

RIGHT TO KNOW ADVISORY COMMITTEE  
Issues Subcommittee

Wednesday, December 18, 2019  
11:00 a.m.  
State House Room 436

Meeting Agenda

1. Welcome and introductions
2. Review of draft language for proposed changes to Archives Advisory Board
3. Review draft letter to Tammy Marks, Director of Maine State Archives
4. Review draft recommendation to establish a separate committee to look at privacy and related issues, including a state Privacy Act
5. Surveillance videos
6. Other issues?
7. Adjourn

**Right to Know Advisory Committee  
Issues Subcommittee**

**PROPOSED DRAFT LEGISLATION TO CHANGE MEMBERSHIP OF THE  
ARCHIVES ADVISORY BOARD  
*REFLECTS DECISIONS MADE AT OCT. 21st MEETING***

**Sec. 1. 5 MRS §96, sub-§2** is amended to read:

**§96. Archives Advisory Board**

**1. Established.** The Archives Advisory Board, established by section 12004-I, subsection 8, shall serve to advise the State Archivist in administration of this chapter and to perform such other duties as may be prescribed by law.

**2. Members.** The Archives Advisory Board consists of ~~9~~ 12 voting members with expertise in the administrative, fiscal, legal and historical value of records. Voting members of the board must represent the spectrum of records in the State and are appointed by the Secretary of State as follows:

- A. Two public members representing the interests of public access to government records, recommended by a public interest group;
- B. Two members from municipal or county government with expertise in local government records, recommended by local or county government entities;
- C. One member representing a state or local historical society, recommended by a state or local historical society;
- D. One member with expertise in the legal requirements of records retention and public records law, recommended by the Attorney General;
- E. One member with expertise in the State's fiscal requirements of records retention, recommended by the Governor;
- F. One member from the executive branch with expertise in executive branch records, recommended by the Governor; and
- G. One member from the Department of Administrative and Financial Services, Office of Information Technology with expertise in electronic records, electronic records management systems and emerging technology related to electronic records, recommended by the Governor; and
- H. Two members representing journalists, newspapers, broadcasters and other news media interests; and
- I. One member representing the protection of personal privacy interests.

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The State Archivist serves as a nonvoting member.

**3. Terms; chair; compensation.** The voting members under subsection 2 serve a 3-year term and continue serving until either reappointed or replaced. In case of the termination of a member's service during that member's term, the Secretary of State shall appoint a successor for the unexpired term. The voting members shall elect a chair. Voting members must be compensated as provided in chapter 379.

**SUMMARY**

This bill adds three additional members to the Archives Advisory Board to ensure that journalists, newspapers, broadcasters and other news media as well as personal privacy protection advocates are part of the expertise involved in the development of records retention schedules.

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**DRAFT**

**Right to Know Advisory Committee  
Issues Subcommittee**

**PROPOSED DRAFT CORRESPONDENCE CONCERNING PUBLIC  
PARTICIPATION WITH ARCHIVES ADVISORY BOARD  
*REFLECTS DECISIONS MADE AT OCT 21st MEETING***

Tammy Marks, Director  
Maine State Archives

Re: Archives Advisory Board activities

Dear Ms. Marks:

Thank you for your assistance to the Right to Know Advisory Committee to understand the important role the State Archives play in preserving the historical records of the State as well as helping to identify resources to manage all public records. Keeping track of records is a difficult task for all public entities, and the records retention schedules are an important piece in the overall records management puzzle. The development of those records retention schedules is key to ensuring that the public has a complete opportunity to know what their government is doing and how it carries out its responsibilities.

We are encouraged to know that the Secretary of State's Office is involved in updating the process and in ensuring that essential perspectives will be included in the development of records retention schedules going forward. Although the process has always been open, we write to request that the new Archives Advisory Board, with support from the State Archivist, take extra steps to ensure that notice of meetings is readily available, and information about the work of the Advisory Board is shared as widely as possible. We encourage the use of email distribution lists to support public knowledge and participation in the development process.

As you already know, the Advisory Committee is recommending legislation to expand the membership of the Archives Advisory Board to include representatives who can provide the perspective of journalists and news media. We also think it is important to include a member who is concerned with protecting individual's privacy interests. We will be making those recommendations to the Judiciary Committee with the expectation that the changes will be considered in the upcoming Second Regular Session.

Thank you again for your continued attention to our concerns.

Sincerely,

Representative Thom Harnett, Chair  
Right to Know Advisory Committee

**Right to Know Advisory Committee  
Issues Subcommittee**

**PROPOSED DRAFT LEGISLATION TO CREATE PRIVACY COMMITTEE  
REFLECTS DECISIONS MADE AT OCT. 21st MEETING**

Privacy Committee Recommendation

Recommendation (vote 5-4): That the Legislature establish a committee to explore the need for a state Privacy Act. Membership should include at least one person who is also a member of the Right to Know Advisory Committee to ensure continuity and coordination. Federal laws establish a balance with the Freedom of Information Act requiring disclosure of government data, and the Privacy Act ensuring that personally identifying information contained in the government data is not released except in limited situations. Maine's Freedom of Access Act provides that all records in the possession of a governmental entity that have been received or prepared for use in connection with the transaction of public or governmental business or contain information relating to the transaction of public or governmental business, are public, with specific exceptions. There is no over-arching state pronouncement that purports to protect individuals' private information. The newly-formed committee would be directed to look at whether such comprehensive protection is necessary, and, if so, how that change in policy should be implemented. Additionally, the committee should explore whether there should be a permanent advisory committee on privacy and privacy-related issues which would parallel the work of the RTKAC, or whether those issues are appropriately covered by RTKAC.

Considerations for surveillance video language

Surveillance video is a public record – videos are related to government conduct and thus are public records – unless specific statutory sections provide otherwise.

Some language to consider for exceptions:

1. It directly relates to and reveals information about a security system; or
2. Disclosure would invade privacy and that invasion outweighs the public's right to inspect any materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy.

Does the public interest in disclosure substantially outweigh the privacy interest? (The individual has a privacy interest, but the State also has an interest in protecting the privacy interests of its citizens/residents.) Who decides?

Need to redact, obscure identities before disclosed?

Do we need to specifically address body-worn cameras and dashboard cameras of law enforcement?

Do we need to specifically address education records covered under FERPA (in which a parent has the right to inspect and review the child's education record and which may only be disclosed pursuant in specific circumstances)?

General privacy considerations in other states:

Does the person have a reasonable expectation of privacy in the information disclosed/to be disclosed? If so, then must decide whether the intrusion on the right of privacy is justified, balancing the governmental interest in disclosure against the private interest in confidentiality. (New Jersey case law)

When an exemption within the Public Records Act protects "privacy," it allows withholding only if disclosure: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. (Washington case law)

The court should first determine whether there is a privacy interest in the requested record. If there is a privacy interest, then exemption (c) requires a balancing test: where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. (Massachusetts case law)

Weigh the public interest in disclosure of the record against the public interest and public policies against disclosure – must conduct on case-by-case basis taking into consideration the totality of the circumstances (Wisconsin case law summary)

Considerations for surveillance video language

Burden of proof:

Standard burden of proof – keep confidential unless clear and convincing evidence that public interest requires disclosure?

But RTKAC subcommittee said should err on side of being public, so shift? Person advocating to keep the record confidential must show clear and convincing evidence that privacy interest outweighs the public interest that would be served by disclosure.

Current Maine law surveillance provisions that may be impacted:

8 §1006, sub-§1, ¶D – application and licensing records and information related to issuance of a license by the Gambling Control Board: The following records are confidential and may not be disclosed except as provided: Financial, statistical and surveillance information related to the applicant or licensee that is obtained by the board or department (Public Safety) from the central site monitoring system or surveillance devices. (Sub-§4 provides that the information obtained from the central site monitoring system or surveillance devices is confidential and may not be disclosed.)

23 §1980, sub-§2-B, ¶B – photo-monitoring evidence collected by Maine Turnpike Authority: This material is confidential and is not available to the public or to any person employed by the authority whose duties do not require access to the material.

23 §7312 – participation in the Federal Railroad Administration Track and Equipment Safety and Inspection Program: DOT commissioner has authority to participate in carrying out investigative and surveillance activities in connection with any rule, regulation, order or standard prescribed by the Secretary of Transportation of the United States under the authority of the Federal Railroad Safety Act of 1970, Public Law 91-458, provided that the commissioner shall comply with all the requirements imposed by the United States Code, Title 45, section 435. The commissioner may employ such expert, professional or other assistance as is necessary to carry out the activities authorized by this section. (Note: federal law has been repealed and replaced; now in 49 USC c. 201)

25 §4501 – use by law enforcement of unmanned aerial vehicles (UAVs, aka drones) capable of doing audio or visual surveillance. Note #1: No mention of the status of the records created by such cameras, therefore must be public? Intelligence and Investigative Information Act probably applies, so balancing test of whether any records are confidential. Note #2: Sub-§6 requires the Department of Public Safety to submit an annual report to the Legislature on the number of instances in which an UAV has been deployed by any law enforcement agency in the State, including information about the number of search warrants sought and the number of search warrants obtained for the deployment of UAVs.

Considerations for surveillance video language

29-A §2117 – use of traffic surveillance cameras restricted: State/municipality may not use a traffic surveillance camera to prove or enforce a violation of Title 29-A. Note: No mention of the status of the records created by such cameras, therefore must be public? Does Intelligence and Investigative Information Act apply?

29-A §2117-A, sub-§4 – use of automated license plate recognition systems: Confidentiality. Data collected or retained through the use of an automated license plate recognition system are confidential under Title 1, chapter 13 and are available for use only by a law enforcement agency in carrying out its functions or by an agency collecting information for its intended purpose and any related civil or criminal proceeding.

33 §2001 – placement of cameras and electronic surveillance equipment on private property. A person (including law enforcement) may not place a camera or electronic surveillance equipment that records images or data of any kind while unattended outside on the private property of another without the written consent of the landowner, unless the placement is pursuant to a warrant. Note #1: FOAA does not apply to records in the hands of nongovernmental entities, so it is important to know who placed the cameras or surveillance equipment with consent of the landowner. Note #2: No mention of the status of the records created by such cameras or surveillance equipment, therefore must be public when in the hands of governmental entities? Intelligence and Investigative Information Act probably applies when law enforcement placed the equipment (such as with warrants, but could be with consent), so balancing test of whether any records are confidential.



**McCarthyReid, Colleen**

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**From:** Parr, Christopher <Christopher.Parr@maine.gov>  
**Sent:** Monday, December 2, 2019 10:37 AM  
**To:** Risler, Hillary  
**Cc:** Reinsch, Margaret; McCarthyReid, Colleen  
**Subject:** \*\* Proposed draft language re: school video recordings  
**Attachments:** 191202 DRAFT - 20-A MRSA sec. 6001-D.pdf

**Importance:** High

**This message originates from outside the Maine Legislature.**

Hillary:

Good morning –

When time allows, would you pls forward the attached draft language to the members of the RTKAC so that the language can be considered at the next Issues Subcommittee meeting, and then by the full committee?

My hope is that if consensus is not reached on the language the subcommittee has been discussing that would be applicable to publicly-created-and-maintained video recordings generally, then perhaps consensus can be reached on language applicable to school video recordings specifically.

Thank you! Pls let me know if you wish to discuss.

Best, C

*Chris*

CHRISTOPHER PARR  
STAFF ATTORNEY  
MAINE STATE POLICE  
DEPARTMENT OF PUBLIC SAFETY  
(e) [christopher.parr@maine.gov](mailto:christopher.parr@maine.gov)

Department of Public Safety  
Maine State Police  
45 Commerce Drive, Suite 1  
Augusta, ME 04333-0042

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**DRAFT – FOR DISCUSSION PURPOSES ONLY**

**Sec. 1. 20-A M.R.S.A. § 6001-D is enacted to read:**

**§ 6001-D. School video recordings confidential**

**1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. School video recording. “School video recording” means a video or audio recording made by any publicly-owned or publicly-leased security or surveillance camera that is on or within school grounds and is in the possession or custody of a public school, a private school approved for tuition purposes or a private school recognized by the department as providing equivalent instruction pursuant to section 5001-A, subsection 3, paragraph A, subparagraph (1), division (b). “School video recording” does not include audio or video recordings that are education records as defined by the federal Family Educational Rights and Privacy Act of 1974, including, but not limited to, any portion of a school video recording that is an education record as defined by that federal law.

B. School grounds. “School grounds” has the same meaning as in section 6554, subsection 2, paragraph E.

**2. School video recordings confidential.** School video recordings are confidential and are not public records for the purposes of Title 1, Chapter 13. A school may not disclose any portion of such recordings, except as provided in subsection 3.

**3. Permissible disclosure of school video recordings.** Notwithstanding subsection 2, a school video recording may be disclosed by the school that is the custodian of the recording to:

A. A criminal justice agency, if the school video recording is known to include, or suspected of including, information material to an investigation being conducted by that agency. School video recordings obtained and maintained by criminal justice agencies pursuant to this paragraph constitute confidential intelligence and investigative record information under pursuant to Title 16, chapter 9;

**DRAFT – FOR DISCUSSION PURPOSES ONLY**

B. An employee, contractor, volunteer, or visitor of the school, or an attorney for any of such persons, who has been accused of misconduct, if the school video recording is known to include, or suspected of including, information material to the accusation. A school video recording disclosed pursuant to this paragraph may not be further disclosed in whole or part to any other person, but may be used in any administrative or judicial proceedings that occur to address the accusation of misconduct;

C. To the attorney for, or a parent or guardian of, a student who has been accused of misconduct, if the school video recording is known to include, or suspected of including, information material to the accusation. A school video recording disclosed pursuant to this paragraph may not be further disclosed in whole or part to any other person, but may be used in any administrative or judicial proceedings that occur to address the accusation of misconduct.

**4. Dissemination of school video recordings in the custody of private transportation agencies.** The disclosure of school video recordings in the custody of a private transportation agency providing services to a school must be expressly addressed in contract. At a minimum, the contract must provide that a private transportation agency may not disclose a school video recording in the custody of that agency except to the extent permitted by this section.