Right to Know Advisory Committee  
October 5, 2016  
Meeting Summary

Convened 1:13 p.m., Room 438, Maine State House, Augusta

Present:  
Sen. David Burns  
Rep. Kim Monaghan  
Stephanie Grinnell  
A. J. Higgins  
Richard LaHaye  
Kelly Morgan  
Judy Meyer  
Paul Nicklas  
Chris Parr  
Harry Pringle  
Helen Rankin  
William Shorey  
Eric Stout

Absent:  
Suzanne Goucher  
Mary Ann Lynch  
Linda Pistner  
Luke Rossignol

Staff:  
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

Discussion regarding the September 14th public hearing on Maine’s Freedom of Access Act

Sen. Burns opened the Advisory Committee’s discussion regarding the September 14th public hearing to gather public input on how Maine’s Freedom of Access Act (FOAA) is working by inviting Brenda Kielty, Public Access Ombudsman, to address the group.

Ms. Kielty recounted that at the last meeting the Advisory Committee had asked her to come back and discuss the strengths and weaknesses of FOAA. Ms. Kielty stated that she was not providing a list of strengths and weaknesses because she did not think it would be particularly helpful. Ms. Kielty said that while she was not going to directly answer the question, given how broad it is, she wanted to give the Advisory Committee a framework for evaluating the statute before it considers making any changes. Changing one aspect of the Act, she noted, can have consequences for other aspects of the Act as well.

Ms. Kielty described her view of the best kind of statute, that it be simple yet elaborated, that is, not too complex yet not so simple as to create ambiguity. Whenever FOAA is made more complex, she
pointed out, it makes the administration of the law more complex for every public body in the State. She noted that FOAA is a very practical statute.

A proper analysis of FOAA should entail dissecting each section, interpreting it and deciding based on policy whether it is good or bad, Ms. Kielty stated. She offered to look at any particular portion of FOAA that the Advisory Committee was willing to ask her to. Sen. Burns thanked Ms. Kielty for her perspective.

Mr. Stout asked Ms. Kielty if the training requirements in FOAA may be expanded or better defined in FOAA than they are currently. Ms. Kielty acknowledged that putting a training requirement for officials into FOAA was a very important step. Putting something pertaining to FOAA training for all State employees, she noted, may be better accomplished through policies than by statute.

Staff noted that there were no comments or written testimony received since the public hearing. Staff had followed up with the Maine Municipal Association, which noted that it had nothing further to offer other than the written testimony it received from an official in Wells and already provided to the Advisory Committee.

Sen. Burns stated that, in summary, the Advisory Committee held a public hearing to see if it needed to consider changes to FOAA to recommend to the Legislature, and for whatever reason, had not received a lot of responses. Sen. Burns agreed with Ms. Kielty that education and training is very important, and suggested that technology issues need to be addressed in order to make sure that the statute is working as it was intended.

**Review of proposed Department of Health and Human Services, Maine Center for Disease Control and Prevention: Data Release Rule, 10-144 CMR, Ch. 175**

Staff reviewed the recent Department of Health and Human Services, Maine Center for Disease Control and Prevention (CDC) rulemaking establishing a Data Release Rule covering the agency’s policies for the release of health-related data.

Staff began by reviewing the Rulemaking Fact Sheet and then proceeding to the actual proposed text of the rule. Staff summarized the rule and reviewed the statutory language upon which authority the agency based its rulemaking, starting with Title 22, section 42, subsection 5. This provision provides confidentiality for Department of Health and Human Services records that contain personally identifying medical information that are created or obtained in connection with public health activities or programs. Among the exceptions to this confidentiality provision is one for disclosures that are specifically provided for by statute or by department rule. Staff also reviewed the confidentiality provision found at Title 22, section 824, which makes confidential the names and other information that may be used to identify an individual having or suspected of having a disease or condition. Under the statute, information that does not name or otherwise identify the individual may be released at the discretion of the Department of Health and Human Services.

Ms. Meyer pointed to the “indirect identification” definition in the rule as being of most concern. Ms. Meyer stated that this provision adds an equation for determining whether a population size is so small as to constitute indirect identification, triggering the confidentiality requirements in statute. Ms. Meyer stated that a massive amount of disease outbreaks would be required before the CDC would be permitted to release information under this new rule. She gave the recent example of two
children being sickened by E. coli bacteria after contact with farm animals during a fair, stating that under this new rule CDC could not release that outbreak information, even though in her view this is something to which the public should be alerted.

Sen. Burns asked which may be the appropriate body to address this concern if the Advisory Committee wished to weigh in on the issue. Staff offered that the Legislature’s Health and Human Services Committee or Judiciary Committee could be appropriate bodies to suggest action from. For example, staff explained, the Legislature could adjust the rulemaking authority of the Department of Health and Human Services so that it was no longer authorized to adopt the rule, or could otherwise limit the scope of the rule. Staff stated the principle that the Legislature has delegated authority to the agency by giving it this rulemaking authority and that, if the Legislature wishes, it can withdraw or adjust this authority.

Mr. Pringle inquired as to the effective date of this rule, and staff replied that there was a 150 day review period by the Attorney General’s Office before the rule could become final and in effect.

Mr. Parr stated that there is a purpose for this rule, and that it flows out of very broad authority delegated to the department. He stated further that, given the broad authority under statute, the department could have arguably effected this change through its policies, without having to engage in formal rulemaking. He also noted that this rule has progressed past the stage of public comment on the policy, and suggested that the Advisory Committee be careful about wading into the substance of this rule. Mr. Parr offered that one potential legislative change would be to designate this category of rule a major substantive rule, requiring approval from the Legislature before enactment, though it did not seem like the Advisory Committee was contemplating this type of action.

Ms. Meyer stated that this rule felt like a new FOAA exception being enacted through rulemaking. Sen. Burns noted he shared the same concerns, and also cited concerns with information about Lyme disease. He wondered whether the public was really aware of this proposed rule. Ms. Meyer noted that there was a lot of feedback provided at the rulemaking hearing, but that the public doesn’t necessarily follow these issues until they become an issue and it is too late. Ms. Morgan stated her view that this rule is very arcane and outside of the public’s awareness, and that the public will have concerns with this if an outbreak happens. Mr. Nicklas asked whether exceptions exist to allow this information to be released, to which staff answered that they would double check the statutes.

Mr. Higgins suggested that perhaps the Advisory Committee should lay out its concerns to the chairs of the next Health and Human Services Committee of the Legislature, and leave the matter to their discretion. Sen. Burns expressed support for this idea. Mr. Parr noted that, as someone who occasionally does agency rulemaking, he appreciates that the Maine Administrative Procedure Act is a multistep process which involves notifying both the legislative committee of jurisdiction and the public of the proposed rulemaking, and that it falls to citizens to educate themselves about important issues. Sen Burns agreed with this, but noted that he still thought the issue deserved a second look by the policy committee.

Mr. Parr made a motion, seconded by Mr. LaHaye, to send a letter to the Legislature’s Health and Human Services Committee explaining the Advisory Committee’s concerns with the new CDC rule and leaving follow up on the matter to that committee’s discretion. The motion carried by a vote of 13-0.
Staff asked for clarification about the letter, and after brief discussion it was clarified that the letter would ask the Health and Human Services Committee to: (1) take another look at the new CDC rule and get its own understanding of what is happening; (2) look to see whether the confidentiality provision at 22 MRSA §824 should be modified to address any concerns the proposed rule raises; and (3) look at whether the personal privacy interest protected by the rule outweigh the public interest in public health issues, given the general policy of openness under FOAA.

_Flanders v. State et. al_, as it relates to (1) requiring advance payment for FOAA requests; and, (2) repeated requests for records that have lawfully been withheld by a government entity

Staff reviewed the basic facts and holding of the recent Superior Court decision, _Flanders v. State, et. al_, BELSC-CV-15-12 (Me. Super. Ct., Waldo Cty., Aug. 12, 2016), with attention to the issues raised for discussion at the Advisory Committee’s September meeting. Those issues were (1) requiring advance payment for FOAA requests; and, (2) repeated requests for records that have lawfully been withheld by a government entity. The Superior Court held that the Maine State Police could not require payment of the costs of copying records before providing them to the requestor; the Court also held that repeated requests for the same documents are not prohibited by FOAA, but that FOAA does provide procedures for an agency or official to deny a request when compliance would be unduly burdensome or oppressive.

Regarding the issue of repeated requests, Mr. Parr explained that this may not be an issue in practice because normal rules of review and precedent would likely allow agencies facing identical requests to deny the records without extended litigation. Mr. Nicklas added that any proposal to address this concern would need to account for the fact that some records may be confidential at one time, but become public at another time.

Regarding the issue of requiring payment for records in advance, Sen. Burns welcomed discussion from Ms. Kielty. Ms. Kielty shared her view that the Superior Court Justice wrongly applied the law regarding payment in advance because Title 1, section 408-A, sub-§8 allows an agency or official having custody of a public record to charge fees for the costs of compliance, and because sub-§10, which specifies when payment in advance may be required, only applies when the estimate of the cost of compliance exceeds $100. Ms. Kielty noted that it is common practice for agencies to ask for advance payment. She further stated that she did not believe that the statute needed to be amended. Members of the Advisory Committee both agreed that the statute may have been wrongly applied and expressed concern that other courts would interpret the law similarly.

Mr. Pringle suggested adding a new paragraph F to Title 1, section 408-A, subsection 8, with the following text: “Payment of all costs may be required before the public record is provided to the requestor.”

Rep. Monaghan stated that she was hesitant to make changes because of all the work in the Legislature to put the fee provisions of FOAA as they are. Mr. Pringle offered that one option would be for the Advisory Committee to do nothing and have the ombudsman address the issues in the FOAA website’s frequently asked questions. Ms. Morgan expressed support for that suggestion, and asked for clarification on the concern with having to mail documents before receiving payment.

Mr. Parr stated that if agencies are put in the position of not receiving fees before they release public records, there is no incentive for requestors to pay. He noted that he would defer to the court case
before he would defer to the website FAQ. Mr. Parr stated that the law should be made clear that once the work of preparing the public record for release is finished, an agency can require the requestor pay the fee before releasing the records.

Sen. Burns stated that if people did not like the court opinion, then either it should be appealed or there should be a change in statute, opining that it was not wise to ignore a Superior Court opinion.

Chris Parr made a motion, seconded by Bill Shorey, to amend FOAA as suggested by Mr. Pringle. The motion carried by a vote of 10-3.

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

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee.

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 distributed proposed legislation based on a recommendation of the Subcommittee that the Advisory Committee had reviewed at its prior meeting and the Subcommittee had reviewed again during its meeting earlier in the day.

Mr. Parr explained the Subcommittee’s revised recommendation on this exception. The Subcommittee recommended keeping the existing public records exception as is, but also recommended adding a new public records exception to make confidential the same categories of personal information contained in communications between the public and a “public official.” He also explained the Subcommittee decision to recommend adding as a topic of discussion for next year’s Right to Know Advisory Committee Mr. Stout’s recommended new public records exception for personally identifiable information generally.

Sen. Burns asked staff if Ms. Pistner’s concerns about enacting broad public records exceptions that do not account for the more specific limits on disclosure contained in the subject-specific statutes, which she expressed by an email sent to the entire group and distributed and discussed at the morning’s Subcommittee meeting, would also apply to this proposed new public records exception. Staff replied that her comments were not directly in response to this proposal, but that there may be a similar concern with the breadth of the proposed new exception. Staff explained that the proposal would except information in a “communication” with a public official, and that the term could be interpreted broadly to include practically any information supplied by the public to a public agency, including, for example, licensing application information. Staff offered that amending the proposal to apply to “correspondence” may help limit the scope of the exception more in line with the proponents’ intention. Mr. Parr expressed support for the idea of this clarification. Mr. Pringle stated that it seemed the group was trying to solve a problem that didn’t exist because the existing exception would apply to any constituent communication regardless of whether it was in the hands of a public agency or the elected official. He suggested leaving the current exception as is, without expanding it. Mr. Parr agreed with Mr. Pringle’s assessment in regards to communications between a constituent and elected official that later end up in the hands of a public agency, but that the issue the proposal is trying to address is the case in which the same information is sent by the member of the public directly to an agency. Mr. Parr continued that an agency has no ability to redact this information unless there is a specific public records exception applicable. Mr. Pringle acknowledged
the concern and noted that he sensed reluctance from the Advisory Committee in enacting a broad exception applicable to all state government. Mr. Pringle also expressed support for the Advisory Committee looking into at some future date the issue of whether broader exceptions from FOAA for personally identifiable information should be put in place.

Mr. Pringle made a motion, seconded by Mr. Stout, to recommend no modification to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 and that the broader question of whether to create a new exception for information in communications between the public and any public official be addressed by the Advisory Committee in a future meeting. The motion carried by a vote of 13-0.

Mr. Parr then made a motion, seconded by Mr. Stout, that the Advisory Committee at its next full meeting next year discuss the idea of enacting a universal definition and public records exception in FOAA for personally identifiable information, and to also to look at creating a general disclaimer to put the public on notice that its communications with elected and other public officials may become public records under FOAA. The motion carried by a vote of 13-0.

The Advisory Committee voted 12-0 in agreement with the Subcommittee recommendations of no modification with respect to the public records exception at 29-A MRSA §2117-A (Advisory Committee reference number 57), relating to relating to data collected or retained through the use of an automated license plate recognition system, 32 MRSA §91-B, sub-§1 (Advisory Committee reference number 58), relating to quality assurance activities of an emergency medical services quality assurance committee and 32 MRSA §91-B, sub-§1, ¶ D (Advisory Committee reference number 62), relating to examination questions used for credentialing by Emergency Medical Services Board.

With respect to the public records exception at 34-B MRSA §1931, sub-§6 (Advisory Committee reference number 66), relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board, the Advisory Committee voted in line with the Subcommittee recommendations for no modification of the current exception and for the Advisory Committee to send a letter to the Legislature’s Health and Human Services Committee notifying it that the board has not been meeting and to consider whether the statute should be repealed.

With respect to the public records exception at 35-A MRSA §10106 (Advisory Committee reference number 69), relating to certain records of the Efficiency Maine Trust and its board, the Advisory Committee staff explained the amendment offered by Michael Stoddard, Executive Director of the Efficiency Maine Trust and recommended by the Subcommittee. The Advisory Committee had reviewed this exception and the proposed legislation at its last full meeting and had sent it back to the Subcommittee for additional review. Staff reviewed the revised proposal, which differed from the prior draft by merging subparagraphs 1 and 2. The more substantive change explained by staff was eliminating the confidentiality of entire records containing the social security number, address, telephone number or e-mail address of a customer that has or may participate in a program of the trust and instead making just this specific information found in otherwise public records confidential. Mr. Parr moved, seconded by Mr. Stout, to adopt the recommendation of the Subcommittee and recommend legislation to amend this public records exception. The motion carried by a vote of 12-0.

Discussion regarding potential formation of a subcommittee of the Right to Know Advisory Committee in 2017 to focus on technology issues
Mr. Stout addressed the group, sharing his observation that the number of technical issues that have arisen in prior years with the Advisory Committee led to the creation of a new seat on the Committee for a member with expertise in information technology. Mr. Stout recommended that a subcommittee be formed that would wrestle with these issues involving technology in more detail and bring its recommendations to the full Advisory Committee for consideration. Mr. Parr made a motion, seconded by Mr. Pringle, to create such a subcommittee next year.

Rep. Monaghan expressed her support for the idea, stating that she was confident new issues around technology and FOAA would arise in the upcoming legislative session. Sen. Burns asked for members interested in joining the subcommittee, to which Mr. Stout and Mr. Parr volunteered. Sen. Burns recommended the subcommittee get together and start talking about issues prior to the Advisory Committee’s next meeting next year. Rep. Monaghan noted that when presenting the Advisory Committee’s annual report to the Judiciary Committee she would discuss this technology subcommittee and suggest that the Judiciary Committee refer any technology related FOAA issues to this subcommittee. Sen. Burns expressed support for the subcommittee meeting with the newly appointed legislative members of the Advisory Committee, noting that such meetings would be publicly noticed. Mr. Stout stated his interest in the subcommittee taking a proactive role, taking a fresh look at issues that the Legislature is or should be wrestling with.

The motion carried by a vote of 13-0.

**Review Annual Report – preliminary draft**

Staff presented the latest draft annual report for the Advisory Committee, and then discussed the process for reviewing the report before submission and submitting any recommendations for revision. The report will be distributed via e-mail. Minor technical suggestions and edits may be made over email, but if there are any substantive concerns or concerns that the report does not reflect the Advisory Committee’s recommendations, such discussions would have to be held in a public meeting.

The meeting was adjourned at 3:52 p.m.