Convened 1:07 p.m., Room 228, Maine State House, Augusta

Present:
Sen. David Burns
Rep. Kim Monaghan
Suzanne Goucher
Stephanie Grinnell
A. J. Higgins
Richard LaHaye
Mary Ann Lynch
Paul Nicklas
Chris Parr
Linda Pistner
Harry Pringle
Helen Rankin
William Shorey
Eric Stout

Absent:
Kelly Morgan
Judy Meyer
Luke Rossignol

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves. Mr. Nicklas participated in the meeting but did not vote, as his appointment was not official until September 15th.

Public Hearing – Maine’s Freedom of Access Act

Sen. Burns opened the Advisory Committee’s public hearing to gather public input on how Maine’s Freedom of Access Act (FOAA) is working, inviting testimony from any interested parties that wished to address the group.

Dr. Dwight Hines came up to the podium and introduced himself. Dr. Hines stated that there were no incentives for a public agency to keep an information inventory, resulting in unreasonable delays in providing information in response to public records requests that should be reasonably anticipated and to which the agency should be able to easily respond.

Dr. Hines also stated his view that it is a problem that the court system is not covered by FOAA. He testified that public officials were too often turning FOAA requests over to attorneys, causing delays and making it more difficult for the requestor to communicate about the request. He
noted that meetings that should be public are not being properly noticed, and that at noticed
meetings it is apparent that the public body has already privately had their discussion and made
their decision. He opined that the value of the open records law is to get people involved in their
government and that he has noticed that community cohesiveness has become a problem in
recent decades. After 1975, he noted, there was a decline in community engagement with town
government and town councils not acting openly and not creating an inclusive atmosphere. Dr.
Hines noted that he has observed public bodies causing unnecessary delays in court proceedings
in which a requestor is challenging the public body’s response to a public records request under
FOAA, with these delays having the effect of running up legal costs for the requestor mounting
the challenge. He stated his desire that the medical examiner share data. He stated that the
State’s administrative courts are a dark place regarding governmental transparency. Dr. Hines
stated that the public is not currently getting the “sunlight,” i.e. government transparency, it
deserves. He noted that civilian review boards of police departments are a positive thing,
although they are expensive. Dr. Hines stated that nothing in FOAA requires quality of
information. He noted that there was not a spirit of open government, even on the Advisory
Committee.

Sen. Burns thanked Dr. Hines for his comments and asked if he would mind providing written
comments, to which Dr. Hines agreed. Mr. Stout asked Dr. Hines about agency delays in
responding to FOAA requests and their use of technology; Dr. Hines stated that agencies
appeared to be afraid of providing information, so they delay, and wondered why it would take
so long for agencies to access a database. Dr. Hines cited a “computer mendacity.”

Sen. Burns asked if Dr. Hines thought there may be a problem with agency access to technology,
to which Dr. Hines replied there was not and that agencies seemed to currently have more than
they can actually use. Dr. Hines lamented that there were not incentives to use modern
technology such as email, due to public officials’ fear of FOAA.

Rep. Monaghan and Sen. Burns acknowledged this concern, each noting that given modern
technology and how easy it is to communicate via emails and text messages, it is unfortunate that
fear of FOAA is putting some in the position of not being able to efficiently use this technology.

Sen. Burns then asked staff to provide information from the two pieces of written testimony,
submitted prior to the public hearing. Staff first related comments received from Lt. Gerald
Congdon of the Wells Police Department, who expressed frustration with the difficulty in
navigating what can be released in a FOAA request. Lt. Congdon recommended a flowchart be
created to provide an easy to follow reference for public officials in responding to FOAA
requests. Staff next related the comments received from Robin Hadlock Seeley of Pembroke.
Ms. Seeley suggested that the law provide guidelines for a reasonable response time for agencies
and other public bodies responding to FOAA requests. She also expressed concern that town
officials, both elected and unelected, are unfamiliar with FOAA, including understanding which
records are public and what notice is required before a public meeting.

Rep. Monaghan inquired from Ms. Kielty whether or not there is an existing flowchart type of
summary of FOAA obligations of public officials and bodies. Brenda Kielty, Public Access
Ombudsman, replied that there was not one currently, but that she would produce one and
distribute it. Sen. Burns asked Ms. Kielty if she had any recommendations regarding FOAA and possible improvements to the law. Ms. Kielty stated that FOAA is a balancing statute, and thus needs to be evolving and dynamic. She agreed to provide written comments for the Advisory Committee’s consideration.

Mr. Pringle stated that he was in favor of having a flowchart developed, but noted the problem with this type of summary is that it will inevitably vary depending on the type of specific information being sought. Ms. Kielty acknowledged this concern and stated that she would follow up with Lt. Congdon to determine his needs.

Garrett Corbin of the Maine Municipal Association (MMA) next addressed the group. With respect to the flowchart, Mr. Corbin noted that this suggestion came about due to outreach efforts by MMA. Having discussed with attorneys in the legal department at MMA, who regularly provide information to municipal members in response to legal questions that include FOAA questions, Mr. Corbin relayed concerns with the fee amount that can be charged by the municipality or other public body for responding to FOAA requests. The current $15 per hour rate that can be charged for time spent past the first hour of responding to a FOAA request is very low, especially given that responding to such requests often requires paying for the services of attorneys. Mr. Corbin recommended a fee standard that permitted actual costs to be assessed to a requestor, perhaps with some sort of balancing mechanism.

Sen. Burns asked about issues with timeliness of FOAA responses, and Mr. Corbin replied that no concerns had been relayed to him. Rep. Monaghan asked if Mr. Corbin could provide written testimony for the Advisory Committee, to which he agreed. She then asked him what he thought of the issue raised by Ms. Seeley in her testimony, regarding inadequate FOAA training for municipal officials. Mr. Corbin replied that FOAA places responsibility for training on the municipalities. MMA tries to help, he stated, but it is ultimately up to the municipality. He expressed doubt about how widespread the issue is. Mr. Stout asked Mr. Corbin about his thoughts and perspective on electronic data retrieval by municipalities in the FOAA context. Mr. Corbin stated that he was unsure, but noted that municipalities face pressures with available staff time due to the tightening of municipal funding. Mr. Parr asked what Mr. Corbin took, if anything, from the low turnout at the public hearing, to which Mr. Corbin speculated that FOAA issues tend to be small and discrete, except for certain issues that get large press coverage, and perhaps there was a lack of media coverage about the public hearing. Mr. Parr noted his surprise that more input was not being provided from the public on how FOAA might work better, given the large media interest in FOAA issues this summer.

Sen. Burns suggested that one shouldn’t read too much into the low attendance at the public hearing. He stated his desire for an additional meeting for the Advisory Committee, in order to complete unfinished business and to see if there may be a consensus with regard to taking action in response to comments received. There were no objections, and the next meeting of the Advisory Committee was scheduled for October 5th.

**Hazardous material transported by railroads**
Staff provided copies of the final draft letter from the Advisory Committee to the Legislature’s Judiciary Committee regarding the public records exception at 1 MRSA §402, sub-§3, ¶U, which makes confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, fire department or other first responder. The Advisory Committee approved the letter, which staff will send to the Judiciary Committee and which will also be included in the Advisory Committee’s annual report.

**Personal contact information for professions and occupations licensed by the State**

Staff reviewed another draft letter from the Advisory Committee to the Judiciary Committee, this one regarding public access to personal contact information for individuals licensed or applying for licensure with the State. The letter reflected the recommendations made by the Advisory Committee on this issue at its August 17th meeting. There was a minor change made from a draft of the letter circulated to Advisory Committee members prior to the meeting, based on recommendations from Sen. Burns and Mr. Parr, so that the letter references the need to balance the privacy interests of the licensees against the “consumer interests” of the public, as opposed to the “public safety interests” of the public. The Advisory Committee approved the letter, which staff will send out to the Judiciary Committee and which will also be included in the Advisory Committee’s annual report.

**Annual Report – preliminary draft**

Staff reviewed a preliminary draft of the annual report with the Advisory Committee. A more complete draft will be presented for review at the next meeting.

**Public Records Exceptions Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005-2012, pursuant to 1 MRSA §433**

After an introduction by Rep. Monaghan, staff presented the recommendations of the Public Records Exceptions Review Subcommittee. For most of the reviewed public records exceptions, after staff described the exception and the Subcommittee’s recommendation, the Advisory Committee adopted the Subcommittee’s recommendation of continuing the exception with no modification. The Advisory Committee recommends no modification to the following exceptions, identified by reference number as listed on the chart prepared by staff: 6, 13, 36, 37, 39, 40, 41, 42, 51, 54, 56, 59, 60, 61, 62, 64, 65, 67. The following items resulted in notable discussion or disagreement with the Subcommittee’s recommendation.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 (Advisory Committee reference number 2), relating to certain personal information contained in communications between an elected official and a constituent, staff reviewed proposed legislation based on the recommendation of the Subcommittee that the exception apply to the entire record of the communication, as opposed to certain types of information found within the
record of the communication. The legislation would provide, however, that such records must be public if the specified categories of information contained within the communication can be easily redacted, and that such redaction must occur before release of the records.

Mr. Pringle stated that this legislation would turn the presumption that a record is public on its head. He noted that the public seeking information about a communication between an elected official and constituent would either receive a redacted copy or not receive anything. He also pointed out that the “significant effort” standard by which the record would be determined to be public is unclear and would constitute a new judicial standard.

Mr. Parr acknowledged Mr. Pringle’s points, but noted that one could approach this from another perspective. The problem with the current statute, he noted, is that public records are defined in law but FOAA is often focused on information within records, as opposed to the records themselves. Mr. Parr explained that this creates a burden on the agency to identify information excepted from FOAA and to redact if appropriate. He noted that it can be very challenging for a public official to make the determination whether or not certain information falls within a public records exception, and that this puts a lot of responsibility and risk on the public officials who need to decide whether or not to redact. Mr. Parr also stated that this burdensome process can lead to perceived delay in providing records pursuant to FOAA request. Mr. Parr agreed with Mr. Pringle’s point about the judicial standard in the language, and suggested that perhaps “unduly burdensome” would be a better test because it would be more familiar in the context of FOAA.

Mr. Stout echoed that non-public information embedded in records that are otherwise public is an example of why responding to FOAA requests can be a lengthy process. He noted that in the context of constituent communications, communication is easy via email and sensitive information may be easily shared. He also noted that technology makes the expectations around producing records and information to requestors an ever-changing challenge.

Rep. Monaghan stated that she tries to not let constituents provide too much personal information in their emails, and that the public needs to understand what information in a communication with an elected official will be considered public. Mr. Burns shared her concerns, stating that there should be a disclaimer and a link to the FOAA law on every legislator’s email. He also noted, however, that quite often constituents send very personal information before they would have a chance to see a disclaimer on the legislator’s email.

Mr. Pringle acknowledged that there is a struggle associated with redacting, but that this is the price the government must pay to ensure openness. He also noted that the Advisory Committee has tried to accommodate agencies in this regard by recommending legislation allowing them to charge the requestor a fee.

Ms. Pistner expressed her discomfort with the reference to redacting in the proposed legislation, noting this would be a unique reference in FOAA and wondering what this would tell the courts about when redaction is or is not required. Ms. Lynch suggested that this should go back to the Subcommittee for review, because Subcommittee members had not seen this draft since making their original recommendation. Mr. Parr suggested that language be added to have a standard
disclaimer regarding FOAA and constituent emails for elected officials and perhaps getting rid of the exception altogether. Mr. Burns expressed interest in Mr. Parr’s suggestion about the email disclaimer, and wondered if perhaps this could be accomplished with a policy of the Legislature instead of a statute.

Mr. Parr made a motion, seconded by Mr. Stout, to send this issue back to the Subcommittee for further discussion.

Mr. Stout stated that redaction is becoming more and more of an issue that agencies are faced with when dealing with electronic records, particularly emails. Mr. Parr echoed Ms. Pistner’s concern about using the term redaction, but noted that it was also used in FOAA at 1 MRSA §408-A. Mr. Parr closed the conversation noting that this issue was also representative of his broader frustrations with FOAA – when you make specific information confidential it will require redaction.

The Advisory Committee approved the motion by a unanimous vote of those present.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶R, (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, staff related the information gathered from the Secretary of State’s Office and Bureau of Motor Vehicles (BMV) in response to the Advisory Committee’s questions about this exception at its September meeting. The agencies did not object to the repeal of the exception, given the broader exception for Social Security Numbers in paragraph N of the same subsection of the statute. A representative of the BMV, Robert O’Connell, appeared before the Subcommittee earlier in the day to discuss this item as well as item number 55, discussed below.

Regarding the confidentiality provision at 29-A MRSA §1301 (Advisory Committee reference number 55), staff related that the BMV had shared draft legislation with the Subcommittee that would amend this confidentiality provision by eliminating the discretionary sharing of Social Security Numbers as permitted by federal law and instead allowing the sharing of this information only as required by federal law, specifically 18 United States Code, Section 2721(b). Mr. O’Connell had notified the Subcommittee that the Secretary of State would be submitting a bill to accomplish this to the next Legislature. Staff passed along the Subcommittee’s recommendation that the Advisory Committee indicate endorsement of this change but not recommend legislation because the Secretary of State will submit the bill. Mr. Parr made a motion, seconded by Ms. Lynch, that the Advisory Committee endorse the Secretary of State’s proposal but not recommend any modification to this confidentiality provision. The motion passed with a unanimous vote of those present.

With respect to 12 M.R.S. §10110 (Advisory Committee reference number 38), relating to a person’s e-mail address submitted as part of the application process for a hunting or fishing license, staff reviewed a draft letter from the Advisory Committee to Chandler Woodcock, Commissioner of Inland Fisheries and Wildlife, based on the recommendations of the Subcommittee. Staff explained that in response to inquiries on this exception, the Department of Inland Fisheries and Wildlife had proposed an amendment that would expand the exception to make the email addresses of individuals applying for permits and registrations as well as hunting
licenses confidential. Under the proposal, the commissioner would also be permitted to allow a member of the public to clearly indicate that the individual’s email address not be kept confidential. The proposal included additional exceptions to confidentiality to allow the department to disclose email addresses to a contractor or state agency for marketing or wildlife management purposes. The draft letter expresses that while the group is supportive of a default confidentiality of this information, it does not have sufficient information or understanding of the scope of the proposed exception to recommend the legislation, and encourages the Commissioner to submit the Department’s proposal as a bill to the next Legislature. The Advisory Committee approved of the letter unanimously.

With respect to 22 MRSA §1711-C, sub-§20 (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee had tabled this item at its last meeting after several members hesitated to endorse the recommendation of the Subcommittee to repeal this provision as unnecessary. At the Advisory Committee’s August meeting, Mr. Parr had asked staff whether the confidentiality protections of the federal Health Insurance Portability and Accountability Act (HIPAA) applied to these records. Staff discussed the public records exception in FOAA at 1 MRSA §402, sub-§3, ¶A that excludes from the definition of public records any records designated confidential by another statute, noting that though the courts in the State of Washington had interpreted a nearly identical provision as including the statutes of other states and the Federal Government, it was unclear what breadth the Maine courts would attribute to this provision of FOAA. Staff advised that regardless, the confidentiality provisions under HIPAA and its associated regulations very likely apply to Maine HealthInfo Net as a “business associate” of a “covered entity,” and indeed HealthInfoNet considers itself bound by HIPAA. Staff stated that HIPAA explicitly preempts state law that is less protective of private health information and therefore would apply as a minimum regardless of any conflicting provisions of State law. Staff counseled that their analysis was based on the organization of the current state-designated statewide health information exchange in Maine, and that it was possible that changes to the health information exchange system or provider could change the analysis. The Advisory Committee voted to continue the current confidentiality provision without any modification.

With respect to the public records exception at 35-A MRSA §10106 (Advisory Committee reference number 69), relating to records of the Efficiency Maine Trust and its board, staff related the Subcommittee’s recommendation of proposed legislation provided by the Executive Director of the Efficiency Maine Trust, Michael Stoddard. Staff reviewed the proposed amendment, which would move the authority to determine whether records of the trust were business sensitive, and therefore confidential, from the board to the director. It also gives authority to the director, as opposed to the board, in making the determination of what information that would be otherwise confidential may be released. Additionally, the amendment would replace an “and” with an “or,” so that any of the criteria for confidential trust records may be present instead of all criteria needing to be met in order for the records to be determined confidential.

Ms. Lynch stated that although she had voted in favor of this amendment at the Subcommittee meeting, after re-reading it she had concerns about the language, particularly the implications of
the new “or” with the application to entire “records,” which would broaden the current confidentiality provision more than originally intended. Ms. Lynch made a motion, seconded by Mr. LaHaye, to refer this item back to the Subcommittee for additional review. The motion passed with a unanimous vote of those present.

**Other issues or questions**

At the invitation of the Sen. Burns to Advisory Committee members for additional issues for discussion, Mr. Parr raised an issue posed by a recent court holding that under FOAA an agency cannot require payment of a fee from a requestor before providing documents pursuant to a FOAA request once the agency’s work of searching and compiling documents has already been completed. Mr. Parr asked that the next meeting agenda include an item to discuss modifying the advance payment provision of FOAA at 1 MRSA §408-A. Additionally, Mr. Parr wanted the group to discuss whether FOAA should allow for litigation over records that have previously already been provided to an individual. Ms. Lynch noted that she would be abstaining from any discussion on this topic. By consensus, the group agreed to place this item on the next agenda.

Mr. Stout made a motion, seconded by Mr. Parr, for an item to be added to the next meeting agenda to discuss the Advisory Committee forming a subcommittee on technology. The motion passed with a unanimous vote of all present.

**Future meetings**

The Advisory Committee’s fifth and final meeting of the year is scheduled for Wednesday, October 5th at 1:00 p.m. in Room 438 (Judiciary Committee Room) of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, October 5th in Room 438 (Judiciary Committee Room) of the State House.

The meeting was adjourned at 4:09 p.m.