Right to Know Advisory Committee
November 15, 2017
Meeting Summary

Convened 9:04 a.m., Room 438, Maine State House, Augusta


Absent: None.

Staff: Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

The Chair of the Advisory Committee, Sen. Lisa Keim, convened the meeting; members introduced themselves.

Discussion of proposal to amend training provisions in the Freedom of Access Act to require officials to complete training when appointed to offices for which training is currently required if elected

The Advisory Committee reviewed a proposal received from a member of the public to require officials in certain appointed positions to complete the training on the Freedom of Access Act that is currently required of officials who are elected to those positions. Brenda Kielty, the Public Access Ombudsman, described the current training process and requirements in Title 1, section 412 of the Maine Revised Statutes; she explained that the section’s application to only elected officials in the listed positions may create some disparity among trained officials simply because some officials are elected to those positions while others are appointed.

In response to Ms. Lynch’s concern that amending the law as proposed would constitute a municipal mandate, Garrett Corbin offered the preliminary opinion of Maine Municipal Association (“MMA”). Mr. Corbin expressed that, although the training is offered online and at no cost, the addition of appointed officials would probably be considered a relatively insignificant mandate because it would occupy additional staff time. Mr. Corbin further expressed his view that MMA’s legislative policy committee would likely support the change, with the understanding that the list of officials would not expand, that the frequency of training would not increase from its current amount, and that it would continue to be offered online.
Staff will prepare a draft bill reflecting the proposal for review at the Advisory Committee’s next meeting.

**Discussion of penalty provisions in the Freedom of Access Act**

Staff reviewed the current penalty provisions in the Freedom of Access Act, which provide for a civil penalty of $500 and for an award of attorney’s fees for substantially prevailing plaintiffs in appeals of denials of records or when actions are illegally taken in executive session. The civil penalty is enforceable only by the Attorney General, and the civil fine is paid by the responsible agency or entity rather than by the individual in his or her personal capacity.

The Advisory Committee discussed the standards applicable to each violation. For the civil penalty in section 410, the violation must have been committed willfully; for a plaintiff to be awarded attorney’s fees under section 409, the violation must have been committed in bad faith. The Advisory Committee considered whether increasing the amount of the civil penalty or amending the standards for imposition of the penalties would achieve greater compliance with the FOAA, but ultimately determined that the issue is complex enough to warrant the attention of a dedicated subcommittee. The members of the subcommittee will be determined at the next full Advisory Committee meeting.

**Discussion of whether to comment on proposed recommendations of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records**

In March 2017, the Chief Justice of the Maine Supreme Court established the Judicial Branch Task Force on Transparency and Privacy in Court Records. On September 30, 2017, the Task Force issued its report (the “TAP Report”), which recommended allowing everyone to obtain court-generated information online in non-confidential cases, other than juvenile cases, while parties (except juveniles) and counsel of record would have online access to both court-generated information and other case filings; anyone who is not a party or counsel in a case could access those other non-confidential case filings electronically from any courthouse. The Judicial Branch has invited comments on the TAP Report by December 15, 2017.

Some members of the Advisory Committee acknowledged the TAP Report’s recommendation to expand availability of court documents beyond the current system, which requires a person to visit a particular courthouse to view the physical records. These members also suggested that complete availability of court records via the Internet may not align with the FOAA’s objectives of increasing government transparency when the court records pertain to private litigants.

Other members of the Advisory Committee questioned why records that are currently public in physical form would not all be made available online to all members of the public, rather than only to parties and attorneys in the case.

The Advisory Committee acknowledged that it could be difficult to reconcile members’ concerns; the Advisory Committee agreed that it would not submit comments on the TAP Report as a group, but that members could still submit comments individually.

**Discussion of remote participation by members of public bodies**

The Advisory Committee reviewed a summary of straw votes taken by members at the previous Advisory Committee meeting on policy decisions related to remote participation by members of public bodies at meetings of those bodies. The Advisory Committee also reviewed a comparison of LD 258 from the...
126th Legislature and LD 1586 from the 127th Legislature, as well as the provisions in law regarding remote participation in Massachusetts, Connecticut, New Hampshire, and Vermont.

The straw votes indicated that a majority of the Advisory Committee supported: allowing remote participation based on the entity’s function; allowing remote participation by elected officials; requiring a physical quorum to be present at the advertised meeting location; allowing voting only by members who are physically present; prohibiting remote participation in executive sessions; prohibiting remote participation in adjudicatory matters; and requiring remote participants to be able to access materials available at the meeting.

Upon further discussion, the Advisory Committee refined the details of proposed remote participation requirements. Members agreed that the body must adopt a policy on remote participation, which would govern the use of remote participation by that body to the extent not prescribed by state law. One member felt that the policy should be approved by voters represented by the body. Members further agreed that remote participants should not be allowed to cast a vote in a proceeding that is adjudicatory in nature, and that the Legislature should be prohibited from allowing remote participation in its meetings.

Members discussed whether other state agencies should be prohibited from allowing remote participation at their meetings, but did not determine which particular agencies would be prohibited or how to define the categories of bodies that would be prohibited. Members also discussed whether remote participation should be allowed in executive sessions: some felt that, because no votes may be taken in an executive session, restricting access to those sessions would merely require remote participants to make decisions during a regular session of the body without the benefit of the executive session discussion; others felt that, because executive sessions by nature involve sensitive information, the uncertainty about being overheard, intercepted, or having confidentiality otherwise compromised requires those sessions to occur only in person.

Staff agreed to draft a summary of discussions and prepare a draft bill with possible language alternatives on the issues discussed for the Advisory Committee’s next meeting. The materials will be distributed to members and posted publicly in advance.

**Discussion of access to records and person information related to licensed professions and state and local government employees**

The Advisory Committee did not discuss this agenda item due to time constraints; discussion may be deferred until the next meeting.

**Scheduling of future meetings**

The Advisory Committee will hold a fifth meeting at a date and time to be determined.

The meeting was adjourned at 11:30 a.m.