Right to Know Advisory Committee  
September 6, 2017  
Meeting Summary

Convened 9:06 a.m., Room 438, Maine State House, Augusta

Present:  
Sen. Lisa Keim  
Rep. Chris Babbidge  
Stephanie Grinnell  
Mary-Anne LaMarre  
Mary Ann Lynch  
Judy Meyer  
Paul Nicklas  
Chris Parr  
Linda Pistner  
Luke Rossignol  
Eric Stout

Absent:  
Suzanne Goucher  
AJ Higgins  
Richard LaHaye  
William Shorey

Welcome and Introductions

Advisory Committee members introduced themselves, including three recently appointed members: Sen. Lisa Keim and Rep. Christopher Babbidge, representing the Legislature; and Mary-Anne LaMarre, representing school interests.

Election of Chair


Freedom of Access Law updated

Staff distributed a copy of Maine’s Freedom of Access Act (FOAA), updated to reflect statutory changes made through the end of 128th Legislature’s First Regular Session. Two statutory changes were made: 1) the repeal of a redundant provision related to the confidentiality of social security numbers; and 2) the addition of language in 1 MRSA §408-A, subsection 8, paragraph F that allows an agency or official having custody of a public record to require payment of all costs before the public record is provided to the requestor. Staff noted the changes take effect November 1, 2017 and also briefly reviewed the duties of the Advisory Committee found at 1 MRSA §411, sub-§6.

Summary of actions taken based on recommendations in last year’s RTKAC report

Staff reviewed the actions taken on the recommendations included in the Advisory Committee’s January 2017 report. The recommendations are shown in italics

- Communicate the Advisory Committee’s interpretation of 1 MRSA §402, sub-§3, ¶U, which relates to hazardous materials transported by rail, to the Joint Standing Committee on Judiciary and
recommend that the Judiciary Committee draft a bill and hold a public hearing on that bill to elicit public input on public access concerns associated with passage of PL 2015, ch. 161, §3.

The Advisory Committee sent a letter to the Judiciary Committee expressing the Advisory Committee’s belief that the exception “is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State . . . or to prohibit disclosure of information about spills or discharges of hazardous materials.” The Advisory Committee also recommended that the Judiciary Committee consider submitting a committee bill to allow additional input from stakeholders and further expressed concerns about the scope of the exception.

The Judiciary Committee considered the Advisory Committee’s recommendation and felt a bill would be a good vehicle for raising potential issues with the law, but, after seeking input through its committee analyst, ultimately did not feel stakeholders could express concerns that would be helpful in drafting proposed legislation.

- Communicate to the Joint Standing Committee on Judiciary guidelines for considering proposed legislation relating to the confidentiality of personal information about professional and occupational licensees and applicants.

The Advisory Committee sent a letter to the Judiciary Committee expressing the Advisory Committee’s determination that a uniform policy on the confidentiality of licensed professionals’ contact information must balance the professionals’ privacy and safety interests with the public’s interest in determining a professional’s training and competency. The Advisory Committee recommended focusing on keeping categories of information confidential, such as personal contact information, unless personal contact information is the other way to identify the professional or when the professional affirmatively opts to allow the information to be disclosed.

In response, the Judiciary Committee considered two bills (LD 1267 and LD 1541) related to the confidentiality of professional licensing information. The Judiciary Committee has carried those bills over to any special or regular session of the 128th Legislature and has asked that the Advisory Committee provide input on resolution of the issues presented in those bills.

- Communicate to the Joint Standing Committee on Health and Human Services potential concerns that the proposed rule of the Maine Center for Disease Control and Prevention appears to limit the scope of information available to the public about threats to public health, including communicable diseases.

The Advisory Committee sent a letter to the Health and Human Services Committee about the Department of Health and Human Services proposed Data Release Rule, 10-144 CMR, ch. 175, which would have affected the release of certain data held by the Maine Center for Disease Control and Prevention. The Advisory Committee expressed concerns about the proposed rule’s limitation on the release of records.

The Department of Health and Human Services rescinded the proposed rule.

- Enact legislation to clarify that government entities may require advance payment before providing a public record to a requestor.

The Legislature accepted the recommendation of the Advisory Committee and passed Public Law 2017, chapter 158, which enacted Title 1, section 408-A, subsection 8, paragraph F, and allows an agency or
official having custody of a public record to require payment of all costs before the public record is provided to the requestor.

- Continue without modification, amend or repeal certain existing public records exceptions enacted after 2004 and before 2013.

The Legislature accepted most of the recommendation of the Advisory Committee and passed Public Law 2017, chapter 163, which amended Title 35-A, section 10106, subsection 1 to change the criteria for designation of records of the Efficiency Maine Trust as confidential, except that the Legislature did not accept the recommendation that the director of the Efficiency Maine Trust be allowed to determine which records contain information that would give a user a competitive advantage and instead kept that authority in the Efficiency Maine Trust Board.

The Legislature accepted the recommendation of the Advisory Committee that a redundant public records exception for social security numbers be repealed.

- Communicate with the Joint Standing Committee on Health and Human Services about potential repeal of the Mental Health Homicide, Suicide and Aggravated Assault Review Board.

The Advisory Committee sent a letter to the Health and Human Services Committee notifying it of the apparent dormancy of the Mental Health Homicide, Suicide and Aggravated Assault Review Board, but asked the Committee to consider whether the Board should be revived or if the provision of law establishing the Board should be repealed.

The Health and Human Services Committee drafted a bill to repeal this board and, after holding a public hearing on the bill, voted to repeal the Mental Health Homicide, Suicide and Aggravated Assault Review Board. The Legislature repealed the board and its associated public records exceptions in Public Law 2017, chapter 93.

**Potential topic for 2017: Remote Participation**

The Advisory Committee discussed whether to renew its discussion of proposed legislation to clarify the law relating to remote participation in public proceedings. Mr. Parr indicated he would support that discussion and asked if other members of committee were also interested. For several years, the Advisory Committee has discussed the issue and has proposed recommended legislation that has not been enacted. Mr. Parr also expressed concern that the use of cyber messaging and texting may be restricting the transparency of public proceedings and the public’s access to those proceedings.

Rep. Babbidge wanted to know what the status quo is with regard to remote participation. Ms. Pistner reminded the Advisory Committee that the Attorney General’s Office advises state agencies that remote participation is not permitted under current law unless specifically authorized (there are several examples in the law that specifically authorize participation in public proceedings by telephone or other electronic communication). Ms. Pistner and Mr. Parr acknowledged, however, that because FOAA is silent with regard to remote participation generally, there is ambiguity because there has been no litigation or court decision to provide other legal guidance.

Several members of the Advisory Committee noted their belief that remote participation in public proceedings is occurring at the local level, with Ms. Lynch referring to it as the “wild west” due to the lack of a legal framework and consistent application by local government entities. Ms. Lynch and Ms. Meyer would support the Advisory Committee’s renewed discussion of the issue. Ms. Pistner and Mr. Parr agreed that there needs to be a framework and guidance for government entities and that the
Advisory Committee should try again to craft recommended legislation for consideration by the Legislature. Mr. Rossignol, Mr. Nicklas and Mr. Stout verbalized their support for additional discussion of the issue.

The Advisory Committee agreed to add the topic of remote participation to the agenda for future meetings. Staff will prepare background materials on prior discussions and proposals to assist the Advisory Committee.

**Legislation related to FOAA issues considered by Judiciary Committee**

Staff reviewed four bills introduced during the First Regular Session related to the public’s access to licensing information for professions and occupations and to the public’s access to information about employees of the State and local government.

Two bills have been carried over by the Judiciary Committee to the next session in order to solicit feedback from the Right to Know Advisory Committee during the interim:

- **LD 1267, An Act To Protect Licensing Information of Medical Professionals.** This bill provides that information concerning the application for and granting of licenses issued by the State Board of Nursing, the Board of Osteopathic Licensure and the Board of Licensure in Medicine is confidential, except that each board is required to allow inspection of certain information (the applicant’s name, business contact information, educational and occupational background, orders and findings that result from formal disciplinary actions, evidence provided to meet financial responsibility requirements for licensure, for example).

- **LD 1541, An Act To Protect Certain Administrative Licensing Files.** This bill makes polygraph examiner and professional investigator administrative licensing files confidential by law, except the final written decision of whether a license is issued or denied, or of whether, in response to a complaint, adverse action is taken against a licensee's license, is publicly accessible and records may be disclosed for criminal justice purposes or to a government licensing agency of this State or another state. In the case of the issuance or denial of a license, the final written decision must state the basis for which a license is issued or denied, and, in the case of a complaint against a licensee's license, the final written decision must state the basis for which adverse action was or was not taken against the license. The Private Security Guards Act also is amended to ensure consistency with the changes made to the Polygraph Examiners Act and Professional Investigators Act.

A related bill was proposed for introduction by the Judiciary Committee, but was indefinitely postponed and not referred to any committee:

- **LD 1633, An Act Concerning Private Personal Information of Public Employees and Licensed Individuals.** This bill is based on a recommendation of the Right To Know Advisory Committee concerning the protection of private personal information that may be considered public records. The bill directs the joint standing committee of the Legislature having jurisdiction over judiciary matters to balance the public’s right to know about public employees and professional and occupational licensees and license applicants with the privacy and safety interests of the individuals involved when a proposed public records exception concerns the private personal information of public employees and professional or occupational licensees or license applicants.

Another bill was initially enacted by the Legislature, but subsequently vetoed by the Governor:
LD 146, An Act to Protect the Confidentiality of State and Local Government Employees’ Private Information. This bill (and Committee Amendment put forward by the Judiciary Committee) amends the law governing the confidentiality of personal information of municipal employees and county employees to parallel the same protections for state employees, with the addition of keeping as confidential any genetic information and information about the sexual orientation of the employee if contained in the records of the municipality. The bill also amends the state employee personnel records provisions to include confidentiality of genetic information and sexual orientation.

The Advisory Committee briefly discussed some of the challenges associated with trying to determine the types of personal information that should be kept confidential and the types that should be accessible to the public with regard to professions and occupations licensed or regulated by the government and with regard to public employees. Mr. Parr outlined the two potential models available to policymakers: 1) make all licensing information public, except for certain types of information designated as confidential; or 2) make all licensing information confidential, except for certain types of information designated as public.

The Advisory Committee agreed to combine the issues raised by these bills into one agenda item for the next meeting. Staff will prepare background materials on the legislative proposals to assist the Advisory Committee with its discussion.

Public Access Ombudsman Update

Brenda Kielty, Public Access Ombudsman, introduced herself to the Advisory Committee and briefly reviewed the duties of her position. Ms. Kiely noted that she views her position as an intermediary between government agencies and requestors for public records or for access to public proceedings, focusing on informal dispute resolution and education about the Freedom of Access Act. Ms. Kielty informed the Advisory Committee of the website maintained by the Ombudsman, www.maine.gov/foaa, which includes the Ombudsman’s Annual Reports and Frequently Asked Questions. In response to an inquiry from Mr. Parr, Ms. Kielty stated that the number of contacts from the public since 2013 continues to increase annually. Of the contacts made in 2016, 366 inquiries were related to public records and 112 inquiries were related to public proceedings.

Mr. Parr also asked about whether a private citizen has standing under FOAA to challenge the validity of a public proceeding. Ms. Kielty responded that she believed 1 MRSA §409, subsection 2 provides authority to challenge the validity of an executive session by any person and may likely provide more general authority. She also noted that the Attorney General has only filed one lawsuit pursuant to its authority under §410. Further, Ms. Kielty remarked that, during a presentation to the Judiciary Committee in the First Regular Session, it was suggested by Rep. Bailey that the Advisory Committee consider whether the current civil penalty ($500 per violation) for violations of FOAA in §410 is appropriate.

Ms. Kielty also expressed support for the Advisory Committee’s decision to discuss remote participation and suggested that the Advisory Committee consider resubmitting its prior legislative recommendation.

Discussion about Formation of Technology Subcommittee

The Advisory Committee discussed the recommendation from last year’s report that the Committee establish a Technology Subcommittee. Ms. Lynch expressed concern that a separate subcommittee singularly focused on technology might detract from the broader issues of public access. Ms. Lynch reiterated the benefit of having an Advisory Committee member with technology expertise, but stated that she did not see a need for a separate subcommittee. Ms. LaMarre concurred that a separate subcommittee was not necessary. Mr. Stout, who is the member with technology expertise, did not disagree with the
sentiments expressed by Ms. Lynch and Ms. LaMarre, but noted there are instances when technology intersects with freedom of access issues and process and a deeper understanding of how technology relates to these issues is beneficial. Sen. Keim stated that there appeared to be no need for a freestanding technology subcommittee, but that technology expertise would be welcomed as part of the Advisory Committee’s ongoing discussion of many issues.

The Advisory Committee declined to establish a Technology Subcommittee.

Discussion about formation of Public Records Exception Subcommittee; review of existing public records exceptions

Staff described the requirements of 1 MRSA §433 requiring the Advisory Committee’s review of existing public records exceptions found in Titles 1 through 7-A before 2019. The Advisory Committee agreed to appoint a Public Records Exception Subcommittee to review the exceptions on behalf of the Advisory Committee that will be presented for final action by the full committee in 2018. Consistent with past practice, the Advisory Committee directed staff to solicit initial input on existing exceptions from state agencies and other stakeholders using the questionnaire developed for that purpose. Once a sufficient number of responses are received, the Public Records Exception Subcommittee will be convened to begin its review.

Rep. Babbidge, Ms. Grinnell, Mr. Nicklas, Mr. Parr, Mr. Rossignol and Mr. Stout volunteered to serve as members of the subcommittee.

Potential topics for future discussion

Ms. LaMarre asked how the Advisory Committee would respond to recent communications emailed by staff from members of the public. Staff regularly forwards email and other communication on issues and topics related to the Freedom of Access Act to the Advisory Committee. The Advisory Committee agreed to consider at the next meeting whether to put any of the issues raised in the emails on an agenda for a future meeting.

Scheduling of future meetings

The Committee’s second meeting is scheduled for Wednesday, September 20th at 9:00 a.m. The third meeting will be held on Thursday, October 12th at 9:00 a.m., and the fourth and final meeting will be held on Wednesday, November 15th at 9:00 a.m. All meetings will be held in Room 438 of the State House.

The meeting was adjourned at 11:45 a.m.