the completion of the trial - was public, but that the court could prohibit disclosure "in the interests of justice." A draft of the proposed language was circulated via e-mail, but had not been discussed before the meeting. Suzanne Goucher explained that there is a need to ensure that trials are free and fair and open. Although the outside world cannot know what happens in the "black box" of the jury room, it is appropriate to know what goes in as well as what comes out. The proposed language still allows judicial discretion to deny access to the information. The criteria included in subsection 3 of section 1454-B of the current law provides sufficient guidance to the courts. There is an overriding public interest, she said, in knowing who is sitting in judgment. Mal Leary agreed, noting that the old language, which the draft proposed to be reinstated, was based on model language developed by a diverse group of chief justices and free press advocates.

Ted Glessner asserted that the old language was changed for good reason. The "interests of justice" standard could be a very high bar, and not address the privacy or embarrassment concerns of potential jurors who are required to answer very personal questions on the questionnaire, questions that are required in order to determine if there is a possibility of bias based on the type of case. He said that concerns had been developing over time, and that Associate Justice Mead of the Supreme Judicial Court had communicated concerns he had heard from jurors and potential jurors. Mr. Pringle explained that he does not support changes, based on the testimony of Justice Mead. He sees a chilling effect on the finding of persons to serve as jurors. Jurors have expressed concerns about their own personal safety, especially when serving on criminal trials. Mr. Pringle defers to Justice Mead, who has a large volume of trial court experience, and knows this issue. Mr. Leary countered that, although he has great respect for Justice Mead, he believes that the factors a court can consider, as listed in section 1454-B, subsection 3, give the court all the room it needs to make appropriate decisions on releasing the information. Mr. Glessner said that in his conversations with justices, the justices have expressed a great deal of concern. Ms. Bellows echoed Mr. Glessner's remarks, and asserted that the highest level of protection should be afforded the juror questionnaires. Release of that information would be detrimental to the privacy of the individual. Ms. Pistner agreed, and noted that Justice Mead had informed the Subcommittee that most requests for information have been granted; the only ones who have been turned down have not seemed to have legitimate need or interest in the information. Being a separate branch of government, and not subject to the Freedom of Access laws, the Judicial Branch should be given some leeway to establish their own appropriate procedures. Ms. Pistner said she was loath to upset the current law without a demonstration that people

are inappropriately denied information when it is requested. Mr. Leary moved to adopt the proposed draft with an amendment that would include the factors of section 1454-B, subsection 3 in section 1454-A as it applies to juror information before a trial has been completed. Mr. Spruce seconded, and the motion failed 5 - 8. (Voting in favor of the motion: Ms. Meyer, Ms. Morgan, Ms. Goucher, Mr. Spruce, Mr. Leary; Voting against the motion: Mr. Glessner, Mr. Pringle, Rep. Hill, Ms. Bellows, Ms. Black, Mr. Flewelling, Ms. Pistner, Mr. Higgins.)

- The Public Records Exception Subcommittee recommended that the Criminal History Record Information Act (CHRIA) be referred to the Criminal Law Advisory Commission (CLAC) for revision with regard to the criminal justice aspects. The intention is for CLAC to refer the confidentiality/public access issues back to the Right to Know Advisory Committee.

The Advisory Committee voted unanimously to do so, and approved the draft letter to John Pelletier, who serves as Chair of CLAC.

- The Public Records Exceptions Subcommittee 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 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. Commissioner Gendron informed the Advisory Committee that the Department of Education does not oppose the draft language. Ms. Meyer moved that the Advisory Committee recommend the proposed language, amended to include the release of the reasons for the action. Ms. Goucher seconded the motion. The vote was 13-1 in favor. (Voting in favor of the motion: Ms. Meyer, Ms. Morgan, Ms. Goucher, Mr. Spruce, Mr. Leary, Mr. Glessner, Mr. Pringle, Sen. Hobbins, Rep. Hill, Ms. Black, Mr. Flewelling, Ms. Pistner, Mr. Higgins; Voting against the motion: Ms. Bellows.)
- The Central Voter Registration System (CVR) has been before the Advisory Committee in the past. The current law provides that all the information in the CVR is confidential, and then provides access to some data for certain purposes. The entire section has operated with a self-repeal date, which was extended last year, partly because of the concern that the confidentiality was very broad, so that giving the protection from public access on a temporary basis while the information and its uses were being reviewed, was the only way to make the public records exception "narrowly tailored." Julie Flynn, Deputy Secretary of State, had addressed the Public Records Exceptions Subcommittee at the most recent meeting, but the members delayed action because legislation is being prepared to revise some of the access aspects of the CVR. Ms. Flynn provided a copy of the draft bill, to be considered by the Legal and Veterans' Affairs Committee during the Second Regular Session, as well as a section-by-section chart explaining each change. Ms. Flynn reminded the Advisory Committee that the CVR is a different type of database - access to the information does not help the public determine if election officials are doing their jobs appropriately, but actually tracks the activities of voters. She questioned how much access to that information is in the public interest, especially if voters are concerned about individually-identifiable information being circulated. She believes there is a very real possibility of a chilling effect, that individuals will not register and vote if they fear that their person information will be available or distributed. Ms. Flynn noted the enormous amount of data in

the CVR, consisting of 2000 data fields and hundreds of data tables. The new bill provides basically the same access to data as currently law, although she pointed out a couple of instances in which access is expanded. Some information is available, but only for specific purposes.

Mr. Spruce explained that the Public Records Exceptions Subcommittee had not taken action on the existing public records exception because of the new legislation. He recommended that the Advisory Committee continue its usual practice of not taking a position on proposed legislation, but continue to follow this bill as it is introduced in the Legal and Veterans' Affairs Committee. Individual members can testify or provide comments. Presumably, the Judiciary Committee will be reviewing any confidentiality provisions. The Advisory Committee agreed, and thanked Ms. Flynn and Rep. Trinward, House Chair of the Legal and Veterans' Affairs Committee, for briefing the Advisory Committee on the bill.

Mr. Spruce moved that the Advisory Committee officially accept the rest of the recommendations contained in the Public Records Exceptions Subcommittee's chart, and Mr. Pringle seconded the motion. The vote was 13-1 in favor. (Voting in favor of the motion: Ms. Meyer, Ms. Morgan, Ms. Goucher, Mr. Spruce, Mr. Leary, Mr. Glessner, Mr. Pringle, Sen. Hobbins, Rep. Hill, Ms. Black, Mr. Flewelling, Ms. Pistner, Mr. Higgins; Voting against the motion: Ms. Bellows.)

Review of Revised Discussion Drafts

❖ *Social Security Numbers*

The Legislative Subcommittee had developed draft legislation to protect Social Security Numbers. The draft had been circulated widely for comments, and a summary of those comments, concerns and suggested changes was presented. A copy of the Vermont law protecting Social Security Numbers was distributed as an example of how other states address the concerns.

Mr. Leary stated that he didn't think the draft legislation was ready to be considered by the Legislature. The Vermont law would be worth reviewing for any ideas for improvement. He moved that the issue of protecting Social Security Numbers be tabled until the Advisory Committee resumes its work in 2010. Mr. Pringle seconded the motion. The Advisory Committee voted unanimously in favor of tabling the issue.

❖ *Use of Technology in Public Proceedings*

Draft legislation had been prepared to explicitly 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 were concerned about the logistics of adopting a policy that met the requirements of the draft, and whether attendance should be required unless not reasonably practical. Ms. Goucher could not identify a pressing need to have the draft become law, and moved that the issue be tabled to 2010, when the Advisory Committee can address the remaining questions and refine the approach. Mr. Spruce seconded the motion, and the vote was unanimous in favor of the motion.

❖ *Taking and Keeping Minutes of Public Proceedings*

Staff reviewed the draft legislation already approved by a majority of the Advisory Committee. The draft legislation requires government entities to make a basic record of its actions. The record must be completed within a reasonable time and is, of course, a public record.

Review list of Bill Titles for Second Regular Session

Staff provided a list of bill titles of proposed and carried-over legislation for the Second Regular Session. Titles that may have some relation to Freedom of Access Issues were highlighted, but text of bills was not yet available for review.

Externship update

Staff announced that Mariya Burnell, a third-year student at the Maine School of Law, has been placed with the Advisory Committee for the Spring 2010 semester as part of the Law School's externship program. Ms. Burnell's responsibilities may include tracking legislation, as well as staffing the Legislative Subcommittee. Ms. Pistner will provide supervisory responsibilities as required by the program, and the Office of the Attorney General will provide work space.

Annual Report

Staff distributed the skeleton of the report that the Advisory Committee is required by statute to submit by January 15, 2010. Staff agreed to have a draft report to members by December 11, 2009.

The meeting adjourned at 3:45 p.m.

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