



SEN. DEBORAH L. SIMPSON, CHAIR  
REP. DAWN HILL, CHAIR

MEMBERS:

SEN. RICHARD A. NASS  
SEN. JOSEPH C. BRANNIGAN  
SEN. BILL DIAMOND  
SEN. EARLE L. MCCORMICK  
SEN. DAVID TRAHAN  
REP. EVERETT W. MCLEOD, SR.  
REP. BRUCE A. BICKFORD  
REP. DAVID C. BURNS  
REP. PEGGY A. PENDLETON  
REP. MARGARET R. ROTUNDO

MAINE STATE LEGISLATURE  
GOVERNMENT OVERSIGHT COMMITTEE

**Meeting Summary**  
**September 23, 2010**  
**Accepted January 28, 2011**

**CALL TO ORDER**

The Chair, Sen. Simpson called the Government Oversight Committee to order at 9:42 a.m. in the Burton Cross Building.

**ATTENDANCE**

Senators:	Sen. Simpson, Sen. Nass, Sen. McCormick, and Sen. Trahan Joining the meeting in progress: Sen. Brannigan and Sen. Diamond
Representatives:	Rep. Rotundo, Rep. Burns, and Rep. Bickford Joining the meeting in progress: Rep. Pendleton Absent: Rep. Hill and Rep. McLeod
Legislative Officers and Staff:	Beth Ashcroft, Director of OPEGA Etta Begin, Adm. Secretary, OPEGA
Executive Branch Officers and Staff Providing Information to the Committee:	Linda Pistner, Chief Deputy Attorney, Attorney General's Office James Brooks, Director, Bureau of Air Quality, Department of Environmental Protection

**INTRODUCTION OF GOVERNMENT OVERSIGHT COMMITTEE MEMBERS**

The members of the Government Oversight Committee introduced themselves for the benefit of the listening audience.

**SUMMARY OF THE AUGUST 19, 2010 GOC MEETING**

**Motion:** That the Government Oversight Committee accept the August 19, 2010 Summary as written. (Motion by Sen. Nass, second by Rep. Rotundo, Passed, unanimous 7-0)

## NEW BUSINESS

### • Quarterly Request List for OPEGA Reviews

Director Ashcroft said the two requests on the quarterly list are from the same requester. The concerns are related to wood smoke, particularly from residential sources. The requestor contends that the situation creates a public health emergency which is being ignored by the government at all levels. In certain cases, he believes there are people going to lengths to suppress science, and assessment of the risks, that would show that it is a public health emergency. Extenuating from that, he contends the inaction and suppression of information constitute violations of the constitution on the part of elected officials. OPEGA determined those issues to be outside the scope of their purview and, therefore, have not included those particular matters before the GOC.

Director Ashcroft noted that the requester has pursued a number of avenues regarding his concerns with wood smoke. He has contacted the Maine Department of Environmental Protection (DEP), Maine Department of Health and Human Service (DHHS), the Governor's Office, individual legislators, elected officials and agencies at the federal level. Most recently, a group of legislators did contact DHHS on behalf of the requestor asking for a review of some of the issues and has received a response back from DHHS.

### **Public Request 1A – State Agency Efforts Related to Existing Laws and Regulations Governing Residential Wood Smoke (DEP)**

Director Ashcroft believes DEP has the primary responsibility for implementation and enforcement of laws and regulations governing residential wood burning devices and for air quality. The possible areas of focus OPEGA suggests are the implementation and enforcement of the laws governing residential wood smoke.

GOC: Rep. Bickford questioned how many complaints had been received regarding the issue.

OPEGA: OPEGA has had 1 request regarding the issue, and the only other information Director Ashcroft has is in the letter from DHHS that states it is their understanding DEP receives 5 to 6 complaints regarding indoor residential wood burning each year, but those complaints are mostly related to the burning of trash.

Chair Simpson noted that a representative from DEP was at the meeting to answer Committee questions. Rep. Burns and Sen. Nass did not think it was appropriate to hear from the Department at this point in the process. Sen. Nass also suggested using the draft Topic Selection Checklist to process this request.

GOC: Rep. Bickford asked for clarification of whether the topic was wood smoke or how the DEP handles complaints.

OPEGA: Director Ashcroft said the topic being considered is implementation and enforcement of existing laws and regulations related to residential wood smoke and how well DEP, or anyone else, is implementing or enforcing existing laws.

Chair Simpson moved on to Part I of the Checklist.

#### 1. Is the topic outside of the GOC's mission and OPEGA's statutory authority?

Director Ashcroft believes it is within their purview because it would be looking at implementation of laws and legislative intent.

#### 2. Is the subject matter already addressed by an OPEGA review planned, or in progress, or covered by a topic already on the On Deck list?

No.

3. Has the issue(s) been recently audited, investigated or reviewed by any other administrative body, judicial entity, or legislative study committee such that the GOC is satisfied the issue warrants no further study?

Director Ashcroft said that DEP and DHHS have recently combined forces to respond to several legislators about the requester's issues and she has a copy of DHHS' letter. The GOC requested a copy of that letter be distributed to them. She also noted that in 2008 the DEP's Bureau of Air Quality presented a report to the Natural Resources (NR) Joint Standing Committee that was directly related to the implementation of the outdoor wood boiler law. It was an extensive report on how they had implemented that law, the challenges they had met, and suggestions for changes to the statute.

The wood stove replacement fund is to be reported on to the NR Committee under statute by January 1, 2012.

There have been recent reviews, studies, and research work done to address concerns of the requester.

Chair Simpson said the item on question 3 is whether or not it is such that the GOC is satisfied and said a copy of DHHS' response letter had to be provided to the GOC before they could make a decision on that question. Copies of that letter were distributed to the GOC.

Sen. Nass thinks there have been efforts fairly recently, and the Legislature has done quite a bit lately, regarding this issue. He and Sen. Trahan thought the GOC should wait for the committee of jurisdiction to do more.

Chair Simpson explained she had asked someone from DEP to come to the meeting so the GOC could ask questions.

Director Ashcroft clarified that what the GOC wanted to hear about from James Brooks, Director, Bureau of Air Quality, DEP is what efforts he is aware of that have been undertaken to address the implementation and enforcement of the existing laws regarding residential wood smoke.

Chair Simpson recognized Mr. Brooks. He has been the Director of the Bureau of Air Quality for 15 years and knows the issue has been around for longer than that. In the 1980's people bought the air tight woodstoves that smoldered all night. DEP started seeing degradation of air quality in river valleys and other places and, as the price of oil abated somewhat, the Bureau saw air quality improve. In the middle part of this decade, they started to see and hear about problems with wood smoke, primarily of outdoor wood boilers. Mr. Brooks said when the price of energy increased in 2008, the Bureau noted some degradation of air quality all across the State. He said wood smoke is the greatest air toxic that people get exposed to in the State of Maine.

Mr. Brooks said the Bureau of Air Quality has developed some rules, but his agency is more designed to control emissions from smoke stacks and cars, and not designed to go out to test individual homes. The Bureau's approach to both issues is to improve the quality of combustion throughout the State. They are not against burning wood but in favor of bringing in the newer technology. The policies that were debated at the NR Committee beginning in 2006 have been to develop programs that increase the standards, efficiency of the units, and also decrease the amount of air pollution and air toxics they admit. The Bureau will be applying for a grant to help with replacement of some wood boilers, and to enforce the regulations regarding wood stoves and boilers.

The Bureau has approximately 100 active complaints against outside wood boilers. They have only documented 5 or 6 cases of residential wood stove problems per year, but have noted air quality being on the edge in some river valleys and, if the trend continues, that will mean problems for growth of any business of any kind. The Bureau's approach has not been to mandate or to do a heavy enforcement of any of the programs. For outdoor wood boilers, they do have the authority to shut them down, have sent out notices of violations and some have voluntarily replaced their outdoor wood boilers with the newer technology.

GOC: Rep. Bickford asked what the penalty was if someone were told to replace or shut down their outside wood boiler and did not.

DEP Mr. Brooks said DEP could use their enforcement policy although as of yet, they have never done so. They would have to develop something for individual homeowners.

GOC: Rep. Bickford also thought the request should be referred back to the committee of jurisdiction.

**Motion:** That the Government Oversight Committee write a letter to the Natural Resources Committee requesting that Committee look into the issue of wood stoves and outside wood boiler replacement, air quality and the policies at DEP and their enforcement regarding those concerns. (Motion by Sen. Trahan, second by Sen. Brannigan).

**Discussion:** Sen. Nass thinks what the GOC should focus on in the letter is the allegation that DEP is not enforcing the current law. It appears to be an ongoing project between the Department and the committee of jurisdiction. The Legislature has passed rules and the Department does not appear to be enforcing the current laws. Sen. Brannigan does not believe this issue is for the GOC to decide.

**Vote on the above motion:** Motion passed unanimously 9-0.

### **Public Request 1B – Public Health Complaints Related to Wood Smoke (Local gov'ts, DEP and DHHS)**

Director Ashcroft said the second part of the requester's concerns is how complaints about public health related to residential wood smoke are handled. The requester has not received assistance from his local government and is frustrated, feeling the State has an obligation to step in. From what OPEGA has found to date, however, there does not appear to be clear jurisdiction on the part of any agency to definitely step in. DHHS has most recently become involved in the concerns of the requester because there was some question as to whether the local health officers that are under the purview of the Maine Center for Disease Control and Prevention (CDC) should be addressing this. DHHS' understanding of their statute related to local public health officers is that their role is confined or limited to communicable disease and public health threats.

GOC: Sen. Brannigan thinks the category would be bigger than just wood smoke and asked who in the State dealt with toxic issues regarding people's health.

GOC: Chair Simpson referred to CDC's letter and asked Mr. Brooks about the study the DEP was doing in Greenville. She wanted to know if it was an effort to get the effect of residential wood burning at a lower level than what is normally tested by DEP.

DEP: Mr. Brooks said DEP was going to undergo a research study that has never been done before in the world. The Department will be undertaking a study to discern what portion of the total amount of particulate matter in the air is from wood smoke. They intend to do this by looking at trace compounds, and relationships between wood smoke emissions and other emission sources, using a particulate matter device they are inventing. By the end of next spring the DEP hopes to have a testing process by which they can monitor for wood smoke alone and potentially set up a standard. DEP is the agency that monitors the air quality, with the interpretive part done by Maine CDC.

GOC: Sen. Brannigan asked Mr. Brooks if his Department had the power to prosecute for all types of pollution.

DEP: Mr. Brooks said DEP has the ability to do enforcement, and levy fines, but is questionable regarding residential wood stoves. They clearly have the power to enforce for outdoor wood boilers.

GOC: Rep. Bickford asked if the GOC could keep this request On Deck and wait for a reply from the committee of jurisdiction.

GOC: Sens. Trahan and Nass expressed that the matter was a premature issue for the GOC because it is ongoing and is under the jurisdiction of the Natural Resources Committee.

**Motion:** That the GOC forward to the Natural Resources Committee all the information received regarding this issue and that the GOC take no further action on the request. (Motion by Sen. Trahan, second by Sen. Nass, Passed, unanimous, 9-0).

Director Ashcroft clarified what she would be drafting for a letter to the NR Committee. Even though the enforcement of existing laws or processes might be within the GOC's jurisdiction, the fact that those processes don't appear to be fully developed in terms of laws, statutes and processes, belongs more with the policy committee. She will make the NR Committee aware of what OPEGA has learned about the topic that suggests there may be policy making decisions to be thought about in relation to these matters.

The GOC thanked Mr. Brooks for information he provided to them.

## UNFINISHED BUSINESS

- **Consideration of Possible Enhancements to OPEGA/GOC Processes**

- **Process for Handling Request for OPEGA Reviews**

- **Report back of information/clarification received from AG's Office regarding confidentiality**

The GOC discussed the draft revisions to the policy and process at their last meeting and made suggestions for changes. Director Ashcroft noted that the Committee's concerns, and the changes they were attempting to incorporate, were in regard to how to protect the confidentiality of someone who might come to a legislator wanting to get a request before the GOC, and how to maintain that confidentiality when in the possession of the legislator. Director Ashcroft referred members to the revised Policy draft.

Discussion included how a citizen's request that came to a legislator would be dealt with. If OPEGA receives a request for a review and the requester has not yet contacted a legislator, OPEGA will let them know the process and that they need a legislative sponsor for their request. If the legislator is willing to sponsor the request, they will contact OPEGA to affirm their willingness to sponsor the request. Whatever is provided to OPEGA in writing would come directly from the citizen, so that it is not in the legislator's hands.

Chair Simpson recognized Linda Pistner, Chief Deputy, Attorney General's Office.

GOC: Chair Simpson said there is a question of whether a legislator's request to OPEGA could be kept confidential.

AG: Ms. Pistner said the only way to protect confidentiality under the law as it is currently written is to keep the communication to verbal only, the Freedom of Information Act (FOIA) law does not apply to conversations, only to documents. A legislator is free to have whatever conversations they want with their constituents, but if the legislator receives anything in writing, including emails, it is subject to FOIA. The Right to Know Advisory Committee is currently reviewing a bill introduced last session regarding confidential documents, but at this point, emails, letters, or other documents in the possession of a legislator, are not confidential.

OPEGA: Director Ashcroft gave the scenario of a legislator who comes to the Director with a request. OPEGA drafts the request in writing, shows it to the legislator, but does not give it to them. Is the identity of that legislator protected under OPEGA's statute?

AG: Ms. Pistner thinks OPEGA's statute, on its face, would appear to protect that, but thinks it presents a different issue when applied to protecting the identity of a legislator that has made a request than it does to protect the identity of a citizen. The law could use clarification in that regard. She thinks a legislator might be criticized if they wanted to keep their identity confidential with respect to a matter they wanted the GOC to take up.

- GOC: Rep. Burns said with some of the phone calls he receives from his constituents he has to take notes during the conversation and asked if his notes would be discoverable.
- AG: Ms. Pistner said his notes are not any different than if a constituent wrote to a legislator.
- GOC: Sen. Nass asked if he did receive a document, couldn't he just pass it to OPEGA to have it be kept confidential.
- AG: Ms. Pistner said no, it was a public record in the legislator's hand.
- GOC: Rep. Burns said if confidentiality is going to be protected, it has to be done according to law and all legislators need to know how to do that. If the GOC wants requests to come through a legislator, but also wants to allow for a complaint to remain anonymous or confidential, then the GOC will have to find a rule that all can use and is user friendly.
- GOC: Rep. Bickford thought a FOAA request had to state the purpose and the specifics of what they want from a document. They can't request all communications that a legislator had between certain dates, they can ask for documents that relate to a specific item for a specified period of time.
- AG: Ms. Pistner said Rep. Bickford put his finger on another problem. There is also nothing in the law that says you have to focus on what you are looking for. She thought that if an over broad request was received, particularly to a legislator, that the AG's Office would go to court to argue the request was unreasonable.
- OPEGA: Director Ashcroft asked if an agency could submit a FOAA request to a legislator for the purpose of finding out the identity of the person who had come to them with the request for OPEGA.
- AG: Ms. Pistner said she believes that is legally possible. There is nothing in the law that says you can't make a FOAA request if you are a State agency or that you can't make them of legislators.
- OPEGA: Director Ashcroft noted the GOC had questioned what protections there would be under the Whistle Blower Act for a constituent that came to a legislator with a complaint.
- AG: Ms. Pistner said the Whistle Blower Act protects against being fired, threatened, or otherwise discriminated against regarding your compensation, terms of your employment, conditions of your employment, location or privilege of employment under certain specific circumstances when you are acting in good faith and are concerned about your safety or are concerned about the safety of others. You do not get those protections until you have first brought the issues to the attention of your employer and given your employer the opportunity to correct them. Once you have done that, legislators are within the definition of a public body, meaning to whom such a report can be made and be protected under the law. She said the Whistle Blower law is not anywhere near as broad as people generally think it is, so you have to look at it carefully to see when it applies. The crux of the chapter that constitutes the Whistle Blower Act is the prohibition against discrimination, and the definition that shows legislators among those who reports can be made if the preconditions are met.
- GOC: Rep. Rotundo asked if the report, under the Whistle Blower Act, has to be written or can it be an oral report in which case there is confidentiality maintained with the legislator. Do whistle blower reports run into the same problem as discussed earlier with information being shared with a legislator that then it becomes available to the public.

AG: Ms. Pistner said she would like the opportunity to consult with somebody before she answered that question. The statute does not say written, if you don't do things in writing, you do them verbally, you may have contingent about what was actually said by whom and when and what was said. She will look into that and will send an email to Director Ashcroft on the issue.

GOC: Sen. Nass asked for clarification of who can make a request. It was his understanding that Ms. Pistner said anyone could make a FOAA request.

AG: Ms. Pistner said that was correct, anyone can make a request.

Whatever comes out of the Right to Know Advisory Committee regarding issues with confidentiality of documents held by legislators will be in a bill that will go before the Judiciary Committee.

The GOC thanked Chief Deputy Pistner for the information provided to the Committee.

The Director noted that there was currently a sentence added to the revised Request for OPEGA Reviews policy that says "Legislators who desire to keep their requests confidential should contact OPEGA prior to preparing the written request so that appropriate steps to maintain confidentiality can be taken". This was intended to allow an avenue for legislators to make requests while keeping their identities confidential.

Chair Simpson suggested adding a line that lets legislators know that requests from them are public information. The Policy should also include language that alerts the legislators to the fact that any written information that is given to a legislator becomes a public document, even if it relates to a citizen's request for an OPEGA review.

GOC: Sen. Trahan was concerned that someone could contact a legislator with information that contained serious allegations against another, i.e. violations of law or criminal activity. If that information was requested through a FOAA request, it could be extremely damaging to a person's career even if the allegations had not been corroborated. Is there a way to handle a FOAA request for that type of information? Could the legislator redact or be more discreet in giving of the information?

AG: Ms. Pistner said the law would not provide any protection for that record, assuming it is a written document as opposed to just oral information. The way to avoid that would be to advise citizens that are speaking to you about an issue that if they give you something written, then you would have to produce it in the event that anyone asked for it. So the information they exchange with you should be kept at the oral level. If the citizen had already provided a document that you have in your hands and you thought it was a problem, the AG's Office could look at it to see if there was any argument that they could create to try to protect it. Certainly the individual who provided the document could go to court if there was a request and they did not want that to be made public.

The Committee thanked Ms. Pistner for answering further questions.

Director Ashcroft will revise the Request for OPEGA Review Process and Procedures to advise legislators that if they are going to make a request for an OPEGA review, they should expect that their identity will be public if asked for, and that they should also advise citizens that any documents they give to legislators should be considered public documents. Under the section "For Requests From Citizens and State Employees", she will leave in "OPEGA will also advise requesters of steps that can be taken in communicating with legislators if they desire to maintain the confidentiality of their request or any related documentation."

Chair Simpson would also add language that made it expressly clear that written documents will not be confidential in the hands of a legislator.

Sen. McCormick asked how you would make it clear to anyone that a legislator's notes during a conversation could also be public information.

Director Ashcroft said she will attempt to word the Policy in a way that encompasses that information. GOC/OPEGA can add that information in their process and hopefully someone requesting a review will read through the process first. It will also be incumbent on any legislator to keep in mind that when someone talks with them, any notes they take are not confidential.

Rep. Bickford could not understand why a legislator would worry about their name being confidential.

Sen. Diamond suggested including the information of confidentiality in the legislative orientation so legislators hear and understand these issues.

Director Ashcroft noted another change that had been made to the request for a review process in response to the GOC's feedback at the last meeting. She had added the language "The legislator(s) willing to sponsor a citizen or employee request must contact OPEGA to discuss the request and indicate their willingness to sponsor it. The citizen or employee will submit a written request, reflecting what the legislator is willing to sponsor, directly to the OPEGA Director using the OPEGA Audit Request Form or via a letter addressed to the Government Oversight Committee or OPEGA. OPEGA may assist in defining requests and completing Forms if necessary."

Director Ashcroft will make the changes to the Requests for OPEGA Reviews Policy and will present this information at the orientation session held for legislators at the beginning of the next term.

- **Redraft of Checklist for Considering Topics for an OPEGA Review**

To be discussed later in the meeting.

- **Follow-up on OPEGA Reports**

- **Follow-up on OPEGA's Fund for Healthy Maine Report**

- **Review draft legislation**

Director Ashcroft reminded the GOC that they had decided to go forward with legislation to implement the recommendations in this Report. She referred the Committee to the draft of the legislation, noting that at the last meeting the GOC decided it should be broken into two pieces of legislation.

She presented the first piece of legislation as an outline. It addresses Recommendation 1 in the Report to create a special study review commission to look at how the allocations of the Fund for Healthy Maine are currently aligned with the State's health priorities, goals, etc. and to suggest any changes to the health uses the money should go to or the dollar amounts that should be going to any of those particular efforts. This would likely be considered a legislative study if it involves legislators sitting on the commission or is being initiated by the Legislature. Legislative studies are governed by Joint Rules and details in the legislation come from the Joint Rules that govern studies. The legislation would likely take the form of a Joint Study Order.

Sen. Nass wanted to clarify that this was a direct recommendation that came from the OPEGA Report on Fund for Healthy Maine.

Director Ashcroft said that was correct.

The GOC had no changes or suggestions to the Outline of Legislation to Implement Recommendation 1 from OPEGA's Report on Fund for Healthy Maine.

Director Ashcroft referred the members to the second draft legislation - **An Act to Implement the Recommendations of the Office of Program Evaluation and Government Accountability Regarding Fund for a Healthy Maine Programs.**

This legislation was in regard to budget and accounting type issues, as well as establishing specific responsibility in statute for who is supposed to be accountable for the Fund, in terms of how it is allocated.

Part A of the draft bill is for statutory changes. It establishes new or revised pieces in the Fund for Healthy Maine statute to require the kinds of things OPEGA was speaking to in their recommendations. It gives responsibility for the distribution of the Fund in accordance with legislative allocations to the Commissioner of the Department of Administration and Financial Services (DAFS). DAFS would be the party who would be held accountable to the Legislature for what is going on with the Fund. OPEGA is working to get the language correct to make sure that it is clear to the agency what they need to be doing and how the budgetary programs need to be set up. Director Ashcroft continues to work with the Executive Branch regarding that. She said the legislation also cross references to the only other piece of statute that deals with the budget, in terms of the form of the budget. The idea is to align to make sure that the Legislature is getting performance information on the Fund for Healthy Maine Programs at the same time the budget is being presented, so legislators would have the full scope of information available when making decisions about what resources should go where.

Part B of the draft bill is implementation provisions for actual practical and technical items that have to be addressed to achieve the result envisioned in OPEGA's Report recommendations. The State Controller, Commissioner of DAFS, and State Budget Officer had all been asked to weigh in on this, as has DHHS. Initial comments the Director received regarded their concerns about the timeframe contained in the draft legislation. They made it clear that, although they were willing to offer comments and suggestions, it did not necessarily mean they were conceding that the legislation is a good idea. Director Ashcroft said everyone was being very cooperative and helpful in trying to get the language right, and that effort will continue until it is a reasonable and workable piece of legislation.

GOC: Sen. Nass expressed interest in hearing the Treasurer's remarks regarding this. He noted that the Director had established goals for the Fund and asked if other funds had goals in the statute.

OPEGA: Director Ashcroft said the intent was to have goals established for programs that are supported by allocations from the Fund, not the Fund overall. Allowed uses for the Fund are specified in statute, but the draft legislation refers to programs and activities being carried out with FHM resources. Not all State programs have goals, but OPEGA suggested in the Report that this may be a good place to pilot a process where they match up financial information with performance information because the agencies already do a good job of trying to monitor the performance and effectiveness of some of the efforts.

GOC: Sen. Nass' concerns about the goals is that it locks the Legislature into the same process and this bill could be the mechanism to institutionalize what is being done. He asked why it was specifying what uses the money is going to be for.

OPEGA: Director Ashcroft said the allowed uses of the Fund are already specified in statute and OPEGA did not suggest any changes to that, however, suggested changes to that could come out of the study commission that is the focus of the other piece of proposed legislation. OPEGA suggested that if it is the Legislature's intent to spend that money on preventive and public health, there may be other public health issues that have emerged over the last 10 years that could use resources.

GOC: Rep. Burns was of the opinion that the intent of the legislation was to require that goals and objectives be demonstrated wherever the money from the Fund goes, and to show the project the funding is attached to so the Legislature and the public could see how the money was being spent and, in fact, whether the programs were attaining any of the goals.

OPEGA: Director Ashcroft said that was correct.

GOC: Sen. Nass suggested that the opening paragraph in the Summary section of the draft bill was where there is an opportunity to put more of the Report's findings, to get more detail about the Report recommendations into the Summary.

Director Ashcroft asked if the Committee expected to have the draft legislation come back to them before it is given to the Revisor's Office.

The GOC agreed that the legislation did not have come back to the Committee. Director Ashcroft will make the changes as discussed, working with agencies, and will submit the legislation to the Revisor's Office.

## **- Follow-up on OPEGA's State Contracting for Professional Services Report**

### **▪ Recommendation Regarding Cooperative Agreements**

Director Ashcroft reported that the only recommendation that had not been fully acted on in this Report was regarding Cooperative Agreements. It was recommended that Cooperative Agreements get a more detailed review to look for possible efficiencies, and additional financial opportunities for the State in terms of cost savings and managing of those contracts.

Director Ashcroft referred to the Summary of Pertinent Information for GOC Consideration regarding Cooperative Agreements. Included is some work by the State Controller's Internal Audit Division, as well as work OPEGA performed last year for the Appropriations and Financial Affairs (AFA) Committee on administrative and professional service contracts. The State Controller's Office had taken on a review of cooperative agreements in response to OPEGA's recommendation. They did start their review in February 2009, but then in July they were tasked with oversight of the State's ARRA reporting process. Director Ashcroft suggested that the Controller's Office hold off on their review until OPEGA's work for the AFA Committee regarding contracts was done. The Controller's Office shared their work with OPEGA.

OPEGA reviewed 21 Cooperative Agreements as part of its project for the AFA Committee. OPEGA's report to that Committee again highlighted the fact that those contracts appeared to have opportunities for finding savings, while still being able to obtain the services through those cooperative agreements. In FY 09 DAFS reported that 166 cooperative agreements were awarded, totaling \$34.8 million. A portion is General Fund. In the limited sample OPEGA had reviewed, there was \$15.8 million of FY 09 expenditures with approximately \$6.5 million of that from General Fund and \$1 million from other Special Revenue.

Director Ashcroft asked if the GOC wanted to do anything further with the Report Recommendation or should it be considered closed.

Chair Simpson and Senators Diamond and Nass made comments regarding the expenses that are charged to the State by the University and Community Colleges under the Cooperative Agreements.

Director Ashcroft said there is an approved schedule of indirect costs that the federal government has approved for the University to charge when they do work for them. That is what is used for the indirect cost rates on contracts with the State. There is a range of what that rate is depending on whether the University is performing the service on their site or the State's. She believes the top of that range is up to about 40% and there are some contracts where that is the indirect cost rate that is applied. So the University is using a standard way of determining what the cost is, but OPEGA's questions are whether that is a true reflection of what their actual indirect costs are. This comes into play for them when the University's cost contribution toward the Cooperative project consists of not charging the State a portion of the indirect costs. In the end, there is a question of whether the University actually contributes toward the cost.

Director Ashcroft suggested that she meet with the Bureau of Purchases because there is an overall general policy agreement that governs the cooperative agreements between the State and the University of Maine. Some of the issues raised by OPEGA might be tackled in review of, and revisions to, that agreement. She could also talk with

the Controller's Office about the likelihood and timing of when they might be reviewing those contracts and she will report back to the GOC.

The GOC agreed that the following questions regarding Cooperative Agreements have to be answered:

- whether there are adequate controls to assure the State is getting the best combination of price and quality, i.e. what compensates for the lack of competitive bidding;
- whether the indirect cost rates that are included in the budgets and charged to the State, are appropriate and how closely they represent actual indirect costs;
- whether the billing and payment structures established are appropriate to the type of service being provided; and
- whether there are adequate controls at the State and/or University or Community College system to assure that the State is not billed for more than 100% of contracted employees' time when those employees are working on multiple Cooperative Agreement projects or other University projects funded by sources other than the State.

Director Ashcroft will explore for the GOC whether there are other avenues to getting specific and detailed responses to the questions, and if not, she will gather what information might help the GOC process it as a potential OPEGA review.

Rep. Rotundo noted that it is not that anyone is doing anything illegal. She thinks about the cuts the Legislature has made to higher education in recent years and is sure that this becomes a way for them to legitimately and legally supplement what the Legislature has been cutting. She is not saying this should not be looked into, but should be mindful of what forces them into this position, which is the significant cuts that have taken place to higher education.

#### **- Follow-up on OPEGA's State Administration Staffing Report**

Director Ashcroft had reviewed with the GOC at their last meeting what OPEGA's recommendations were in this Report, some of which called for legislative action. She reported that the Administration had made an effort to produce standardized organization charts and those charts were submitted to the AFA Committee last year. The Administration also conducted a market study of total compensation packages for a range of positions across State government and that information was also available. To the Director's knowledge, no one has gone any further with the information from the organizational charts or market study which OPEGA had said might be important in determining whether the State was right-sized, and if there were any opportunities to reduce costs related to administrative positions.

One of OPEGA's recommendations was that all departments be required to provide an updated chart each biennium when they submit their budget. The GOC wanted to review the Report before it was discussed any further.

GOC: Sen. Nass thought this could be the focus of another piece of legislation as far as organizational charts.

GOC: Sen. Diamond believed that information was already available, and in terms of priority with other issues on OPEGA's work plan, he did not think this ranked high.

GOC: Rep. Burns agreed with Sen. Diamond, if that information is available, but he understood the information is not available and asked for clarification of whether or not it is.

OPEGA: Director Ashcroft said both members were right. OPEGA requested organizational charts because the task they had been trying to do was to evaluate what actually existed for administrative positions. OPEGA saw that a couple of other states had legislation and processes for evaluating their management layers and spans of control. The obstacle faced by OPEGA was that even though there were organizational charts for many departments they were not standardized or based on a consistent format. Based on the charts OPEGA

did see, it was difficult to tell for sure what the spans of control might be and what the layers were. The Executive Branch did go through the process of trying to do a standardized set of charts for every agency in State government so the Legislature does now have that, but they have likely become out of date now. A key limitation of those charts is that they do not reflect vacant positions.

- GOC: Sen. Diamond said that the AFA Committee had looked at all agencies. He gave the example of looking at the Planning Office. They took every employee and looked at the job description and whether it was federal, half federal, part federal or a state paid position. You have to sit down and do it, it is not something that you can open a page and the information is right there, it does take some work. Every agency is different and has different combinations and formulas for payment of various people and he thinks to sponsor legislation might be a bit much.
- GOC: Sen. Nass believes what Director Ashcroft is talking about – layers of management and spans of control – is a standard typical management tool to determine over large organizations, where the differences are, where somebody might need help, and where somebody might have too much.
- OPEGA: Director Ashcroft reminded the GOC that the reason OPEGA did this review was because there was interest in assessing whether or not there were opportunities to reduce administrative costs and the question is, are they still interested in doing that more global kind of exercise. If not, doing it on a department-by-department basis is effective. If you are trying to look at the structure of State government as a whole, however, and compare one agency to another, it is hard to do that without some type of standardized organizational charts.
- GOC: Chair Simpson said most legislators do not get the same level of information as members of the AFA Committee and thought it would be helpful to have an over arching view of how State government worked.
- OPEGA: Director Ashcroft said OPEGA had also noted that for positions in certain Administrative Units, the State is paying the employee's contribution to the Maine State Retirement System. Confidential type positions were provided that benefit in lieu of a salary increase at some point in the past. If the salaries and total compensation packages for those positions are now equal, or comparable, to the market then does the State need to be providing that extra benefit still. She thinks the Executive Branch was going to do a salary study because they wanted to know how the salaries for some positions compared, but is not sure anyone has analyzed the study results from this point of view.
- GOC: Chair Simpson asked if the Executive Branch had reported any of that information to the AFA Committee.
- OPEGA: Director Ashcroft did make the Office of Fiscal and Program Review aware of that study.
- GOC: Rep. Burns said if there were standardized organizational charts and information on the span of control each policy committee would have a better understanding of their agencies' structure when reporting to the AFA Committee.
- OPEGA: Director Ashcroft said the organizational charts she was describing would show the structure and who reports to whom and how many positions, but it would not show existing positions that were vacant at the time the charts were developed. The current charts do not show the vacant positions or include the salary information, but that information could be asked for.
- GOC: Rep. Rotundo said the information is there now, but if the policy committees don't ask for it, they will not get it.
- GOC: Chair Simpson said for her it is the standardization. It is not that the information is not there, but it is not standardized across departments and believes that is the one piece missing. The question is how to get the departments to use a more standardized methodology so that when the AFA Committee hears from the committees of jurisdiction they know that what they are looking at is a comparison of apples-to-apples.

GOC: Sen. Diamond does not have a problem with standardizing, but cautioned that after all the work it takes to standardize, he is not convinced you will be able to compare departments and it will not be the instrument members believe it will be.

OPEGA: Director Ashcroft said the Executive Branch has now already developed a more standardized charts for each agency so thinks this would be asking them to update their information. It would not be asking departments to start from scratch, as they did it last year, with the exception of DHHS. The question is does the Committee want them to keep the charts updated on a regular basis so they are available for the Legislature's use.

GOC: Chair Simpson said it makes sense to update the charts as departments are preparing their budgets. She is not sure asking departments to update their charts would require legislation.

GOC: Sen. Nass said the oversight committees become defenders of the department they oversee. He gave the example of the Taxation Committee and the continued request from the Administration to keep adding auditors and inspectors. He now has no idea who is doing what or what the management structure is. He also thinks the number of management layers and the span of control is the information that has been missing.

OPEGA: Director Ashcroft, not being sure of the appropriate avenue, asked if a request to the Executive Branch could be made so that, in conjunction with the budget they will be submitting, they update the organizational charts so the next Legislature and Executive would have the most up-to-date information.

GOC: Chair Simpson thought the next AFA Committee would like to have that information.

OPEGA: Director Ashcroft asked the GOC for direction regarding who should be making the request and to whom that request should be made.

The GOC agreed that Director Ashcroft should talk with the DAFS' Commissioner about what the GOC is interested in having done to see what the reception is.

Chair Simpson asked if there was objection to taking items out of order. Hearing none, the Chair moved to **Additional OPEGA Research Related to Requested Review of Maine Arts Commission.**

- **Additional OPEGA Research Related to Requested Review of Maine Arts Commission**

Director Ashcroft referred the GOC to the original request for a review of the Maine Arts Commission. The request comes from a person with concerns about the Commission's awarding of contracts. A person, who had formally been on the Commission, received a contract right after resigning from the Commission. There were also questions about proper procedural practices used by the Commission when it went into executive session.

In addition to requesting an OPEGA review, the requester also made DAFS aware of his concerns. DAFS, in conjunction with the Chairman of the Maine Arts Commission, requested a review of the issues and asked the State's Equal Opportunity Officer to conduct that review. A review was done, and a letter was issued to the Deputy Commissioner of DAFS and the Chairman of the Maine Arts Commission. OPEGA reviewed that letter, asked additional questions and Director Ashcroft's assessment was that there was nothing further that OPEGA might do in terms of research or understanding the specifics around the situation. DAFS felt strongly that there were no actual violations of law concerning the contracts, and there was no financial gain that would have constituted a conflict of interest under the State's current statutes. They also feel strongly that there was a proper convening of executive session.

Director Ashcroft believes all of the issues have been researched and conclusions made about each, but is not sure anybody has communicated back to the person who has the concerns what they have done for work and why they arrived at the conclusions they did. A letter that went to the requester simply said they had reviewed it and didn't see

any contract issues, there was no level of explanation as to how they got to that point. Director Ashcroft did not know if that would help to satisfy the requester's concerns, but thinks there is no further work that OPEGA could do at this point. The statute is limited in terms of what constitutes a conflict of interest. She agrees that the requester had a right to question it based on the timing of everything that occurred, and there certainly could have been a perception that there was a conflict, but the State does not have any statutes, ethics or policies regarding these situations.

GOC members referred to other information provided on the request, in particular, the follow-up on the Controller's findings from 2007. The State Controller found eight findings including non-compliance with State travel policy, insufficient controls over grant payments, insufficient controls over hiring of independent contractors and payments for goods and services under \$5,000 issued without proper invoice. Members asked what had been the result of that research.

Director Ashcroft said the State Controller recently did a follow up on the actions taken on their finding and felt they were sufficiently taken care of. OPEGA has a copy of their report, has reviewed it, can see what work they have done and that follow up work done on it.

GOC: Rep. Burns asked if the problems have been rectified or were they unfounded.

OPEGA: Director Ashcroft said in the State Controller's review there had been a lot of financial transaction questions, they did find problems, and did recommend changes to processes. The Service Center is now involved in the processing of expenditures. In addition to the processes being put in place, they tested for other unusual circumstances, but did not turn up anything.

Director Ashcroft will contact the State Controller's Office and suggest that they contact the requester and explain what work they have done on these issues.

**Motion:** That the Government Oversight Committee take no further action on the request for a review of the Maine Arts Commission. (Motion by Sen. Nass, second by Rep. Burns, Passed unanimously, 8-0).

#### **- Follow-up on OPEGA's State Boards, Committees, Commissions and Councils Report**

This item was not discussed.

- **Using Government Evaluation Act as a Basis for Developing OPEGA Work Plans**

This item was not discussed.

### **REPORT FROM OPEGA DIRECTOR**

- **Project Status Report**

This item was not discussed

- **Other Items**

None

### **OTHER BUSINESS**

Rep. Burns referred to the letter the GOC received from Anne Jordan, Commissioner of Public Safety in response to OPEGA's Emergency Communications in Kennebec County Report. He was pleased with her report, but had concerns about some parts of it. He asked where the GOC was going to go as a Committee with the follow-up on the Report.

Director Ashcroft said Commissioner Jordan was to report back to the GOC by August 30<sup>th</sup> the status of actions taken on OPEGA's Report. The letter referred to by Rep. Burns is the Commissioner's report back. In her letter, Commissioner Jordan raised concerns she had in regards to further consolidation of the PSAPs, and the fact that there did not seem to be any movement on uniform or equal systems for paying for the service and that was going to continue to cause people to shop around, which had caused problems in the first place.

Sen. Nass thinks the concerns raised should go to the Utilities and Energy (U&E) Committee and they will have to make the next move regarding consolidation. He agrees with the Commissioner that it is problematic, the question is who is going to do something about it.

Rep. Burns has concerns that no action will take place on the issues. He said it is not only the issues raised in the Commissioner's letter, but also the compliance and noncompliance that have been reported to the GOC regarding transferring of calls. He has some understanding of what is currently going on in light of the most recent PSAP consolidation recommendation and wanted to know where the responsibility is going to lie, is it with the GOC or U&E Committee.

Director Ashcroft noted that OPEGA did have a recommendation in the Report specific to the cost issue and the equalization of the rates. The action taken on that was to assign the Maine Public Communication Board the task of setting incremental rates for the State's PSAPs so that they might be using the same rate methodology as the others. Until they have done that she does not know if anybody will see whether that has some equalizing effect or not. In terms of who is responsible, she said OPEGA does have recommendations they are still tracking on this review and will continue to come back to the GOC with status information as a topic until those action items is finished.

Sen. McCormick does not believe communities are just rate shopping, it is their satisfaction with the service they receive.

Rep. Burns noted the need for the GOC to stay involved because of the three issues raised in Commissioner Jordan's letter.

Director Ashcroft believes the next GOC, at the beginning of next year, will be going through the follow up process on reports OPEGA released that this GOC has not already address.

## **NEXT COMMITTEE MEETING**

Following Committee discussion it was decided not to meet in October and members will be polled for a meeting date in November.

## **ADJOURNMENT**

The Government Oversight Committee meeting was adjourned at 12:47 p.m. on the motion of Sen. Diamond, second by Sen. Nass, unanimous.