

Right to Know Advisory Committee  
May 30, 2012  
Meeting Summary

Convened 9:40 a.m., Room 438, State House, Augusta

Present:  
Sen. David Hastings  
Rep. Joan Nass  
Perry Antone  
Joe Brown  
Richard Flewelling  
AJ Higgins  
Judy Meyer  
Linda Pistner  
Harry Pringle

Absent:  
Mike Cianchette  
Ted Glessner  
Mal Leary  
Bill Logan  
Mike Violette

On Telephone:  
Shenna Bellows  
Kelly Morgan

Staff:  
Peggy Reinsch  
Colleen McCarthy Reid

**Introductions**

Senator Hastings called the meeting to order and asked all the members to introduce themselves. He welcomed everyone back for a new year of activities.

**Summary of Second Regular Session, 125th Legislature's FOA actions in 2012**

Staff reviewed the Legislature's actions during the 125<sup>th</sup> Legislature's Second Regular Session related to Advisory Committee recommendations and other freedom of access issues.

The Legislature enacted 2 pieces of proposed legislation that incorporate the Advisory Committee's recommendations:

- LD 1465, An Act to Amend the Laws Governing Freedom of Access, *enacted as Public Law 2011, chapter 662*
- LD 1804, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Public Records Exceptions, *enacted as Public Law 2011, chapter 524*

Staff specifically noted that the Legislature has provided funding for a full-time ombudsman position, funding a 0.5 position in the Supplemental Budget bill, PL 2011, c. 655, Sec. A-3 and providing the additional funds for a full-time position in PL 2011, c. 662 ( LD 1465). Due to the different effective dates for the two laws, the Attorney General's Office has authorization to hire a ½ time position beginning July 1, 2012. Linda Pistner reported to the Advisory Committee that the AG's Office has submitted the necessary paperwork to the budget office for approval and will move forward with advertising the position as soon as possible. The additional funding for the full-time position is expected to become available in September. Ms. Pistner noted that the functions of the Ombudsman will be guided by the enabling law in Title 5, Section 200-I, including responding to inquiries from the public and government agencies, conducting education

and training, resolving complaints, providing advisory opinions and reporting annually to the Legislature and Advisory Committee. Ms. Pistner invited the Advisory Committee to provide comments on the qualifications and functions of the Ombudsman.

One bill, LD 1805, An Act to Implement Recommendations of the Right To Know Advisory Committee Concerning a Public Records Exception for Proposed Legislation, Reports and Working Papers of the Governor (supported by a majority of the Advisory Committee) was not enacted by the Legislature.

Staff also reviewed 4 bills containing proposed public records exceptions that were reviewed by the Judiciary Committee:

- LD 1627, An Act Regarding Birth, Death and Marriage Data, *enacted as Public Law 2011, chapter 511*
- LD 1138, An Act to Amend the Tree Growth Tax Law and the Open Space Tax Law, *enacted as Public Law 2011, chapter 618*
- LD 1470, An Act to Evaluate the Harvesting of Timber on Land Taxed under the Maine Tree Growth Tax Law, *enacted as Public Law 2011, chapter 619*
- LD 958, Resolve, to Authorize the Legislature to Contract for an Independent Review to Evaluate the Essential Programs and Services Funding Act, *enacted as Resolve 2011, chapter 166 effective May 29, 2012*

Staff noted that the enacted laws adopted the recommendations of the Judiciary Committee related to the public records exception, except for one bill, LD 1138. That law was enacted without following the Judiciary Committee's recommendation regarding the proposed exception relating to the confidentiality of a forest management and harvest plan provided by a landowner seeking open space tax treatment. Staff also noted that the exceptions related to the tree growth and open space tax laws are in Title 36 and are scheduled to be reviewed (along with other exceptions in Title 36) by the Advisory Committee this year.

### **Existing exceptions review process**

Staff explained that the Advisory Committee is scheduled to review the existing exceptions in Titles 26 through Title 39-A and distributed a chart listing the exceptions. Staff also reminded the Advisory Committee about two items that the Advisory Committee and Judiciary Committee have not made final recommendations on:

- Title 22, section 8754, related to sentinel event reporting by hospitals; and
- Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act.

The Advisory Committee agreed to review the exceptions in Titles 26 through 39-A and the tabled items in Title 22 and to refer them to the Public Records Exception Subcommittee.

### **Continuing projects**

The Advisory Committee reviewed the list of continuing projects.

*PL c. 264: email and other communications of elected/public officials.* This potential project was referred to the Advisory Committee by the Judiciary Committee. The Judiciary Committee requested guidance from the Advisory Committee related to the storage, management and retrieval of public officials' communications, especially email, for purposes of the Freedom of

Access laws. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee.

*Use of technology in public proceedings (participation from remote locations).* The Legislative Subcommittee has developed draft legislation governing the use of technology in public proceedings to allow participation of members from remote locations. There are several state agencies with specific statutory provisions that allow public proceedings to be conducted by telephone or other means that would be affected by the proposed draft legislation. The Subcommittee has not solicited input on the draft from these agencies yet. The Advisory Committee agreed to continue working on the draft legislation and refer it to the Legislative Subcommittee.

*Training and education for public officials.* The Advisory Committee discussed whether additional training and education issues need to be addressed as a result of the new requirement that government entities have a designated public access officer. The Advisory Committee determined that, since the law allows the designation of an existing employee, governmental entities will not have significant issues in complying with the law. The Advisory Committee did not refer this issue to a subcommittee.

*Templates for drafting specific confidentiality statutes.* The Public Records Subcommittee and Legislative Subcommittees worked with staff and former extern, Sean O'Mara, to develop drafting templates for confidentiality exceptions related to consumer and business records submitted to state agencies. Draft templates have been prepared, but input from state agencies is needed. The Advisory Committee agreed to refer this issue to the Legislative Subcommittee.

*Application of FOA laws to Maine Public Broadcasting Network.* The Advisory Committee was asked to consider the application of FOA laws to the Maine Public Broadcasting Network by a member of the press. Under current law, MPBN board meetings are defined as public proceedings, but the definition of public record does not specifically address MPBN records. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee. Staff will also research the legislative history of the amendment to the definition of public proceeding to include MPBN board meetings.

### **Criminal History Record Information Act (CHRIA) --- update**

Staff reported that the Criminal Law Advisory Commission did not bring the proposed draft revision of the Criminal History Record Information Act (CHRIA) to the Legislature this session. Staff noted that issues raised by the judicial system may have caused the delay. The Advisory Committee will invite the Criminal Law Advisory Commission to brief them on the status of the CHRIA revision at a future meeting.

### **Bulk records --- update**

Staff summarized the Law Court's opinion in the MacImage case decided March 27, 2012 and provided a copy of the law enacted by the Legislature (PL 2011, c. 518) which makes permanent the statutory fees determined to be reasonable by Law Court. The Law Court found that the specific statute in Title 33 regarding the registries controlled the dispute over the reasonableness of the fees charged by the registries—not the general language of the FOAA. As the Advisory Committee did not make a specific recommendation related to bulk data given the unresolved court case, the Advisory Committee discussed whether there are additional issues to be discussed now that the Law Court has rendered its decision. The Advisory Committee decided that it would

be worthwhile for the Bulk Data Subcommittee to revisit the issue of bulk data in light of the court decision to close the “loop” on the discussion.

### **Law School Externship – update**

Linda Pistner reported that Katherine (Katie) Lybrand has been selected as the Advisory Committee’s Law School extern for the upcoming fall semester. Katie will be a third-year student at the University of Maine School of Law and interned last summer with the Attorney General’s office. Ms. Pistner acts as supervisor throughout the externship. The Advisory Committee and staff look forward to working with Katie beginning in September.

### **Suggested topics and projects for discussion**

The Advisory Committee discussed 3 suggested topics and projects to determine if the Committee wanted to add the topics to the 2012 agenda.

*Letter from Freedom of Information Coalition related to encryption of radio transmissions between law enforcement and public safety personnel.* The Advisory Committee discussed a letter from the Freedom of Information Coalition requesting that the RTKAC examine the freedom of access issues raised by the potential encryption of public safety and law enforcement communications. The Advisory Committee noted that this may raise significant concerns among stakeholders and members will need to spend time talking with stakeholders before developing any recommendations. The Advisory Committee agreed to review this issue and to create a subcommittee to consider this single issue.

*Letter from Rep. Nelson related to parental privacy in Maine schools.* The Advisory Committee discussed a letter from Rep. Mary Nelson asking the RTKAC to consider whether Maine law should be clarified to ensure the confidentiality of home email addresses of parents of students. The Falmouth School Department received a FOA request for the email addresses of all parents of students in the school system. While the Falmouth School Department believes the email addresses are confidential under the Federal Family Educational Rights and Privacy Act because they are maintained as part of confidential student records, Rep. Nelson’s letter notes that the issue is not clear under state law. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee.

*Penalties for release of confidential information.* Staff reported that a State agency made an inquiry about whether there are any statutory penalties if an agency released confidential information as part of a request for information pursuant to the Freedom of Access Act (FOAA). Staff noted that there is no general statutory provision, but that there are a few examples of statutes specifically relating to certain agencies that assess penalties for the “intentional or knowing” release of confidential information.

The Advisory Committee declined to review the issue at this time, noting that they believed that the release of confidential information by state agencies was not a problem.

### **Relationship between Ombudsman and RTKAC**

The Advisory Committee briefly discussed the relationship of the Ombudsman with the RTKAC and whether the Advisory Committee should refer this issue for further discussion to a subcommittee. Ms. Pistner stated that she expected that the Ombudsman would attend RTKAC meetings and report about issues and inquiries on a regular basis. Harry Pringle agreed that the

Ombudsman should not be a RTKAC member but that sharing of information between the Ombudsman and the RTKAC would be important. Staff pointed out that the statute requires the RTKAC to maintain the FOA website; it may be useful at some time in the future to discuss whether the Ombudsman should take over those duties. Sen. Hastings reminded everyone that the Ombudsman is required to report annually to the RTKAC so he expects there will be an ongoing working relationship between the two. The Advisory Committee decided to defer any additional discussions of the role and functions of the Ombudsman until the position is filled.

**Subcommittees: members and duties**

The Advisory Committee agreed to keep the same subcommittees and membership as last year, but added one additional subcommittee to review the issues raised by the Maine Freedom of Access Coalition related to radio encryption. The membership of each subcommittee is noted below.

**Bulk Records Subcommittee**

Mike Cianchette, Chair  
 Perry Antone  
 Joe Brown  
 Richard Flewelling  
 Judy Meyer  
 Sen. Hastings\*  
 Rep. Nass\*

**Encryption Subcommittee**

Linda Pistner, Chair  
 Perry Antone  
 Joe Brown  
 AJ Higgins  
 Mal Leary  
 Judy Meyer  
 Sen. Hastings\*  
 Rep. Nass\*

**Legislative Subcommittee**

Judy Meyer, Chair  
 Mike Cianchette  
 Richard Flewelling  
 Ted Glessner  
 Mal Leary  
 Bill Logan  
 Kelly Morgan  
 Linda Pistner  
 Harry Pringle  
 Sen. Hastings\*  
 Rep. Nass\*

**Public Records Exception Subcommittee**

Shenna Bellows, Chair  
 Perry Antone  
 Joe Brown  
 AJ Higgins  
 Linda Pistner  
 (Ted Glessner, if needed)  
 (Harry Pringle, if needed)  
 Sen. Hastings\*  
 Rep. Nass\*

Not assigned as of 5/30/12: Mike Violette  
 \*denotes ex officio status, do not count for a quorum

**Future Meetings**

- The Advisory Committee scheduled the following meetings for 2012:
- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
  - Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
  - Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

The following subcommittee meetings were also scheduled:

- Radio Encryption Subcommittee, Monday, July 16, 2012 at 9:00 am;
- Public Records Subcommittee, Monday, July 16, 2012 at 1:00 pm; and
- Legislative Subcommittee, Thursday, July 19, 2012 at 9:00 am.

Senator Hasting adjourned the meeting at 11:45 a.m.

Respectfully submitted,  
Peggy Reinsch and Colleen McCarthy Reid

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Committee May 30 2012.docx

Right to Know Advisory Committee  
October 11, 2012  
Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:

Sen. David Hastings  
Rep. Joan Nass  
Perry Antone  
Shenna Bellows  
Joe Brown  
Richard Flewelling  
AJ Higgins  
Bill Logan  
Judy Meyer  
Kelly Morgan  
Linda Pistner  
Bruce Smith (for Harry Pringle)

Absent:

Mike Cianchette  
Mal Leary  
Mary Ann Lynch  
Mike Violette

Staff:

Curtis Bentley  
Colleen McCarthy Reid  
Peggy Reinsch

**Introductions**

Senator Hastings called the meeting to order and asked all the members to introduce themselves. He welcomed Bruce Smith, sitting in for Harry Pringle, representing school interests. (Mr. Smith abstained from all votes.) Senator Hastings also noted that Ted Glessner had withdrawn as the representative of the Judicial Branch and that Mary Ann Lynch is taking his place, although she could not attend the meeting.

**Introduction of Law School Extern**

Katherine Lybrand is this year's Law School Extern with the Right to Know Advisory Committee. The externship spans the fall term of the University of Maine School of Law. Ms. Lybrand is a third-year student and Linda Pistner, Deputy Attorney General, is the official supervisor of the externship. Ms. Lybrand has been working with Ms. Pistner as well as the newly-appointed Public Access Ombudsman. She provided the Advisory Committee with a memo outlining her recommendations for changes and improvements in the State's Freedom of Access website.

**Introduction of Public Access Ombudsman**

Brenda Kielty, appointed by Attorney General Schneider as the new Public Access Ombudsman, introduced herself and thanked the Advisory Committee members for all their

hard work to make her position possible. Ms. Kielty is transitioning from a position as a special assistant to the Attorney General, but will be in the Ombudsman position full-time soon. She recognizes there is lots to do, but is looking forward to all it entails. She will be scrupulous about maintaining her independent and neutral role, advocating for the integrity of the Freedom of Access Act. She outlined some ideas for activities, noting that she is still in the early stages of setting up a new division within the Attorney General's Office. She said that although the Attorney General has authority to file a lawsuit to enforce the statute, the time limits are strict. Ms. Lybrand is researching other states' remedies and Ms. Kielty will be looking at all potential options. She thinks the most important part of the role is to educate the public as well as public officials. Ms. Kielty mentioned that the new role of Public Access Officer – each public agency is required by Public Law 2011, chapter 662 to designate an employee to take the lead FOA role for the agency – will be very helpful to the public as well as agencies; she hopes to provide resources for the new Public Access Officers, as well.

Joe Brown mentioned that Hancock County has already begun implementing the new law, and Perry Antone reminded the members that Maine law enforcement agencies already have FOA policies, as required by law for the past few years. Richard Flewelling said that the Maine Municipal Association has been educating municipalities and their employees since June, recognizing that there has to be a transition period for towns and agencies to appoint their Public Access Officers and have them complete the required training.

Ms. Kielty said more information about the Ombudsman position will be available on the website soon, and the different methods of contacting her will be included. She provided her phone number and email address: 626-8577, [Brenda.Kielty@maine.gov](mailto:Brenda.Kielty@maine.gov). She is already receiving calls and email. <http://www.maine.gov/foaa/ombudsman/index.htm>

### **Reports of Subcommittees; Discussion of Subcommittee Recommendations**

- Bulk Records Subcommittee

Judy Meyer reported for the Bulk Records Subcommittee, because Subcommittee Chair Michael Cianchette was absent. Ms. Meyer reminded the Advisory Committee that the genesis of the Subcommittee was the dispute between the county registries of deeds and the private company MacImage of Maine, LLC, concerning MacImage's request for records, in digital format, and the cost and timing of those copies. The Subcommittee was reluctant to weigh into the turmoil while both the Legislature and the courts were trying to make sense of all the interests involved. The Law Court's ruling in March of this year settled the issue for the registries of deeds, and the Legislature had enacted separate language that addressed the concerns that had been raised by the State Police with regards to accident reports.

At the request of Ms. Meyer, the Advisory Committee voted to disband the Bulk Records Subcommittee. It was requested that the Ombudsman keep an eye on the issues, as members know the question have not really gone away. The Subcommittee can be reconstituted as necessary.

- Encryption Subcommittee

Ms. Pistner presented the report of the Encryption Subcommittee, which was included in the packet of materials. She thanked staff and Assistant Attorney General Laura



Yustak Smith, and noted that the Department of Public Safety had been very knowledgeable and helpful. The two meetings were very collegial discussions, and everyone is pretty comfortable that current encryption practices are fine, and the transition from analogue to digital radio systems was the initial cause of concern.

The Subcommittee made two recommendations. First, propose no statutory changes. Second, that the Advisory Committee send a letter to the Board of Trustees of the Maine Criminal Justice Academy requesting that it consider creating a model encryption policy for consideration by local law enforcement agencies that reflects the current practices, and requesting that the board report back to the Advisory Committee on any decisions or actions taken pursuant to the request. The Advisory Committee unanimously adopted both recommendations.

- Legislative Subcommittee

Ms. Meyer reported that the Legislative Subcommittee met three times and covered five topics.

- The application of the Freedom of Access laws to Maine Public Broadcasting - Issue raised by the late Mike Brown when MPBN refused to provide certain financial information about employees that he requested, saying the information was not “public” under the FOA laws. The manner in which the request was unnecessarily harsh. Mark Vogelzang (President and CEO of MPBN) and Jim Zimpritch (MPBN’s attorney) attended the Subcommittee meeting and provided written remarks. The Subcommittee found no compelling need to amend the statute and make public all the records of MPBN, a private non-profit corporation.

The Subcommittee recommended no change, and the Advisory Committee unanimously agreed. AJ Higgins abstained, as an employee of MPBN, and Mr. Brown abstained because he did not have sufficient information to make a decision.

- Status of email addresses collected by schools and towns - Issue raised by Rep. Mary Pennell Nelson via letter to the Advisory Committee. Falmouth schools received a request for parents’ emails. The Subcommittee discussed whether email addresses are confidential and should they be and also discussed the practical problems with redacting all email addresses from otherwise public documents. Harry Pringle had argued that the email addresses are probably confidential under FERPA, but the State should make it clear. Mr. Pringle offered to prepare draft legislation. The Subcommittee discussed the draft on two occasions but finally decided to not take action until the new Public Access Ombudsman can collect information to determine if it is a problem.

The Subcommittee recommended no change in the statute (although Rep. Nelson may propose legislation independently). The Subcommittee also recommended that the Advisory Committee officially request the Public Access Ombudsman to look at the issue, collect information and report back. The Advisory Committee unanimously supported the recommendations, although Shenna Bellows abstained because the ACLU would probably support Rep. Nelson’s legislation.

- Balancing the public disclosure of elected officials' email with the availability of technology and other systems to maintain records and provide public access (PL 2011, c. 264) – The Legislature had requested that the Advisory Committee provide guidance on maintaining, storing, sorting and retrieving email. The Subcommittee invited David Cheever, the State Archivist, to discuss issues of maintaining, storing and accessing records, especially digital records such as email. Mr. Cheever said it was a national problem, there is no solution yet, whatever the solution is will probably cost a lot of money, and that this is an area where Maine should NOT be a leader. If legislators are looking for clarity, the FAQs and the retention rules are the best resources available. The Legislature's own record retention schedule (under Title 5, chapter 6) does not include "correspondence," however, and the Subcommittee thought that should be corrected.

The Subcommittee recommended that the Frequently Asked Questions be amended to identify the requirements and any guidance with regard to state and local record retention schedules. The Subcommittee also recommended that the Legislature consider revising its own record retention schedule to cover "correspondence." The Subcommittee recommended that the training for legislators include best practices with regard to email.

The Advisory Committee discussed all the recommendations and recognized that the proposed changes to the FAQs needed a little more work. The Advisory Committee voted unanimously to table the recommendations until the next meeting. Ms. Kiely will continue to rework the questions and answers.

- Use of technology in public proceedings to allow member participation from remote locations - Issue has been under discussion for a few years: the FOA Act is silent on whether members not present at a public proceeding of a board, commission or other body can participate via telephone, video link, etc. Four entities (FAME, Workers' Comp Board, Ethics Commission and Emergency Medical Services Board) have specific statutory authorization to meet via telephone or other technology in certain circumstances; all requested exemption from the proposed language.

The Subcommittee developed draft legislation, a key provision of which is that an entity can use the procedure only if it has adopted a policy that authorizes such participation. Ms. Meyer walked the Advisory Committee through the draft, and noted that a minority of the Subcommittee does not support the language as drafted, and that Mr. Pringle had abstained from the Subcommittee vote because the school boards had not decided whether to support it.

The Advisory Committee discussed the draft, including the limitation on participation when additional materials are present at the public proceeding. Mr. Brown said he would like to run the draft by his county commissioners. He also expressed his support for the concept that county commissioners, if not other members of boards and commissions, should have "face time" with each other. Mr. Flewelling clarified that this would not apply to "Town Meetings" because that form of municipal government has its own specific statutory requirements. Ms. Meyer said the whole

idea is to extend a courtesy to a member who is not able to attend. Mr. Smith noted that the draft addresses not just a public access issue but a governance issue as well.

The Advisory Committee voted to table the proposal, giving time for Advisory Committee members to share the draft with the organizations and constituents they represent, as well as providing an opportunity for the supporters of various versions to prepare specific explanations.

- Templates for drafting specific confidentiality statutes - Another topic that has been under consideration for a few years, requested by the Judiciary Committee. The Subcommittee agreed to recommend the “templates” prepared by staff and a former law School Extern as guidance for drafting new statutes that protect information provided by an applicant for financial or technical assistance provided by the State, town or other public entity. Ms. Bellows noted that standard language makes the statutes more understandable and the review of public records exceptions a much easier process. The Advisory Committee unanimously recommended that the templates be made available to agencies and legislative drafters.

- **Public Records Exception Subcommittee**

Ms. Bellows will propose a full slate of public records exceptions for approval at the next meeting. She presented a draft letter to the Department of Health and Human Services concerning two programs, never implemented, that contain public records exceptions. Although the Health and Human Services Committee of the Legislature recommended repeal of the programs, the Subcommittee is reluctant to recommend the elimination of entire programs when the Subcommittee’s focus is really centered on public records exceptions. The letter would identify the programs and recommend that if the Department believes they should be eliminated, it would be best if the Department proposed such legislation itself. The Advisory Committee unanimously agreed to send the letter.

Ms. Bellows mentioned two issues that she expects the Advisory Committee to deal with at the next meeting. First, the potential repeal of the public records exceptions concerning hospital and health care facility sentinel events reporting: the Subcommittee is currently divided, with the medical community opposing any change. Second, the public records exception protecting records about public-private partnerships on transportation projects. The Subcommittee heard several comments from members of the public concerned about the proposed East-West Highway project, and how the existing law would limit the availability of information until a project proposal is complete. The Subcommittee is divided on going forward with any recommendation, but members are trying to reach a compromise.

### **Future Meetings**

The Advisory Committee scheduled the following meetings for 2012:

- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

The following subcommittee meetings were also scheduled:

- Public Records Subcommittee, Thursday, November 8, 2012 at 9:00 am.

Senator Hasting adjourned the meeting at 3:30 p.m.

Respectfully submitted,  
Peggy Reinsch, Colleen McCarthy Reid and Curtis Bentley

Right to Know Advisory Committee  
November 15, 2012  
Draft Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:  
Sen. David Hastings  
Rep. Joan Nass  
Perry Antone  
Shenna Bellows  
Joe Brown  
Richard Flewelling  
AJ Higgins  
Mal Leary  
Mary Ann Lynch  
Judy Meyer  
Kelly Morgan  
Linda Pistner  
Harry Pringle

Absent:  
Mike Cianchette  
Bill Logan  
Mike Violette

Staff:  
Peggy Reinsch  
Colleen McCarthy Reid

**Introductions**

Senator Hastings, Advisory Committee chair, called the meeting to order and asked all the members to introduce themselves.

**Public Access Ombudsman Update**

Brenda Kielty provided the Committee with an update on her recent activities. Ms. Kielty reported that she has been interviewed by local newspapers and had speaking engagements at the annual meetings for school board and water district members. Future events include the Freedom of Access training for the 126<sup>th</sup> Maine Legislature and an administrative law class at the University of Maine Law School. Ms. Kielty told the Committee she is willing to speak to other groups and invited the Committee to make suggestions. Ms. Kielty has also begun meeting with various stakeholder groups about FOA issues and concerns. Finally, Ms. Kielty noted that phone calls, email and mail are coming in regularly; although it is too early to analyze the data, the inquiries are not yet repetitive.

Ms. Kielty thanked the members for their suggestions and comments on the Frequently Asked Questions and reported that arrangements are being made to update the website documents. The Advisory Committee agreed that future changes and updates to the FAQs and FOA website do not need to have their prior approval. Ms. Kielty will continue to circulate information about any updates or changes to the Advisory Committee through email.

**Legislative Subcommittee Report—Draft authorizing use of technology in public proceedings to allow member participation from remote locations**

The Advisory Committee continued discussion of the draft amendment which was tabled at the October 11<sup>th</sup> meeting. Staff reviewed the draft amendment recommended by a majority of the Legislative Subcommittee and summarized the positions of the majority and minority on the draft.

Judy Meyer and Linda Pistner reiterated their opposition to the language in the draft that would allow participants to vote in a proceeding without having all of the materials available to those members physically present. They also expressed concern about removing the language that limited the ability of someone to participate remotely when attendance was “not reasonably practical” and letting each body determine the conditions under which remote participation is appropriate.

Commissioner Brown expressed his opposition to extending the provision to elected officials, believing that those elected should have to face the public when voting and making decisions; he was not opposed to allowing remote participation by appointed members of boards and commissions. He also wondered whether this proposal was trying to fix a process that isn't broken.

Sen. Hastings asked about the applicability of the proposal and asked if it would apply to the Legislature. Harry Pringle replied that it would apply to the Legislature, but reminded the members that the draft only authorizes public bodies to adopt a policy allowing remote participation and does not require all bodies to do so. Mr. Pringle noted that he had abstained from the Legislative Subcommittee's vote because the school board interests he represents had not taken a position on the draft. Although most school board members he has since asked about the proposal seem opposed, Mr. Pringle suggested that it was time for the Advisory Committee to recommend a proposal to the Legislature as the issue has been under consideration for several years.

Before moving forward, Mr. Pringle thought the Advisory Committee should consider the consequences of the language in subsection 1 and paragraph G as drafted; he feared that the language could be interpreted to invalidate a vote taken at a proceeding when a member participates remotely. Mr. Pringle suggested amending paragraph G to add the following language: Failure to comply with this paragraph does not invalidate the action of the body. Richard Flewelling agreed with Mr. Pringle's suggestion and said such a “savings clause” has been included by the Advisory Committee in previously recommended legislation related to written records of public proceedings.

Mal Leary expressed his support for moving forward with a proposal to the Legislature, stating that the demand for the change is based on technology. Mr. Leary noted several other states allow this practice and 4 state agencies are currently authorized by law as well. The permissive language of the draft will provide a framework for agencies, boards and commissions to consider authorizing remote participation.

Ms. Meyer again stated she was not comfortable moving forward and would like the proposal to go back to the Subcommittee for more work. Mary Ann Lynch disagreed; she thought the draft should move forward to the Legislature with Mr. Pringle's changes and the Legislature will determine whether additional changes are needed. Sen. Hastings noted that the Legislature has already made exceptions on a case-by-case basis for certain agencies and suggested that that practice should be continued.

Comm. Brown reiterated his opinion that the draft should not apply to elected bodies. Mr. Flewelling understood the concern, but pointed out that, at the local level, many elected boards would already be prohibited from using the provision under subsection 2 because the proceedings are judicial or quasi-judicial.

Mr. Pringle moved to amend the draft in paragraph G; Mr. Flewelling seconded the motion. The Advisory Committee voted 8-5 in favor of the motion (Sen. Hastings, Commissioner Brown, Ms. Meyer, Kelly Morgan and Ms. Pistner were opposed).

Ms. Meyer again asked if the Advisory Committee should step back and gather more data and input from stakeholders as not all boards and commissions were asked for comments on the draft. Mary Shenna Bellows said that she could see both sides of the issue, but will support moving forward because the draft amendment is permissive and does not mandate that all public bodies authorize remote participation.

On the motion of Ms. Bellows (second by Mr. Leary), the Advisory Committee voted 8-5 to recommend the remote participation draft to the Judiciary Committee (Sen. Hasting, Commissioner Brown, Ms. Meyer, Ms. Morgan and Ms. Pistner were opposed).

### **Public Records Exception Subcommittee Report**

#### *Review of Existing Exceptions in Titles 26 through 39-A*

Ms. Bellows, Subcommittee Chair, reported that the Subcommittee had completed initial review of 92 exceptions in Titles 26 through 39-A as well as several exceptions tabled from 2011 in Title 22. In 2013, the Subcommittee will complete review on 29 exceptions. The Subcommittee is unanimously recommending that 54 exceptions continue without modification; only 2 exceptions are recommended without change by majority vote of the Subcommittee. The Advisory Committee accepted the recommendations of the Subcommittee that 56 exceptions be continued without modification.

With regard to the exceptions that the Subcommittee is recommending changes, staff reviewed each of the proposed amendments. The Advisory Committee made the following decisions.

Community Right to Know Act Provisions: Title 22, Sections 1696-D and 1696-F
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The Advisory Committee unanimously accepted the recommended changes. The amendment clarifies that all information about toxic and hazardous substances in use or present at a specific location, including trade secrets, are public and also removes the 50-mile radius residency restriction on access to the information collected under this program.

1: 26 MRSA §3
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The Advisory Committee unanimously accepted the recommended changes. The amendment makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

5: 26 MRSA §934
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The Advisory Committee voted 12-0 to accept the recommended changes (Ms. Lynch abstained from voting). The amendment to the provision relating to reports of the State Board of Arbitration and Conciliation in a labor dispute would make clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

11: 29-A MRSA §152, sub-§3

The Advisory Committee voted 12-0 to accept the recommended changes (Mr. Leary abstained from voting). The amendment removes language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

14: 29-A MRSA §257

The Advisory Committee unanimously accepted the recommended changes to repeal the provision relating to the Secretary of State's motor vehicle information technology system. After further discussion and input from the Office of Information Technology, the Secretary of State's Office concurred that the provision was not necessary as the information technology system was covered under other provisions in existing law---1 MRSA § 402, sub-§ 3, ¶ M and 29-A, section 1401, sub-§8.

15: 29-A MRSA §57, sub-§4

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language that is redundant with another section of law.

80: 38 MRSA §585-B, sub-§ 6

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language relating to the confidentiality of mercury reduction plans for air emission source emitting mercury on the recommendation of DEP.

81: 38 MRSA §585-C, sub-§ 2

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language relating to the confidentiality of hazardous air pollutant emissions inventory on the recommendation of DEP.

#### Public-Private Partnerships/DOT projects

Current law (23 MRSA §4251) designates all information that MaineDOT has about a public-private partnership project confidential until the Department determines whether the plan meets the statutory standards. Approved projects are then submitted to the Legislature for approval. Ms. Bellows explained that the Subcommittee discussed the provision on several occasions, including the morning of the meeting, and received input from the Department of Transportation, Natural Resources Council of Maine and many members of the public. The Subcommittee voted 3-2 in favor of no change, with one abstention. (Rep. Nass, Commissioner Brown and Chief Antone voting in the majority; Ms. Bellows and Mr. Higgins supporting an amendment, Ms. Pistner abstaining.) The amendment supported by Ms. Bellows and Mr. Higgins would repeal the



confidentiality provision and make information about a public-private partnership public once the information has been submitted to DOT. Ms. Bellows reiterated her strong support for the minority amendment which provides for transparency about potential projects which will have a significant impact on the public, will increase competitiveness among entities interested in these projects and will provide for consistency across state agencies in terms of access to information.

Ms. Bellows also distributed a rough draft (labeled Minority Report B) that was discussed by the Subcommittee, but was withdrawn before it was voted upon. The draft was prepared by Linda Pistner for the purpose of discussing options for making at least some information about public-private partnerships projects before the current law allows release. Ms. Pistner's concern about the current law is that by the time the plan is released and it goes to the Legislature, the opportunity for changes has passed and the only options are up or down. The draft was an attempt to find a middle ground between the current law and Minority Report A, which proposes to delete the confidentiality completely. Ms. Pistner expressed her opinion that the Legislature will revisit the issue.

Perry Antone explained his recommendation that no change be made in the current law. Large projects shouldn't go forward without some information serving as a check, but supporting free enterprise means allowing the development of plans without revealing trade secrets and other information to competitors. Businesses, he says, should have the ability to develop what they want to do until an agreement or just before an agreement is entered into with the State. Without a specific proposal that finds some middle ground, Chief Antone believes the current law should stay in place. Commissioner Brown stated that he is comfortable that DOT and the Legislature can appropriately handle the process under the current law. He believes that existing law provides sufficient transparency and public input.

Ms. Meyer asked about how the provision might impact the East-West Highway project. Ms. Bellows and Chief Antone reported that the Subcommittee had been told by DOT that they have not received any information about the East-West Highway pursuant to the public-partnership project provision. Rep. Nass reiterated that the Subcommittee had agreed that the discussion was not about a particular project, whether it is the East-West Highway or any other specific proposal, and the members should not focus on the public interest expressed about one potential project.

Ms. Lynch expressed support for the majority recommendation of no change, noting that the provision was recently enacted and reviewed by the Legislature and Advisory Committee. She was concerned about giving interested parties unhappy with the decision a "second bite at the apple." Ms. Bellows recognized Ms. Lynch's concerns, but said she was persuaded to revisit the exception because of the significant public interest made known to the Subcommittee.

The Advisory Committee voted to table the proposal, giving time for Advisory Committee members to consider the draft.

### *Sentinel Events*

Ms. Bellows informed the Advisory Committee of the Subcommittee's decision to table consideration of the confidentiality provision in the sentinel events reporting law until 2013. Although all Subcommittee members are interested in seeking changes to the current law, the members need additional time to work with stakeholders to determine whether further discussions can identify common ground for an expansion of the information about sentinel events reported publicly.

### **Review of Letters Recommended by Advisory Committee**

The Advisory Committee reviewed 3 draft letters and authorized Sen. Hastings to sign and send the letters on the members' behalf:

- A letter to the Board of Trustees of the Maine Criminal Justice Academy outlining the discussions of the Encryption Subcommittee and recommending that the Academy consider adopting a model policy relating to encryption of radio transmissions for use by law enforcement personnel;
- A letter to the Public Access Ombudsman outlining the discussions of the Legislative Subcommittee relating to the confidentiality of parent email addresses and asking that the Ombudsman research the issue, collect information from school boards and others and report back to the Advisory Committee in July 2013; and
- A letter to the Director of the Maine State Museum outlining the discussions of the Public Records Exception Subcommittee relating to Title 27, section 377 and recommending that the Museum consider proposing legislation to amend the definition of "site" as the scope of the suggested change has broader implications to the law.

### **Review of Draft Report**

Staff distributed a draft copy of this year's annual report. If there are any comments or suggestions on the draft report, members should submit them to staff before 5 p.m. on Tuesday, November 27<sup>th</sup>.

### **Future Meetings**

The Advisory Committee's final meeting for 2012 will be on Thursday, November 29, 2012 at 1:00 pm, Room 438, State House.

Sen. Hastings adjourned the meeting at 3:13 p.m.

Respectfully submitted,  
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee  
November 29, 2012  
Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:

Sen. David Hastings  
Rep. Joan Nass  
Perry Antone  
Shenna Bellows  
Joe Brown  
Richard Flewelling  
AJ Higgins  
Bill Logan  
Judy Meyer  
Kelly Morgan  
Mike Cianchette  
Mal Leary  
Harry Pringle

Absent:

Linda Pistner  
Mary Ann Lynch

Staff:

Curtis Bentley  
Colleen McCarthy Reid  
Peggy Reinsch

**Introductions**

Senator Hastings called the meeting to order and asked all the members to introduce themselves.

**Discussion of Public Records Exception Subcommittee Recommendations; Public-private partnership projects**

Shenna Bellows reviewed the background of the subcommittee's discussion on to what extent documents associated with public-private partnership projects should be open to the public. Ms. Bellows restated the minority view of the subcommittee that the confidentiality provision regarding these projects should be repealed entirely. Perry Antone restated the majority view of the subcommittee that there should be no changes to the law because trade secrets and business ideas need to be protected as preliminary proposals go through the process.

During discussions, some committee members felt the public did not have adequate time to review proposals because once the Maine Department of Transportation (MDOT) determines a private entity meets certain standards its proposal is turned into a bill for submission to the Legislature. Others stressed that the importance of public-private projects

and cautioned that the Advisory Committee should not propose anything that might deter private entities from participating in those projects.

Bruce Van Note, Deputy Commissioner, Maine Department of Transportation, expressed concern that if the confidentiality provision is repealed no private entity would submit a proposal for consideration because information in the proposal would be available to its competitors. Similarly, opening proposals up sooner to the public would likely discourage private entities from submitting proposals to MDOT. He also stated that MDOT was involved in drafting the confidentiality provision of the law and in its review in front of the Joint Standing Committee on the Judiciary before it was passed by the Legislature. Mr. Van Note said current law strikes a good balance between protecting proprietary information and the public's interest in an open process. He stated the MDOT's role is up-front on technical and engineering concerns and whether a proposal should go forward is for the Legislature to decide.

It was proffered that the public interest would be better served by making the information public before a proposal becomes a bill so that other entities can compete for the project. Mr. Van Note responded that he was confident competitors would make themselves known to the Legislature and the legislative process would work things out.

Ms. Bellows made a motion that was seconded by Mr. Higgins to accept the subcommittee's minority report to repeal the provision that makes information provided to MDOT confidential until the project proposal is complete. While there was some support on the committee for the motion others felt an outright repeal of the confidentiality provision went too far and would deter private parties from participating the process.

The motion failed 5 to 8 with members voting as follows. Ms. Bellows, Mr. Higgins, Mr. Leary, Ms. Meyer and Ms. Morgan voted in favor of the motion and Mr. Antone, Mr. Brown, Mr. Cianchette, Mr. Flewelling, Sen. Hastings, Mr. Logan, Rep. Nass and Mr. Pringle voted in opposition to the motion.

Mr. Pringle made a motion to add a provision to the law that would require MDOT to give notice of the project at least 30 days prior to introducing a bill to the Legislature. During discussion on the motion, the point was raised that as a practical matter this may already be occurring but suggesting a specific time period would ensure some "breathing room" to give the public an opportunity to comment on the agreement before it goes to the Legislature. Some members suggested increasing the waiting period to 60 days because 30 days may not allow enough time. Others thought 60 days was going too far because the public would have an additional chance to comment when the bill proposing the agreement is given a public hearing before the appropriate legislative committee.

Mr. Van Note said this is a policy matter for the Legislature to work out but he did not feel the proposed 30 day waiting period would negatively affect public-private partnerships.

The motion passed on a 7 to 6 vote as follows. Ms. Bellows, Mr. Flewelling, Mr. Leary, Sen. Hastings, Ms. Meyer, Ms. Morgan and Mr. Pringle voted in favor of the motion and Mr. Antone, Mr. Brown, Mr. Cianchette, Mr. Higgins, Mr. Logan and Rep. Nass voted in opposition to the motion. Mr. Antone, Mr. Brown, Mr. Cianchette, Mr. Logan and Rep.

Nass stated that they supported making no changes to the law. Shenna Bellows stated that she preferred to repeal the entire confidentiality provision.

### **Annual Report**

The Advisory Committee reviewed the draft annual report and made a number of clarifying changes to the draft. The Advisory Committee directed staff to send the final version of the report to committee members by December 4 for a final review.

### **Future Meetings**

The Advisory Committee did not assign another meeting date for 2012. Senator Hasting adjourned the meeting at 2:43 p.m.

Respectfully submitted,  
Peggy Reinsch, Colleen McCarthy Reid and Curtis Bentley