



SEN. ROGER J. KATZ, CHAIR
REP. DAVID C. BURNS, CHAIR

MEMBERS:

SEN. MARGARET M. CRAVEN
SEN. LAWRENCE BLISS
SEN. EARLE L. MCCORMICK
SEN. NANCY B. SULLIVAN
SEN. DAVID TRAHAN
REP. DONALD E. PILON
REP. ANDREA M. BOLAND
REP. JOYCE A. FITZPATRICK
REP. LESLIE T. FOSSEL
REP. STEPHEN D. LOVEJOY

MAINE STATE LEGISLATURE
GOVERNMENT OVERSIGHT COMMITTEE

Meeting Summary
March 11, 2011
Accepted August 16, 2011

CALL TO ORDER

The Chair, Senator Katz, called the Government Oversight Committee to order at 8:05 a.m. in the Burton Cross Building.

ATTENDANCE

Senators:	Sen. Katz and Sen. Craven Joining the meeting in progress: Sen. Bliss, Sen. McCormick, Sen. Trahan, and Sen. Sullivan
Representatives:	Rep. Burns, Rep. Pilon, Rep. Fitzpatrick, Rep. Boland, and Rep. Lovejoy Joining the meeting in progress: Rep. Fossel
Legislative Officers and Staff:	Beth Ashcroft, Director of OPEGA Wendy Cherubini, Senior Analyst, OPEGA Matthew Kruk, Analyst, OPEGA Etta Begin, Adm. Secretary, OPEGA
Executive Branch Officers and Staff Providing Information to the Committee:	Phyllis Gardiner, Sr. Attorney General Division Chief, Office of the Attorney General

INTRODUCTION OF GOVERNMENT OVERSIGHT COMMITTEE MEMBERS

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

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OPEGA FINAL REPORT

- **Maine Turnpike Authority**

- **Committee Work Session**

- **Brief Update on Status of Responses to GOC's Request for Records**

Chair Katz asked Director Ashcroft to give an update on the status of the responses received to the GOC's request for records related to the Maine Turnpike Authority (MTA) purchases and donations of gift certificates.

The Director said letters requesting records were sent to 17 vendors and 9 have responded with specific information. One vendor would produce records only if they were provided a subpoena. Letters were also sent to 8 organizations that MTA had reported as receiving donations of gift cards and have heard back from 7. One organization was not sure they would have records, but if they did, they still may not be able to produce them by the requested date. OPEGA did hear back from all 4 MTA officials that letters were sent to. Director Ashcroft worked with the GOC Chairs to send a formal follow-up request to MTA asking them to provide additional clarification on their response. It is premature at this time to get into the details about the responses. However, it does seem likely that additional steps will need to be taken to get the answers to the GOC's questions. Those steps may include the need to question individuals about what they may have for knowledge regarding the transactions where records do not exist.

Chair Katz suggested the GOC send out letters inviting certain people to come before the Committee on April 15, 2011 so they can ask them questions. Those individuals would include MTA senior staff and others at MTA who might be in the position to have knowledge of where the gift certificates or funds went. Secondly, Board members of MTA who were sitting on the Board during the time period the GOC is exploring and representatives of a few of the vendors. Chair Katz said letters would be sent to the individuals asking for their appearance at the April 15th GOC meeting and requesting them to respond by March 23rd as to whether they are willing to attend. The letter would also request they produce any records they have with respect to the disposition of any of the gift certificates or funds by April 1st. He asked that the letter indicate that the GOC may ask for their testimony under oath. He asked if any members of the GOC had comments with respect to the above stated course of action.

No Committee member objected.

The GOC would like to further pursue information from the 4 vendors who have not responded to the request at all. The vendors include Akari, Leading Hotels, Portland Harbor Hotel and Restaurant Bandol. Chair Katz made a motion that the GOC subpoena each of the above vendors making the same request for records as previously made by letter so the Committee can have the benefit of the information those vendors have.

Rep. Lovejoy noted that Restaurant Bandol in Portland was no longer in business.

Motion: That the Government Oversight Committee send a subpoena to Akari, Leading Hotels, Portland Harbor Hotel and Restaurant Bandol requesting records they have regarding gift certificates/cards purchased by MTA. (Motion by Chair Katz, second by Chair Burns, Passed, vote 10-2).

Chair Katz recognized MTA's bond counsel, Meghan Burke, from Mintz Levin, in Boston, Massachusetts. The GOC had requested that Ms. Burke attend to address certain issues and questions regarding MTA's bonds and Bond Resolution. A copy of her presentation is attached to the Meeting Summary. (Note: An audio of this meeting is posted to the GOC/OPEGA Website. It includes Ms. Burke's presentation and questions of the GOC members and the Chairs and Leads of the Transportation Committee. A notation in parenthesis indicates where on the audio recording the additional discussions are located).

Ms. Burke's presentation. (17:42)

Questions and comments of the GOC and Transportation Committee included the following.

- Sen. Trahan had questions regarding what legislative actions would affect MTA's bond rating. (01:15)
- Rep. Lovejoy commented on the debt service ratios coverage. (01:26)
- Rep. Cebra expressed concerns regarding limitations on the Transportation Committee's oversight of the MTA and the lack of oversight by MTA's Board. (01:32)
- Sen. Diamond questioned whether it was possible to change MTA's budget and accounting cycle from a calendar year budget to a fiscal year budget so the Legislature could be in a better position to oversee MTA's budget. (01:36)
- Chair Burns asked questions regarding the Reserve Maintenance Fund, the Legislature's approval over use of monies in that Fund, and the State's remedy if money went somewhere not previously agreed to. (01:40)
- Rep. Pilon noted Ms. Burke's work with the Massachusetts Turnpike Authority and New Hampshire asking if they were independent Turnpike Authorities like MTA at one time. (01:43)
- Chair Katz was interested in what the bondholders' reaction would be to MTA disregarding requirements in its statute; MTA's independent consulting engineer having a dual role as project engineer; legislative oversight of MTA and \$160,000 in funds that MTA could not account for. He also questioned what discretion MTA has in assigning operating expenses to the Reserve Maintenance Budget rather than the operating Budget. (01:46)
- Rep. Fossel asked if Ms. Burke's organization supplied any gift certificates or bought any raffle tickets. (01:57)
- Sen. Craven asked if the bonding agencies reviewed the entire budget of MTA and how they would view the practice of a business giving favors, gift certificates, etc. to partners that they work with. (02:00)
- Rep. Boland asked how bondholders would view the GOC's current oversight of activities regarding MTA. (02:03)
- Sen. Sullivan noted that MTA's actions regarding giving gift cards may have been to build the goodwill to the towns and communities the Turnpike was dealing with during the widening. (02:04)
- Rep. Fitzpatrick asked how the bond rating agencies viewed the immediate resignation of the Chief Executive. 02:07
- Sen. Collins asked for examples of situations that would cause a decrease in bond ratings. He also wanted to know if MTA's structure and position as a quasi agency of government was unique to other toll roads in the Northeast. (02:11)
- Rep. Lovejoy commented on MTA's reliance on a consulting engineer to put together a budget that is used for the Reserve Maintenance Fund and the audited financials. (02:14)
- Sen. Diamond wanted to confirm his understanding of what Ms. Burke said regarding changing the budget for the Turnpike Authority from calendar year to fiscal year. (02:13)

The GOC and Transportation Committee members thanked Ms. Burke for her presentation and answering their questions.

RECESS

The Government Oversight Committee recessed at 10:23 a.m. on the motion of Chair Katz.

RECONVENED

Chair Katz reconvened the meeting at 10:27 a.m.

■ Briefing by Attorney General's Office on MTA Lobbying and Donation Activity

Director Ashcroft introduced Phyllis Gardiner from the Attorney General's Office. The GOC had asked the AG to explore whether or not it was permissible or prohibited for the MTA to be hiring outside lobbyists or making sponsorships or donations to various civic and charitable organizations. Attorney Gardiner has researched those questions and shared her findings with the GOC.

Attorney Gardiner said the Maine Courts have not really addressed the issues directly with respect to the MTA, or any other agency, so it is not entirely clear how a court would rule on the issues. She summarized what her research had revealed to date and what guidance the AG can offer.

There is no direct express statutory prohibition on hiring outside lobbyists. It can be argued, however, that there is an implied limitation based on provisions in the lobbyist registration statute. That statute is found in Title 3, sections 312-A to 327, and requires all State departments and agencies to register the officers and employees who will serve as their legislative designees. In Title 3, section 313-A, legislative designee is defined to include an employee designated by the head of the agency to lobby or monitor legislation on behalf of the agency and any employee who is reasonably expected to lobby or monitor legislation for more than 20 hours in a legislative session. "State agency or State agency employee" is defined in section 312-A, subsection 17 to include those employed by an independent board or commission listed in Title 5, Chapter 379, and that list includes the Maine Turnpike Authority.

Legislative designees have to register with the Maine Ethics Commission, but they are exempt from all the other requirements of the statute for lobbyist reporting and the like. It is interesting that the definition of "person" in the statute, which term is used in defining both the term "lobbyist" and lobbyist "employer" in the statute, excludes the State or any agency of the State. While the statute certainly stops short of saying agencies may not engage in lobbying other than through legislative designees, one could argue that the limitation is implied and that the Legislature's express intent was that agencies would represent themselves before the Legislature through their designated employees. Attorney Gardiner noted that MTA has registered 2 employees as legislative designees. MTA is also registered as the employer of several lobbyists at a private law firm.

The MTA statute also does not have any express provision allowing or prohibiting hiring an outside lobbyist. There are a number of powers listed in the MTA statute, Title 23, section 1965, subsection 1, including a subparagraph that empowers the Authority to utilize DOT's Office of Legal Services or the Department of Attorney General to perform a variety of legal services including "legislative issues." That provision was enacted as part of a supplemental budget for fiscal year 92/93. The bill summary does not indicate the intent behind that provision. Supplemental budgets are many pages long and the AG has not had time to explore the legislative history to see if there is any indication as to why that provision was enacted. Separately from that, the list of authorities or powers that the Authority has includes the power to "employ such assistants, agents, servants, engineers and attorneys and such other employees as it deems necessary or desirable for its purposes." The AG reads that provision to be limited to employees, not outside contractors. There is of course another power listed in that same statute which empowers the Authority to make contracts with a wide variety of public and private entities, including private corporations and partnerships. The last paragraph of subsection 1965(1), paragraph T, has broad language which authorizes the Authority "to take all other lawful action necessary and incidental to these powers." These are certainly broad powers, although not expressly authorizing the contracting for outside lobbying services, and it is not clear at all whether a court would construe the provisions of the lobbyist registration statute as a limitation on the MTA's powers.

There is also a body of case law, including a Maine Superior Court decision that involved the Turnpike Authority, suggesting that absent express legislative authorization, public agencies do not have authority to spend public money to influence an election on a bond issue or referendum. Those cases seem to draw a distinction between spending by an agency to advocate directly to the Legislature and spending to influence the voters in an election. The leading case that the Maine Court relied on is a California Supreme Court case, Stanson v. Mott, which suggests expenses for lobbying of the Legislature might be more easily justified “as a necessary incident of a modern governmental agency performing its statutory duties” than would expenses to influence the general public in an election campaign.

Attorney Gardiner found a couple of AG opinions from other jurisdictions addressing the issue of outside lobbyists. Each one has to be construed in relation to the particular statutes in that state, so they are not easily translated to Maine. However, some of those have concluded that lobbying the legislature is a legitimate function of a public agency and that the agency has implied authority to spend money for that purpose. Attorney Gardiner noted that this issue has surfaced a couple of times before with other State or quasi-State agencies and it comes down to the same analysis - do they have expressed or implied authority under statute to hire outside lobbyists and is it really necessary to their functions?

GOC: Rep. Fossel asked if it was a common or unusual practice for a governmental organization to hire outside lobbyists.

AG: Attorney Gardiner thinks it is an unusual practice based on having looked at who is registered as a lobbyist employer on the Ethics Commission website.

GOC: Rep. Fossel asked if a State agency approached the AG’s Office and asked for an opinion on whether they thought it was wise for them to hire an outside lobbyist, it sounds as though her advice would be to be very cautious about it.

AG: Attorney Gardiner said the lobbyist registration statute suggests the Legislature expects agencies to lobby with their own employees, which involves the expenditure of money in the form of employee time.

GOC: Chair Burns wanted to know if it’s appropriate for a State agency, or a quasi governmental agency, to have outside counsel assist in addressing issues as a result of a legislative inquiry rather than going to the AG’s Office.

AG: Generally speaking, agencies are either authorized by statute to retain outside counsel, or have their own in-house attorneys. Otherwise, they need the approval of the AG’s Office to hire outside counsel.

The Legislature has expressly authorized counsel positions in some agency statutes. DOC and PUC have their own legal departments, for example, but that has been authorized by the Legislature and is a longstanding arrangement.

Everything has to be looked at through two lenses with MTA – their statutory authority to do something and whether it is consistent with their bond resolution. Attorney Gardiner understands from bond counsel that lobbying expenses would be considered necessary and ancillary to carrying out the projects and purposes that are legitimate under the bond resolution and statute. She thinks the GOC is looking at a more refined question of whether the Legislature has generally authorized agencies to hire outside lobbyists as opposed to using its employees. Bond counsel did not draw that fine a distinction between whether the lobbying is being done by in-house or outside lobbyists.

GOC: Rep. Boland asked Attorney Gardiner to define her interpretation of bond counsel to make it more specific to the case of the MTA.

AG: Attorney Gardiner had not looked at the bond resolutions specifically, so was not comfortable commenting on that. She also did not know why MTA believes it is more effective to use outside lobbyists rather than its own inside employees. The MTA might argue that using outside lobbyists is necessary to carry out its functions and meet obligations under the bond resolution.

GOC: Sen. Trahan said from the information the GOC received from Attorney Gardiner it was clear the federal government does not allow federal money to be used to pay outside lobbyists and that is why agencies thought they could not hire outside lobbyists because a portion of their money was federal. He requested a copy of that statute and an explanation of its intent.

He is concerned about the ethical and appearance issues of hiring outside lobbyists and asked if Attorney Gardiner had an opinion regarding an agency hiring outside lobbyists to lobby the Legislature.

AG: She declined to give any general opinion and indicated that she did not know the specific provision in federal law. She agreed to research that and get information to the Committee.

It is difficult to find much law with regard to the sponsorships or donations to various civic and charitable organizations. Some states have provisions in their state constitutions that specifically prohibit gifts to private individuals, corporations, and private entities, but most other states, including Maine, do not have that specific provision. Maine relies on the public purpose doctrine, which generally limits expenditures of any state agency or authority to those that are for a public purpose. Generally speaking, expenditures have to be authorized by statute and for a public purpose. The Law Court has stated generally that implied powers of an agency are those that necessarily arise from powers that are expressly granted to the agency, are reasonably inferred from powers expressly granted, or are essential to give effect to powers that are expressly granted. In most of the case law regarding public purpose challenges, the courts look to what the Legislature has defined as a public purpose, and the legislative finding is given significant weight by the court. It is ultimately up to the court, however, to decide whether the Legislature's action in authorizing certain expenditures satisfies the public purpose doctrine.

The MTA statute does not appear to expressly authorize the Authority to make donations to other organizations. It is also unclear as a factual matter, how the Authority's donations to other organizations necessarily arises from, is reasonably inferred from, or essential to give effect to the Authority's other powers. From the information the Attorney General's Office has, it is not obvious why that would fit into an implied power or a public purpose, but Attorney Gardiner did not know what MTA's claims or rationale was. In terms of guidance in Maine, there are not any AG opinions on this question. The case law that is available clearly lays out the public purpose doctrine, and doctrine of implied powers, but both of those require examination of the specific facts to analyze whether those tests are met. She was not in a position to tell the GOC how the AG's Office would analyze the facts under those doctrines, but thinks they are the tests that would have to be applied to determine whether sponsorships and donations are allowed or not.

GOC: Sen. Trahan asked if Attorney Gardiner was saying that to settle the question a charge would have to be brought on the improper use of funds. A judge would weigh all the facts and determine if that money was spent appropriately in accordance with the statutes and doctrines Attorney Gardiner spoke of.

AG: Attorney Gardiner clarified her comments. Certainly a challenge could be brought in court to address this issue, and the facts would have to be flushed out. However, the Legislature itself can make a judgment about whether they think such expenditures serve a public purpose and could add to or clarify the statute to specify what was allowable going forward.

The GOC thanked Attorney Gardiner for attending the meeting.

■ OPEGA Report Back on Activities/Policies at Other Quasi-State Agencies

The GOC had requested that OPEGA contact other quasi-state agencies to determine what they have in place for policies and/or practices in regard to donations and sponsorships, travel and meals and prohibition of employment of outside lobbyists. Director Ashcroft summarized the information OPEGA had gathered from 13 of the 15 agencies contacted. OPEGA had not yet completed discussions with the other two agencies.

Donations and Sponsorships: Three of 13 agencies reported sponsorship or donation activity. The activity was guided by either formal or informal policies and they reported using some measures to make sure donations and sponsorships were related to the agency's mission. Seven of the 13 agencies either had a formal or informal policy that would impact sponsorships and donations. Those policies did not specifically prohibited sponsorships or donations, but did in some way limit what was made for sponsorships or donations by that organization.

Travel and Meals: Twelve of the 13 agencies had a formal policy related to travel and meals. The only agency that did not, had a very small dollar amount in their budget for it.

Employment of Outside Lobbyists: Only 1 agency of the 13 reported using an outside lobbyist and that was for a specific bill. They had contracted with the lobbyist for expertise they needed on a particular issue. Two of the agencies contacted indicated that they receive a significant portion of their budget from federal funds, and were expressly prohibited from using those funds for outside lobbying services. All the others noted that any lobbying they did was done by their internal staff. Many were under the impression that they were prohibited from using outside lobbyists so not many had a formal policy specifically prohibiting that practice.

GOC members noted that it appeared MTA was the only agency hiring outside lobbyists so a prohibition on that would not affect many agencies. The GOC also discussed the difference between hiring outside lobbyists and outside legal counsel to handle legal matters.

Director Ashcroft said OPEGA had not asked specific questions about using outside counsel. Her impression, as expressed by Attorney Gardiner, was that there is an express intent that State agencies will use the Attorney General's Office unless they get approval to do otherwise. MTA's statute authorizes the Authority to use the AG's Office, but does not go as far as requiring them to do so.

Sen. Sullivan observed that there may be times when an agency needed legal expertise that they did not have on staff and was not really an area the AG's Office might have expertise in. She mentioned real estate issues as an example. She hoped the Legislature would not prohibit agencies from using outside counsel if that seemed necessary and appropriate.

SUMMARY OF THE JANUARY 28, 2011 GOC MEETING

Director Ashcroft said OPEGA did receive minor corrections from Rep. Fitzpatrick. Those corrections have been made and the Summary will be posted to the GOC/OPEGA website.

NEW BUSINESS

None

UNFINISHED BUSINESS

- **Discussion on Selecting Next Projects for OPEGA Work Plan** (On Deck List and New Topics for Consideration)

The GOC agreed to discuss this item at another meeting.

STATUS REPORTS FROM DIRECTOR

- **Legislation Impacting OPEGA**

Director Ashcroft alerted the GOC that there were currently two Bills that directed OPEGA to perform particular studies. They were:

LD 306-Resolve, Directing the Office of Program Evaluation and Government Accountability to Make Recommendations to Find Efficiencies in Per-pupil Cost Associated with Interscholastic Activities; and LD 806-An Act to Provide Public Access to Price Lists of Hospitals and Ambulatory Surgical Facilities.

The GOC asked Director Ashcroft to make the relevant Joint Standing Committees aware of the GOC's alternative procedure for requesting OPEGA reviews by direct letter to the GOC.

- **Current Work in Progress**

Director Ashcroft briefed the GOC on OPEGA's current work in progress. She advised the GOC that there was additional work on the Health Care Services in the Correctional System review that she felt it would be valuable to do. The consultant had completed the review it had been tasked with and is in the process of issuing a final report to OPEGA. She thinks it would be worthwhile for OPEGA to further explore with DOC the root cause or implications of some of the issues identified by the consultant related to the quality of health care being provided and the effectiveness of the contract management. This would take OPEGA additional time to get the Final Report out. In the meantime, Director Ashcroft suggested preparing an Information Brief that would focus on suggestions the consultant had made for potentially reducing costs and improving efficiencies. The consultant has already provided these very detailed suggestions to DOC and they would require legislative support. DOC is preparing to issue a new Request for Proposals for Healthcare Services and it would be good if these ideas got before the Legislature now.

The GOC agreed with the Director's suggestions for this review.

NEXT GOC MEETING DATE

March 25, 2011, 9:30 a.m.

ADJOURNMENT

The Government Oversight Committee meeting was adjourned at 11:25 a.m. (Motion by Sen. Trahan, second Sen. Sullivan, unanimous).