

<p style="text-align: center;"><b>Right to Know Advisory Committee Radio Encryption Subcommittee</b></p>
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**Background Materials from 2012 RTKAC Encryption  
Subcommittee**

- 1. 9-16-12 Encryption Subcommittee Report to RTKAC**
- 2. 11-15-12 RTKAC Letter to Maine Criminal Justice  
Academy**
- 3. 12-6-12 Response to RTKAC from Maine Criminal  
Justice Academy**
- 4. 7-16-12 Encryption Subcommittee Meeting Materials**
- 5. 8-15-12 Encryption Subcommittee Meeting Materials**
- 6. RTKAC Seventh Annual Report**

Hon. David R. Hastings III, Chair  
Hon. Joan M. Nass  
Perry Antone  
Shenna Bellows  
Percy L. Brown, Jr  
Michael Cianchette  
Richard Flewelling  
James T. Glessner



A. J. Higgins  
Mal Leary  
William Logan  
Judy Meyer  
Kelly Morgan  
Linda Pistner  
Harry Pringle  
Mike Violette

STATE OF MAINE  
**RIGHT TO KNOW ADVISORY COMMITTEE**

Encryption Subcommittee

September 16, 2012

Dear Senator Hastings,

As you recall, the Encryption Subcommittee was established to consider the concerns raised by the Maine Freedom of Information Coalition in its letter dated April 27, 2012 about the possibility that police and emergency service providers may begin to encrypt more of their radio communications after completing the federally mandated switch from an analogue to a digital radio system. We have reviewed the current encryption practices of Maine's law enforcement agencies and first responders and considered how moving to a digital radio system may impact those practices. We also reviewed federal and state laws that may apply to the use of encryption to help guide us in our deliberations. This letter contains a brief outline of our work and our unanimous recommendations to address the concerns raised by the Maine Freedom of Information Coalition.

On July 16, 2012 and August 15, 2012, the Encryption Subcommittee met in room 438 of the State House and received testimony from Suzanne Goucher representing the Maine Freedom of Information Coalition and the Maine Association of Broadcasters; representatives from the Maine State Police, Department of Public Safety, including Col. Robert Williams (Chief of the Maine State Police), Lt. Col. Raymond Bessette (Deputy Chief), Lt. Don Pomelow (Commanding Officer of Troop C), and Major Grotton (Special Services); and Wayne Gallant, of the Office of Information and Technology. In addition, we directed our staff to work with Assistant Attorney General Laura Yustak Smith to review federal and state laws and policies that may pertain to the encryption of public safety radio transmissions; staff reported those findings to us at our last meeting. Summaries of our meetings may be found at <http://www.maine.gov/legis/opla/righttoknowsums.htm>

Based on our review we make the following unanimous recommendations:

1. That the Right to Know Advisory Committee not propose any statutory changes to address issues raised in the Maine Freedom of Information Coalition's letter dated April 27, 2012; and

2. That the Right to Know 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 reflect the current practices and requesting that the board report back to the Advisory Committee on any decisions or actions taken pursuant to this request.

Although all members of the Subcommittee agreed that current encryption practices are not an issue in Maine, members were concerned about the potential for law enforcement agencies to use digital technology to encrypt transmissions to which the public should have a right of access. Accordingly, if current practices change significantly it would be appropriate to revisit this issue.

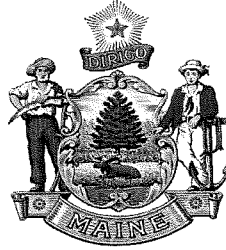
We appreciate the opportunity to delve into this matter for the Advisory Committee. Please feel free to contact me if you have any questions.

Sincerely,

Linda Pistner, Chair

cc: Members, Right to Know Advisory Committee

Hon. David R. Hastings III, Chair  
Hon. Joan M. Nass  
Perry Antone  
Shenna Bellows  
Percy L. Brown, Jr  
Michael Cianchette  
Richard Flewelling  
Mary Ann Lynch



A. J. Higgins  
Mal Leary  
William Logan  
Judy Meyer  
Kelly Morgan  
Linda Pistner  
Harry Pringle  
Mike Violette

STATE OF MAINE  
**RIGHT TO KNOW ADVISORY COMMITTEE**

November 15, 2012

Brian MacMaster, Chair, Board of Trustees  
Maine Criminal Justice Academy  
15 Oak Grove Road  
Vassalboro, Maine 04989

Dear Mr. MacMaster:

The Right to Know Advisory Committee requests that the Board of Trustees consider establishing a model encryption policy for radio transmissions by law enforcement agencies and first responders that reflects current practices.

As you may know, the Right to Know Advisory Committee was created by the Legislature as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Recently, the Maine Freedom of Information Coalition informed us of its concern that public safety agencies and first responders may begin encrypting radio transmissions that are not currently encrypted as part of the federally mandated switch from an analogue to a digital radio system.

As part of our work on this matter, we established the Encryption Subcommittee to study the issue and report its findings and recommendations to us. The Subcommittee was composed of Linda Pistner, chair (Office of the Attorney General), Rep. Joan Nass, Perry Antone (representing law enforcement interests), Joe Brown (representing county or regional interests), Mike Cianchette (representing State Government interests), AJ Higgins (representing broadcasting interests), Mal Leary (representing a statewide coalition of advocates of freedom of access), and Judy Meyer (representing newspaper publishers).

The Encryption Subcommittee held two meetings this summer and heard testimony from the Maine Freedom of Information Coalition, Maine Association of Broadcasters, and the Department of Public Safety. After considerable discussion, the Subcommittee made the following recommendations to us: 1) That no changes be made to existing law regarding the encryption of radio transmissions by public safety agencies and first responders; and 2) That we send a letter to the Board of Trustees of the Maine Criminal Justice Academy asking that it consider creating a model encryption policy for consideration by local law enforcement agencies.

The Advisory Committee has adopted those recommendations and this letter is our formal request that you consider establishing a model encryption policy that reflects current practices for consideration by local law enforcement agencies. We also request that you please inform us of any decisions or actions taken pursuant to this letter.

Thank you for your consideration of our requests.

Sincerely,

A handwritten signature in cursive script that reads "Dave Hastings". The signature is written in dark ink and is positioned above the typed name.

Senator David Hastings III  
Chair

cc: Suzanne Goucher, MFOIC

# BOARD OF TRUSTEES MAINE CRIMINAL JUSTICE ACADEMY

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December 6, 2012

Senator David Hastings III, Chair  
Right to Know Advisory Committee  
Maine State Legislature  
13 State House Station  
Augusta, ME 04333-0013

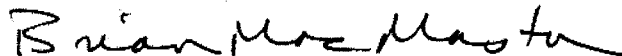
Dear Senator Hastings:

My apologies for the late response to your letter of November 15, 2012, but, for whatever reason, I only received the letter a couple of days ago.

The Board of Trustees of the Maine Criminal Justice Academy does not formulate model policies for law enforcement. The Board is charged by the Legislature with developing standards for law enforcement policies mandated by the Legislature. It is then the responsibility of each law enforcement agency in the State to develop its own policy that, at a minimum, incorporates the standards promulgated by the Board. The Board has no statutory authority to promulgate standards for policies other than those mandated by the Legislature.

Model policies for law enforcement are developed and disseminated by the Maine Chiefs of Police Association as a service to its membership. Such is the case with the mandated policies. The Association develops model policies that incorporate the Board-promulgated standards. The Association also develops other (non-mandated) model policies for its membership. Accordingly, it may be prudent to invite the Association to develop a model policy on encryption for radio transmissions. To that end, I have taken the liberty of forwarding your letter to the Board of Directors of the Association.

Sincerely,



BRIAN MACMASTER  
Chair  
Board of Trustees

**RIGHT TO KNOW ADVISORY COMMITTEE  
ENCRYPTION SUBCOMMITTEE**

DRAFT AGENDA

July 16, 2012

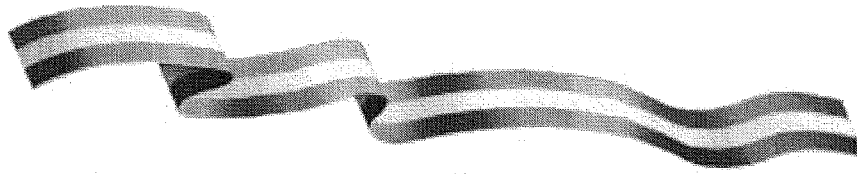
9:00 a.m.

Room 438, State House, Augusta

**Convene**

1. Welcome and Introductions (Linda Pistner, Chair)
2. Presentations:  
Broadcasters (Suzanne Goucher, Maine Freedom of Information Coalition)  
Department of Public Safety (Lt. Colonel Ray Bessette)
3. Additional comments and discussion
4. Scheduling next meeting and agenda items

**Adjourn**



Maine Freedom of Information Coalition

PO Box 232  
Augusta, Maine  
04333

April 27, 2012

The Honorable David Hastings, Senate Chair  
The Honorable Joan Nass, House Chair  
Maine Right To Know Advisory Committee

Delivered via email

Dear Senator Hastings and Representative Nass:

An issue has come to our attention, and the members of the Maine Freedom of Information Coalition respectfully request that it be examined by the RTKAC when it reconvenes this summer.

The Federal Communications Commission has mandated that public safety agencies and other VHF and UHF land mobile spectrum users must migrate to narrower-bandwidth equipment by January 1, 2013. This shift is commonly known as “narrowbanding.” In Maine, this migration, called MSCommNet, is being managed by the state Office of Information Technology. Among the features being touted for MSCommNet is the following: “Local Control - Each state agency will be able to decide who can listen and speak on their talk group and can assign their own security settings.”<sup>1</sup>

It appears that public safety and other agencies in Maine and elsewhere are taking advantage of this “feature” by encrypting their radio transmissions<sup>2</sup>, making it impossible for anyone to “listen in” on a conventional public-safety radio scanner. Indeed, this debate has been raging elsewhere since before 9/11/01<sup>3</sup>, though it is relatively new to Maine.

While we recognize that there are legitimate public safety reasons for encrypting certain radio transmissions, such as for SWAT teams or hostage-response teams, we think a wholesale shift to

<sup>1</sup> Found at [http://www.maine.gov/oit/services/radio/mscommnet/faq/MsCommNet\\_flyer.pdf](http://www.maine.gov/oit/services/radio/mscommnet/faq/MsCommNet_flyer.pdf)

<sup>2</sup> For example, the Presque Isle police department has already migrated to an encrypted radio capability, with the Presque Isle fire department soon to follow. An encrypted system is also being used by the Caribou public works department. See <http://www.mainemediaresources.com/ffj/02221201b.htm>

<sup>3</sup> See, for example, “Police Scanners in the Digital Age,” written in the summer of 2001, available at [http://www.rtdna.org/pages/media\\_items/police-scanners-in-the-digital-age181.php](http://www.rtdna.org/pages/media_items/police-scanners-in-the-digital-age181.php)



encryption of public safety radio transmissions raises several important freedom of information concerns:

- If such radio transmissions are encrypted, is it now, or will it become, illegal for members of the public to purchase scanners capable of decrypting them?
- If so, does this raise a concern that it has or will become illegal for citizens to monitor business conducted by public officials at public expense?
- What assurance will there be that the public will have access to the recordings, transcripts, or other public records of encrypted radio transmissions?
- What public safety concerns are raised by the inability of the news media to inform the public about breaking news or weather events that pose a risk to life or property if the media are unable to monitor public safety radio transmissions in real time?
- Is it possible to address the need for a limited amount of encryption capability by setting aside certain frequencies for this use, and keeping the remaining frequencies “in the clear”?

We offer the following in order to inform your discussion:

There is no HIPAA<sup>4</sup> implication in the move to encryption. HIPAA’s health information privacy provisions apply only to “covered entities,” which are defined in HIPAA rules<sup>5</sup> as follows:

*Covered entity means:*

*(1) A health plan.*

*(2) A health care clearinghouse.*

*(3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.*

Public safety agencies, such as ambulance services, thus are not covered by HIPAA’s privacy requirements.

There is nothing in the Federal Communications Commission’s rules for the narrowbanding migration, or in the Federal Emergency Management Agency’s grant guidance for funding for the migration, that requires a public safety agency to encrypt its radio transmissions. In fact, the U.S. Department of Homeland Security’s SAFECOM Program has published on its website a document from the Public Safety Wireless Network Program, titled Security Issues Report—Impediments and Issues on Using Encryption on Public Safety Radio Systems, which reaches this conclusion:

*The case for improved security in communications and system architecture through the use of encryption technologies still has not been made. Expense, coupled with the concern that less-than-ideal management resources and practices are available, remain significant reasons why radio system managers find it prohibitive to move encryption into their systems for consistently secured radio traffic.*

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<sup>4</sup> The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

<sup>5</sup> 45 CFR 160.103, which can be viewed at <http://www.gpo.gov/fdsys/pkg/CFR-2007-title45-vol1/pdf/CFR-2007-title45-vol1-sec160-103.pdf>

The report is at <http://tinyurl.com/cbe4wna><sup>6</sup>.

In conclusion, we feel that “security” is not a suitable reason for public officials to draw the shade over an established source of sunshine. While many law enforcement agencies have argued that encrypted communications will keep their personnel safer and prevent criminals from monitoring their radio traffic, they have offered little hard evidence that those concerns outweigh the longstanding public interest in the openness of government activities. The secrecy that results from encrypted public safety information also impedes the public’s right to know about matters of public concern and activities that are funded with public dollars.

We thank you for your attention to the foregoing, and for your exemplary service to the people of Maine.

Very truly yours,

Suzanne D. Goucher  
President, MFOIC

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<sup>6</sup> The full link is: [http://www.safecomprogram.gov/SiteCollectionDocuments/Security\\_Issues\\_Report%20-%20Impediments\\_and\\_Issues\\_on\\_Using\\_Encryption\\_on\\_Public\\_Safety\\_Radio\\_Systems.pdf](http://www.safecomprogram.gov/SiteCollectionDocuments/Security_Issues_Report%20-%20Impediments_and_Issues_on_Using_Encryption_on_Public_Safety_Radio_Systems.pdf)

**State of Maine**  
**DEPARTMENT OF PUBLIC SAFETY**  
**OFFICE OF THE COMMISSIONER**

PAUL R. LEPAGE  
GOVERNOR

JOHN E. MORRIS  
COMMISSIONER

SENT VIA E-MAIL

May 31, 2012

**MAINE RIGHT TO KNOW ADVISORY COMMITTEE**

Attn: The Honorable David R. Hastings III, Senate Chair  
The Honorable Joan M. Nass, House Chair

**SUBJECT: LAW ENFORCEMENT AND PUBLIC SAFETY AGENCIES' ENCRYPTED RADIO COMMUNICATIONS MATTER**

Senator Hastings, Representative Nass:

I understand the Maine Right to Know Advisory Committee is creating a subcommittee to examine the concern recently raised by the Maine Freedom of Information Coalition regarding the imminent ability law enforcement and public safety agencies will have to digitally encrypt radio communications between such agencies.

Given the mission of the Maine Department of Public Safety, as well as the serious public safety, officer safety, and citizen privacy issues that would presumably be discussed in relation to this matter, I am respectfully requesting that at least one person from my department be appointed as an informal member to the Right to Know Advisory Committee's "Encryption Subcommittee" – this, to ensure that the multiple perspectives our agency has on this issue may be shared as the subcommittee and full committee consider this very important topic.

Respectfully,



JOHN E. MORRIS, COMMISSIONER  
MAINE DEPARTMENT OF PUBLIC SAFETY

**RIGHT TO KNOW ADVISORY COMMITTEE  
ENCRYPTION SUBCOMMITTEE**

**AGENDA**

August 15, 2012

9:00 a.m.

Room 438, State House, Augusta

**Convene**

1. Welcome and introductions (Linda Pistner, Chair)
2. Information requested from staff at last meeting:
  - Federal laws/rules pertaining to encryption of emergency transmissions
  - Applicable state law
3. Department of Public Safety – provide a list of subject matter and situations that are or should be confidential when transmitted over the emergency/public safety systems (Lt. Don Pomelow and Major Grotton)
4. General discussion and development of report to full committee
5. Scheduling next meeting and agenda items (if needed)

**Adjourn**



**Response to Encryption Subcommittee request for information about federal or state law that may apply to the encryption of public safety radio transmissions.**

Prepared by Curtis Bentley, OPLA

August 15, 2012

As you recall, the Encryption Subcommittee asked staff to work with the AG to identify any federal or state laws/regulations/policies regarding the encryption (scrambling) of public safety radio transmissions. I have been working with Laura Yustak Smith on this request.

Federal law:

I did not locate any federal laws or rules that are clearly applicable to the encryption of police or first responder radio transmissions.

Laura contacted United States Attorney Mark Winter about the existence of any applicable federal laws or rules and he is unaware of any applicable federal law or regulation. Mr. Winter directed us to Michael Wilhelm, Deputy Chief of the Policy Division in the FCC's Public Safety and Homeland Security Bureau for information about any Federal Communication Commission rules or policies regarding encryption. Mr. Wilhelm stated that "[T]he Commission's rules do not require encryption of public safety communications. That said, encryption is commonly used, notably on tactical police channels."

I contacted Rob Turner, Chief Inspector, Tactical Operations Division, Office of Strategic Technology, U.S. Marshals Service regarding the protocol the U.S. Marshals Service uses to determine what radio transmissions to encrypt/scramble. He e-mailed me the following USMS **policy** statement. "All USMS radio communications must be encrypted with the current edition of USMS key. Unencrypted transmissions are allowed only in cases of exigent circumstances and to ensure interoperability in a critical incident" In response to my follow-up question about how the policy was developed he responded, "I wrote the policy with input from Chief deputies and operational users in the field. Our implementation of encryption wide scale is an officer safety enhancement. We cannot afford to have our enforcement operations, high threat prisoner movements and personal protection operations intercepted by the general public and distributed by the media."

State law:

Criminal History Record Information Act (Title 16, subchapter 8). This Act places restrictions on state criminal justice agencies, courts and the Office of the Attorney General regarding the dissemination of certain criminal justice "records." While radio transmission by criminal justice agencies may contain information that would be subject to the Act, it is unlikely en route radio transmissions would be considered "records" for

purposes of the Act. Once the radio transmission is recorded the provisions of the Act may apply.

Freedom of Access (Title 1, chapter 13). It is unlikely that the public access requirements of FOA would apply to police or first responder radio transmissions en route because such communications do not appear to fall under the definition of “public record” (1 MRSA § 402, sub-§ 3) or a “public proceeding” (1 MRSA § 402, sub-§ 2). Once the radio transmission is recorded the provisions of the Act may apply as well as the confidentiality provisions of Title 25, chapter 352 or other Maine statute.

Emergency Services Communications (Title 25, chapter 352) §2929. Confidentiality of system information (E-9-1-1). This statute makes certain E-9-1-1 call information confidential and defines “confidential information” as information “contained in any database, report, audio recording or other record of the bureau or a public safety answering point....” It is not clear that en route radio transmissions would be considered a database, report or recording for purposes of this statute.

Based on my review of the statutes and legislative history, it appears that the Legislature did not fully contemplate the interception of police and first responder radio transmissions by third parties when enacting these provisions of law.

**Maine Revised Statute Title 15, Chapter 102:  
INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS**

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## 15 §709. DEFINITIONS

The following words and phrases as used in this chapter, unless the context otherwise indicates, shall have the following meanings. [1973, c. 561, (NEW).]

**1. Communication common carrier.** "Communication common carrier" means any telephone or telegraph company.

[ 1973, c. 561, (NEW) .]

**1-A. Administration of criminal justice.** "Administration of criminal justice" has the same meaning as in Title 16, section 611, subsection 1.

[ 1987, c. 680, §1 (NEW) .]

**2. Contents.** "Contents," when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport or meaning of that communication.

[ 1973, c. 561, (NEW) .]

**3. Intercepting device.** "Intercepting device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

A. Any telephone or telegraph instrument, equipment or facility or any component thereof being used by a communication common carrier in the ordinary course of its business or extension telephones used by a subscriber to telephone service; or [1973, c. 561, (NEW).]

B. A hearing aid or similar device being used to correct subnormal hearing to not better than normal. [1973, c. 561, (NEW).]

[ 1973, c. 561, (NEW) .]

**4. Intercept.** "Intercept" means to hear, record or aid another to hear or record the contents of any wire or oral communication through the use of any intercepting device by any person other than:

A. The sender or receiver of that communication; [1979, c. 701, §11 (AMD).]

B. A person within the range of normal unaided hearing or subnormal hearing corrected to not better than normal; or [1973, c. 561, (NEW).]

C. A person given prior authority by the sender or receiver. [1979, c. 701, §11 (AMD).]

[ 1979, c. 701, §11 (AMD) .]

**4-A. Investigative officer.** "Investigative officer" means an employee of the Department of Corrections designated by the Commissioner of Corrections as having the authority to conduct investigations of offenses relating to the security or orderly management of a facility administered by the department.

[ 1997, c. 361, §1 (AMD) .]

**4-B. County jail investigative officer.** "County jail investigative officer" means an employee of a county jail designated by the county jail administrator as having the authority to conduct investigations of offenses relating to the security or orderly management of the county jail.

[ 1997, c. 361, §2 (NEW) .]

**5. Oral communications.** "Oral communications" means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

[ 1973, c. 561, (NEW) .]

**6. Person.** "Person" means any individual, partnership, association, joint stock company, trust or corporation, or any other legal entity, whether or not any of the foregoing is an officer, agent or employee of the United States, a state or a political subdivision of a state.

[ 1973, c. 561, (NEW) .]

**7. Wire communication.** "Wire communication" means any communication made in whole or in part through the use of facilities for transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception.

[ 1973, c. 561, (NEW) .]

SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 701, §11 (AMD). 1987, c. 680, §1 (AMD).  
1997, c. 361, §§1,2 (AMD).

## 15 §710. OFFENSES

**1. Interception, oral communications prohibited.** Any person, other than an employee of a common carrier as defined in this chapter, a law enforcement officer or an investigative officer as defined in this chapter, carrying out practices otherwise permitted by this chapter, who intentionally or knowingly intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire or oral communication is guilty of a Class C crime.

[ 1987, c. 680, §2 (AMD) .]

**2. Editing of tape recordings in judicial proceedings prohibited.** Any person who knowingly or intentionally edits, alters or tampers with any tape, transcription or other sound recording, or knows of such editing, altering or tampering, and presents that recording in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made and the original state of the recording, is guilty of a Class C crime.

[ 1979, c. 663, §96 (AMD) .]

**3. Disclosure, or use of wire or oral communications prohibited.** A person is guilty of a Class C crime if he:

A. Intentionally or knowingly discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or [1979, c. 663, §97 (RPR) .]

B. Intentionally or knowingly uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception. [1979, c. 663, §97 (RPR) .]

**4. Duty to report.** Any communications common carrier shall promptly report to the Attorney General any facts coming to its attention in the conduct of its business which may indicate a possible violation of this section and such carrier shall adopt reasonable rules to assure compliance with this subsection, provided

such carrier shall not be liable to any person who may claim an injury arising out of any such report, if made in good faith. Any person violating this subsection shall be subject to a civil penalty not to exceed \$5,000, payable to the State, to be recovered in a civil action.

[ 1979, c. 663, §98 (AMD) .]

**5. Possession of interception devices prohibited.** A person, other than an employee of a common carrier as defined in this chapter, a law enforcement officer or an investigative officer as defined in this chapter, carrying out practices otherwise permitted by this chapter, who has in his possession any device, contrivance, machine or apparatus designed or commonly used for intercepting wire or oral communications defined in this chapter, is guilty of a Class C crime.

[ 1987, c. 680, §3 (AMD) .]

**6. Sale of interception devices prohibited.** A person who sells, exchanges, delivers, barter, gives or furnishes or possesses with an intent to sell any device, contrivance, machine or apparatus designed or commonly used for the interception of wire or oral communications as defined in this chapter is guilty of a Class B crime. This subsection shall not include devices manufactured under written contract for sale to common carriers, law enforcement agencies and the Department of Corrections, provided that the production of any such device shall not have commenced prior to the signing of the contract by both parties.

[ 1987, c. 680, §4 (AMD) .]

#### SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 663, §§95-100 (AMD). 1987, c. 680, §§2-4 (AMD).

### 15 §711. CIVIL REMEDY

Any party to a conversation intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses such communications and shall be entitled to recover from any such persons: [1973, c. 561, (NEW) .]

**1. Damages.** Actual damages, but not less than liquidated damages, computed at the rate of \$100 per day for each day of violation; and

[ 1979, c. 663, §101 (AMD) .]

**2. Attorney's fee.** A reasonable attorney's fee and other litigation disbursements reasonably incurred.

[ 1973, c. 561, (NEW) .]

#### SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 663, §101 (AMD).

### 15 §712. EXCEPTIONS

**1. Switchboard operators, communication common carrier agent.** It is not a violation of this chapter for an operator of a switchboard or an officer, employee or agent of any communication common carrier, as defined in this chapter, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of the communication, provided that the communication common carriers

shall not utilize service for observing or random monitoring, except for mechanical or service quality control checks, nor shall any such officer, employee or agent use or disclose to another the contents as defined in this chapter of the communication so intercepted.

[ 1987, c. 680, §5 (NEW) .]

**2. Investigative officers.** It is not a violation of this chapter for an investigative officer, as defined in this chapter, or for an employee of the Department of Corrections acting at the direction of an investigative officer, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the administration of criminal justice, if:

A. Either the sender or receiver of that communication is a person residing in an adult or juvenile correctional facility administered by the Department of Corrections; and [2009, c. 93, §1 (AMD) .]

B. Notice of the possibility of interception is provided in a way sufficient to make the parties to the communication aware of the possibility of interception, which includes:

- (1) Providing the resident with a written notification statement;
- (2) Posting written notification next to every telephone at the facility that is subject to monitoring; and
- (3) Informing the recipient of a telephone call from the resident by playing a recorded warning before the recipient accepts the call. [1997, c. 361, §3 (AMD) .]

C. [1997, c. 361, §3 (RP) .]

This subsection does not authorize any interference with the attorney-client privilege.

[ 2009, c. 93, §1 (AMD) .]

**3. County jail investigative officer.** It is not a violation of this chapter for a county jail investigative officer, as defined in this chapter, or for a county jail employee acting at the direction of a county jail investigative officer to intercept, disclose or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the administration of criminal justice if:

A. Either the sender or the receiver of that communication is a person residing in an adult section of the county jail; and [1997, c. 361, §4 (NEW) .]

B. Notice of the possibility of interception is provided in a way sufficient to make the parties to the communication aware of the possibility of interception, which includes:

- (1) Providing the resident with a written notification statement;
- (2) Posting written notification next to every telephone at the jail that is subject to monitoring; and
- (3) Informing the recipient of a telephone call from the resident by playing a recorded warning before the recipient accepts the call. [1997, c. 361, §4 (NEW) .]

This subsection does not authorize any interference with the attorney-client privilege.

[ 1997, c. 361, §4 (NEW) .]

#### SECTION HISTORY

1973, c. 561, (NEW). 1973, c. 788, §61 (AMD). 1979, c. 701, §12 (AMD).  
1987, c. 680, §5 (RPR). 1995, c. 182, §1 (AMD). 1997, c. 361, §§3,4  
(AMD). 2009, c. 93, §1 (AMD).

## 15 §713. EVIDENCE

The contents of an interception are not admissible in court, except that the contents of an interception of any oral or wire communication that has been legally obtained under the laws of another jurisdiction in which the interception occurred or that has been legally obtained pursuant to section 712, subsection 2 or 3 is admissible in the courts of this State, subject to the Maine Rules of Evidence. [1997, c. 361, §5 (AMD) .]

### SECTION HISTORY

1979, c. 701, §13 (NEW). 1983, c. 379, (AMD). 1995, c. 182, §2 (AMD). 1997, c. 361, §5 (AMD).

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**STATE OF MAINE  
126<sup>TH</sup> LEGISLATURE**

**Seventh Annual Report  
of the  
RIGHT TO KNOW ADVISORY COMMITTEE**

**January 2013**

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Rep. Joan M. Nass  
Perry Antone Sr.  
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## EXECUTIVE SUMMARY

This is the seventh annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The 16 members are appointed by the Governor, the Chief Justice, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website: <http://www.maine.gov/legis/opla/righttoknow.htm>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2012, the Advisory Committee met on May 30, October 11, November 15, and November 29. The Advisory Committee established the Legislative Subcommittee, the Public Records Exceptions Subcommittee, the Encryption Subcommittee and the Bulk Records Subcommittee to assist it in conducting its work. All four subcommittees held meetings and made recommendations to the Advisory Committee.

The Advisory Committee was very fortunate to have the services of a Legal Extern of the Maine School of Law. Katherine Lybrand, currently a third year student at the Law School, worked with the Advisory Committee during the first semester of the 2012-2013 school year.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2012 recommendations and a summary of relevant Maine court decisions from 2012 on the freedom of access laws.

For its seventh annual report, the Advisory Committee makes the following recommendations, although not all the recommendations are unanimous:

- Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A;**
- Communicate to the Department of Health and Human Services about repealing two programs never implemented;**
- Amend the Community Right-to- Know Act to provide for more public access to information about hazardous substances;**
- Continue discussion and consideration of the confidentiality provision in the sentinel events reporting law;**
- Make no changes to the law regarding the encryption of radio transmissions from police and first responders;**
- Request that the Board of Trustees of the Maine Criminal Justice Academy consider creating a model encryption policy for consideration by local law enforcement agencies that reflects the current practices, and request that the board report back to the Advisory Committee on any decisions or actions taken pursuant to the request;**

- Request that the Public Access Ombudsman look at the confidentiality of email addresses collected by schools and municipalities and report back to the Advisory Committee;**
- Make no changes to the application of the Freedom of Access laws to the Maine Public Broadcasting Corporation;**
- Provide guidance through updates to the Frequently Asked Questions webpage and training for legislators with regard to the storage, management and retrieval of public officials' communications, including email;**
- Make available to agencies and legislative drafters templates for drafting specific confidentiality statutes;**
- Make no additional modifications to the Freedom of Access Act concerning bulk requests or bulk transfers of public records, with the understanding that concerns about bulk requests and bulk data transfers will most likely be revisited in the future (divided report);**
- Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report); and**
- Enact legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a transportation project (divided report).**

In 2013, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.

The Advisory Committee looks forward to a full year of activities and working with the Public Access Ombudsman, the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its seventh annual report.

## I. INTRODUCTION

This is the seventh annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at [www.maine.gov/legis/opla/righttoknowreports.htm](http://www.maine.gov/legis/opla/righttoknowreports.htm).

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. David R. Hastings III Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Joan M. Nass	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Perry Antone Sr.	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Shenna Bellows	<i>Representing the public, appointed by the President of the Senate</i>
Percy Brown Jr.	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Michael Cianchette	<i>Representing State Government interests, appointed by the Governor</i>
Richard Flewelling	<i>Representing municipal interests, appointed by the Governor</i>
Mary Ann Lynch	<i>Member of the Judicial Branch</i>
A.J. Higgins	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Mal Leary	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
William Logan	<i>Representing the public, appointed by the Speaker of the House</i>
Kelly Morgan	<i>Representing newspapers and other press interests, appointed by the President of the Senate</i>

Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Mike Violette (resigned May 30, 2012)	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>

Ted Glessner, an original member of the Right to Know Advisory Committee when it was created in 2006, resigned his membership after 6 years of service to the Advisory Committee representing the Judicial branch. The Advisory Committee thanks Mr. Glessner for his long-term service and his continuing interest in public access.

The complete membership list of the Advisory Committee, including contact information, is included as Appendix B.

## **II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES**

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's freedom of access laws;
- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;
- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- Examining inconsistencies in statutory language and proposing clarifying standard language; and

- Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to be able to work with the newly-appointed Public Access Ombudsman, former Special Assistant Attorney General Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

By law, the Advisory Committee must meet at least four times per year. During 2012, the Advisory Committee met on May 30, October 11, November 15, and November 29. The Advisory Committee established the Legislative Subcommittee, the Public Records Exceptions Subcommittee, the Encryption Subcommittee and the Bulk Records Subcommittee to assist it in conducting its work. All of the full committee meetings and subcommittee meetings were held in the Judiciary Committee Room of the State House in Augusta and open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage which can be found at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). Agendas, meeting materials and summaries of the meetings are included on the webpage.

### **III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES**

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's freedom of access laws. The Advisory Committee identified one court decision summarized below.

#### **2011 Maine Supreme Judicial Court Decision**

*MacImage of Maine LLC, et al. v Androscoggin County, et al.*, 2012 ME 44. The Supreme Judicial Court held that county registries of deeds must establish reasonable fees for responding to bulk requests for real estate records that are available to the public by law. The Law Court found that the fees charged by the counties for the transfer of bulk records were reasonable and the counties were not required to provide bulk transfers of the records at the price requested by a private entity. In making its ruling, the Law Court relied heavily on recently enacted legislation (Public Law 2011, chapter 378) that established fees and applied retroactively.

In 2010, this case was initiated in Superior Court by MacImage of Maine, LLC and its general manager, John Simpson, who brought suit against six counties seeking access to the computer database of records maintained by each county's registry of deeds. MacImage's plan to build a single website on which the land records of all counties are available for review and copying was dependent on MacImage's ability to obtain the records of the registries of deeds both initially and on a regular basis for updates. MacImage requested the electronic bulk transfer of the records from each county, which the counties were not willing or able to do at the price MacImage was willing to pay.

The Superior Court determined that the Legislature's 2010 amendment to Title 33, sections 651 and 751 made clear that the Title 33 statute, and not the fees provisions of the Freedom of Access Act, applies to the establishment of copying fees for the records of the registry of deeds in each county. The Court found that section 751 did not, however, authorize the counties to charge fees based on the overall cost of maintaining their data in electronic form. The Court then reviewed each county's fees for the bulk transfer of records to MacImage, and found that each county's fees were not reasonable and constituted constructive denial of MacImage's public records requests. The Court ordered each county to provide a download of the requested records using county-specific cost formulas.

After the counties had commenced their appeals, the Legislature enacted Public Law 2011, chapter 378, which repealed section 751, subsection 14, replaced that subsection with new statutory language, and provided a retroactive explanation of what qualified as a reasonable fee between September 1, 2009, and June 16, 2011, the effective date of the Act.

In vacating the Superior Court's ruling, the Law Court held that the real estate records held by the county registries of deeds, along with the indexes to those records, are available to the public pursuant to Title 33, section 651 and not through the more general provisions under the Freedom of Access Act (Title 1, section 402, subsection 3 and section 408 [now section 408-A]). It also noted that the Legislature through Public Law 2011, chapter 378, established reasonable fees for responding to record requests for records and indexes, including the transfer of electronic data. The Law Court held that the legislation is applicable to the disputed fees and that those fees fall within the parameters for "reasonable fees" established by that legislation.

#### **IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES**

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities and the nature of the requests received from the Legislature, the Advisory Committee reorganized its subcommittee structure in 2012. Four subcommittees were appointed: 1) Legislative; 2) Public Records Exceptions; 3) Bulk Records; and 4) Encryption. Senator Hastings and Representative Nass, the legislative members of the Advisory Committee, are ex officio members of each subcommittee.

***Legislative Subcommittee.*** The Legislative Subcommittee's focus is to serve as an advisor to the Legislature when legislation affecting public access is proposed and to respond to requests from

the Legislature or others to consider issues affecting public records and public access. Judy Meyer serves as chair of the Subcommittee and the following serve as members: Shenna Bellows, Michael Cianchette, Richard Flewelling, Mary Ann Lynch (who replaced Ted Glessner representing the Judicial Branch), Mal Leary, William Logan, Kelly Morgan, Linda Pistner and Harry Pringle.

During 2012, the Legislative Subcommittee had three meetings and was charged with several specific tasks.

*Review the status of Maine Public Broadcasting Network records under the Freedom of Access laws*

In 2011, the Advisory Committee was asked by Mike Brown, a newspaper reporter and columnist, to consider the issue after Maine Public Broadcasting Network, in response to a request for certain financial records, stated that MPBN was only required under the law to make proceedings of its board of directors public and records held by MPBN were not “public” under the FOA laws.

Mark Vogelzang, President and CEO of Maine Public Broadcasting Network, and James Zimpritch, legal counsel to MPBN, gave brief remarks to the Subcommittee explaining that MPBN’s board meetings and materials from those meetings are open to the public and that, under federal law and guidelines, annual tax filings with the Internal Revenue Service and certain donor information are made public. The request for job title and salary information about MPBN employees made by Mr. Brown raised concerns about the privacy of employees; although MPBN does receive some public funding, it was specifically established as a private, nonprofit corporation, not a state agency.

Mr. Vogelzang also stated that there were concerns about whether releasing the information would establish a precedent in addition to the belief that MPBN employees have an expectation of privacy. Mr. Zimpritch expressed concern that broadening the law to make MPBN’s records public would have unintended consequences and again noted the ability of the public to access MPBN’s audited financial statements and IRS Form 990.

The Subcommittee believed the current law strikes a good balance for both MPBN and the public but noted the law is also ambiguous and unclear about whether MPBN is only subject to the public proceedings part of the FOA laws. One member expressed concern that a broad change to the law may be problematic for MPBN and other quasi-state agencies.

The Subcommittee voted 5-0, with Kelly Morgan and Ms. Pistner abstaining, that the Subcommittee recommend no change in current law.

*Consider the use of technology for the purpose of remote participation by members of public bodies*

The Subcommittee reviewed the draft legislation previously developed by the Subcommittee to govern the ability of public bodies to allow the use of technology for remote participation of a

member. The Subcommittee also reviewed the written comments received by state agencies currently authorized by statute to conduct meetings through the use of technology: Finance Authority of Maine (FAME); Maine Commission on Governmental Ethics and Election Practices (Ethics Commission); Emergency Medical Services Board (EMS); and the Workers' Compensation Board.

Representatives of several agencies provided information to the Subcommittee as summarized below.

Bill Norbert, representing FAME and the Small Enterprise Growth Fund Board, explained that each agency uses their authorization to conduct meetings remotely only when necessary; the mechanism works well and all efforts are made to provide transparency to the public. The agencies prefer their current exception and, if the Subcommittee moved forward with the draft, Mr. Norbert highlighted concerns about the draft language, particularly the meaning of the terms "reasonably practical" and "simultaneous" in the context of the draft and the definition of an "emergency."

Jay Bradshaw of the EMS stated that the EMS uses remote technology to conduct EMS board meetings and hearings very effectively and efficiently, noting cost savings of up to \$1500 per meeting. With regard to the draft, Mr. Bradshaw expressed concern about the physical quorum requirement and the prohibition on conducting public hearings; the language as drafted would provide obstacles to the current manner in which EMS conducts board meetings and hearings on the rulemaking process.

Jan McNitt Adams of the Workers' Compensation Board also told the Subcommittee that the Board wants to preserve its current statutory authority although they do not have huge issues with the draft. Ms. McNitt Adams explained the authorization for telephone meetings has been in place since 2004. The Board has used the provision to help recruit and retain members as before the authorization was in place the Board had a fair amount of turnover.

The Ethics Commission provided written comment that also recommend that no changes be made that would affect their ability to conduct meetings remotely. In the letter, Jonathan Wayne, the Executive Director, explained the reasons why the Commission needs the authorization to conduct telephone meetings as necessary in the days leading up to an election to address complaints.

The Subcommittee voted 5-2 to recommend consideration by the full Advisory Committee of draft language that authorizes boards and commissions to adopt policies to allow members to participate from a remote location if certain minimum requirements are met. (In favor: Mr. Cianchette, Mr. Flewelling, Mr. Logan, Ms. Lynch, Ms. Morgan; against: Ms. Meyer, Ms. Pistner; Abstain: Mr. Pringle).



Review the storage, management and retrieval of public officials' communications, especially email

The Subcommittee invited the State Archivist to make a presentation on any best practices and recommended retention policies for elected officials' records. Public Law 2011, chapter 264 directs the Advisory Committee to examine the benefit of public disclosure of elected officials' emails and other records balanced with the availability of technology and other systems to maintain the records.

David Cheever, the State Archivist, provided an overview of the efforts of the State Archives and Records Center to assist state agencies and others on records management and preservation. Mr. Cheever pointed out that written guidance has been developed for records management and retention, including a separate manual for email and digital records.

With regard to email and digital records of State Government, Mr. Cheever explained that the state agency remains the custodian of the record and has responsibility for retrieval and access to the record although the Office of Information Technology is responsible for the maintenance and storage of the records. Mr. Cheever told the Subcommittee there are no easy answers in records management; email and digital records especially are a challenge for public and private entities, including the federal government. Because of the costs of developing the necessary technology, Maine will likely have to wait for the development of a proven, national solution.

Mr. Cheever said the current best practice is to retain an email if there is any question about whether it is a public record. He recommended that emails that are clearly not subject to retention should be deleted within 24 hours as back-up systems will retain copies after that period. Mr. Cheever thought that enforcement, especially for electronic records, would be very difficult and expensive to administer; for now, compliance is through the "honor system."

The Subcommittee agreed to suggest amendments to the Frequently Asked Questions section of the FOAA website to address the guidelines for retention of emails and digital records and to include links to the manuals developed by the State Archives and Records Center. It also agreed to recommend to the full Advisory Committee that the Legislature revise its training and education for legislators to include an explanation of the benefits of using the State-provided email addresses.

Review the status of email addresses collected by schools and towns

The Subcommittee used portions of three meetings to discuss potential legislation specifically designating parents' emails confidential when collected by their children's schools. The issue was brought to the Advisory Committee's attention by Representative Mary Pennell Nelson, who recommended that state law be clarified. The members reviewed draft legislation prepared by Harry Pringle that would make parents' email addresses and other personal information confidential when collected by school administrative units. Mr. Pringle outlined his thoughts in preparing the draft and noted that, while in his opinion parent email addresses are confidential under FERPA, there is no *specific* provision in federal law that protects the confidentiality of parents' email addresses separate and distinct from students' email addresses. The draft

proposes a new provision in Title 20-A which specifically protects the release of email addresses as well as other personal information about a parent that may be collected by a school.

The Subcommittee worked through each aspect of the draft but in the end was significantly divided on whether to recommend the entire draft legislation to the Advisory Committee. The members recognized that there were a number of issues still unresolved, and the extent of the problem is unclear. The Subcommittee agreed to postpone any action on the draft legislation and requested that the Public Access Ombudsman research the issue, collect information and report back to the Subcommittee next year.

*Consider creating drafting templates for exceptions to the Freedom of Access Act access requirements*

The Subcommittee developed draft templates for drafting specific confidentiality provisions concerning records provided by individuals and businesses to governmental agencies. Bill Norbert of the Finance Authority of Maine had provided suggested additions for clarification as to what information submitted by an applicant would be public.

The Subcommittee agreed to recommend to the Advisory Committee that the templates be used as guidance for drafting new statutes.

*See discussion of Advisory Committee recommendations in Section VI.*

**Public Records Exceptions Subcommittee.** The Public Records Exception Subcommittee's focus is to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; to examine inconsistencies in statutory language and to propose clarifying standard language. Shenna Bellows is the chair of the subcommittee and the following serve as members: Perry Antone, Percy Brown, AJ Higgins and Linda Pistner.

During 2012, the Public Records Exception Subcommittee held five meetings: July 16, August 8, September 13, November 8 and November 15.

*Title 22, section 8754, reporting of sentinel events*

The Subcommittee reviewed its previous work on the confidentiality of sentinel events reporting from 2011 and reviewed a copy of the most recent report submitted by the Department of Health and Human Services. Some members of the Subcommittee expressed support for repealing the confidentiality provisions completely, although it was acknowledged that it would cause a lot of concern and require a public hearing and thorough discussion involving many people. Other members agreed that a thorough process would be required, suggesting that either the full Advisory Committee or the Judiciary Committee of the Legislature could host that process.

Katherine Lybrand, the Advisory Committee's Law School Extern, presented to the Subcommittee a memo she had prepared describing other states' sentinel events reporting programs and the availability of information collected through those processes. Ms. Lybrand noted that a lot of states do include names of hospitals and information about the sentinel events

that were reported. Some state reports include comparisons among hospitals, as well as proposals or actions for improvement.

The Subcommittee received a written memorandum provided by the Maine Hospital Association, the Maine Medical Association, the Maine Osteopathic Association and the Medical Mutual Insurance Company of Maine that expressed their strong opposition to any changes in the confidentiality provision. In remarks to the Subcommittee, Jeff Austin of the Maine Hospital Association stressed that the quality of care in Maine is very high and that a great deal of information about quality of care that is already publicly available. Mr. Austin said that removing the confidentiality provision would have a significant chilling effect on the interest of hospitals to work with other groups on legislation, because the association would not be able to trust that compromises would hold. Mr. Austin said that robust sentinel event reporting is not necessarily an indication of poor care. Sentinel events reporting covers rare events; a better indicator of potential problems is the quality of routine care. Mr. Austin noted that the purpose of the reporting statute is not to inform the public but to improve care.

The Subcommittee also received comments from two quality care managers for local hospitals, who explained the importance of confidentiality in the sentinel event reporting process. They felt it has taken years to develop the “no blame” culture which allows everyone involved to be completely candid and allows the discovery of the causes of unexpected outcomes. Sometimes human errors are forced by system problems: was it a system error vs. a conscious deviation from the standard of care? Competence issues can be dealt with and are reported to hospital boards. The hospitals are transparent about quality indicators; information is readily available on two public websites: [www.GetBetterMaine.org](http://www.GetBetterMaine.org) and [www.HospitalCompare.hhs.gov](http://www.HospitalCompare.hhs.gov). Both stressed that the quality data available on the websites are more specific and more useful than sentinel events reports.

A representative of the Department of Health and Human Services also told the Subcommittee that DHHS greatly values the confidentiality provided in current law. If an immediate risk exists, information is turned over to the licensing personnel who can take action quickly. It is also important to have follow up plans – need to know what to do, and who will do what when specific events do occur. The “no blame” philosophy underlying the current law is really important.

The Subcommittee members tentatively agreed that full disclosure of all information provided to DHHS through the sentinel events reporting program would most likely be counter-productive. The challenge is to find what information is helpful to people in making informed health care decisions. Ms. Bellows said transparency is an important factor in increasing public trust, and Chief Antone said the hospitals must be permitted to maintain their investigative process. The members agreed to table the issue until 2013 with the understanding that more information from other states, coupled with good discussions with the hospitals and quality care professionals, will identify common ground with regard to providing useful information to the public.

*Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act*

The “Community Right-to-Know Act” was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public’s right to access information collected by the Department. Trade secrets are completely protected.

The Right to Know Advisory Committee asked for guidance from two joint standing committees of the Legislature: Environment and Natural Resources (which oversees other toxic and hazardous substances programs) and Health and Human Services (which oversees the Department of Health and Human Services). HHS responded by deferring to ENR, which did not respond before the 125th Legislature, Second Regular Session adjourned.

The Subcommittee studied this issue and worked through different draft proposals, resulting in a unanimous recommendation. The members agreed that rather than allowing the claim of a “trade secret” to prohibit access, the burden should be on the entity using or storing the toxic or hazardous substance to show that it would be subject to confidentiality under the general provisions of the Freedom of Access Act, e.g. records within the scope of a privilege protected from discovery. The members also voted to remove the 50-mile radius residency restriction on access to the information collected by DHHS under this program.

*Title 22, section 3188, related to the Maine Managed Care Insurance Plan*

*Title 22, section 3192, related to the Community Health Access Program*

Two programs that were enacted and never implemented are the Maine Managed Care Insurance Plan and the Community Health Access Program. The Right to Know Advisory Committee requested assistance from the Health and Human Services Committee on both of these programs. In a letter to the Advisory Committee in January 2012, HHS recommended that both programs be repealed. The Judiciary Committee chose not to include the repeal in LD 1804, An Act to Implement the Recommendations of the right to Know Advisory Committee Concerning Public Records Exceptions because the proposed repeals had not had a public hearing.

The Subcommittee voted 5-0 to keep the confidentiality provision, while sending a letter to the Department of Health and Human Services with the suggestion that if the Department believes the statutory language is not necessary, then the Department could propose repeal in departmental legislation.

*Public-private partnership projects under Title 23, section 4251*

At the July 16 meeting, the Subcommittee heard concerns expressed by members of the public about the confidentiality provision related to public-private projects in Title 23, Section 4251. The Natural Resources Council of Maine also expressed opposition to the confidentiality provision in current law, noting that one of the criteria that the MaineDOT must consider before approving a project – which then makes the information public – is that the project is in the public interest. How would the Department be able to make that decision without any public input?

In response, the Subcommittee agreed to review the provision. The Subcommittee reiterated that the Subcommittee's mission is not to examine or be involved in the East-West Highway study, but to weigh whether the confidentiality provision in Section 4251, which may eventually be applicable if and when a private entity submits a proposal for a qualifying project, appropriately balances the interests involved.

The Subcommittee invited the Department of Transportation to update the questionnaire on Section 4251 (last reviewed the year it was enacted in 2010). In its updated questionnaire, the Department still believes that the confidentiality provision is appropriate, and reported that it has received no documents from any entity making a proposal covered by the new statute.

There was some interest in modifying the public records exception, but the Subcommittee initially voted three in favor of leaving the language as is and two in favor of repealing subsection 10.

After the initial Subcommittee vote, Linda Pistner provided a rough draft (labeled Minority Report B) for the purpose of discussing options for making at least some information about public-private partnerships projects public before the current law allows release. Her 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. Because Ms. Pistner believed the proposal needed fine-tuning, Minority Report B was withdrawn as an official proposal to the Subcommittee before it was voted on.

After reviewing both proposed minority reports, the MaineDOT took the position that, although there is an appreciation for the issues raised, any weakening of the confidentiality provision would stifle the chance of proposals. MaineDOT reiterated that the Department has not had any proposals yet. Representatives of the MaineDOT said it is not that the Department opposes changes, but that the real world consequences of removing confidentiality must be part of the discussion. MaineDOT is happy to consider anything. A representative of the Natural Resources Council of Maine expressed concerns that the public reporting requirement proposed in the second minority report could be avoided easily, and continued to support the repeal of blanket confidentiality.

The three Subcommittee members who initially voted to keep the current law as is remained opposed to any changes to the confidentiality provision. The members expressed confidence in the ability of the MaineDOT and the Legislature to appropriately handle the process under the current law. Members also recognized that, while some information about large projects should be available to the public, supporting free enterprise means allowing the development of plans without revealing trade secrets and other information to competitors. A business should have the ability to develop what it wants to do until an agreement or just before an agreement is entered into with the State.

Two members of the Subcommittee supported an amendment to Section 4251 that would repeal the confidentiality provision and make clear that information and records submitted to the Department of Transportation about public-private partnerships are public pursuant to the freedom of access laws. These members contended that the amendment provides for transparency and for consistency across agencies. Members also expressed concern about the confidentiality for potential projects being used to the detriment of landowners or homeowners.

Ms. Pistner said she did not want to open all of the records completely as proposed in Minority Report A, but believed that every process needs a range of views earlier in the process than the current law allows for these public-private partnership projects.

The Subcommittee voted 3-2 in favor of no change, with one abstention. (Representative Nass, Chief Antone and Commissioner Brown voting in the majority; Ms. Bellows and Mr. Higgins supporting Minority Report A; Ms. Pistner abstaining.) Mr. Higgins noted that if there is support for a middle ground in the full Advisory Committee, he may support that rather than repealing the confidentiality completely.

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

During 2012, the Public Records Exception Subcommittee reviewed over 90 existing public records exceptions found in Titles 26 through 39-A. The subcommittee completed review of 64 existing public records exceptions, and tabled the remainder for continued analysis and discussion in 2013. In its review, the Subcommittee sought input from the State agencies responsible for administering the public records exceptions and a number of interested parties affected by specific exceptions, including the Department of Labor, the Bureau of Human Resources within the Department of Administrative and Financial Services, the State Board of Arbitration and Conciliation, the Maine State Library, the Maine Historic Preservation Commission, the Bureau of Motor Vehicles of the Department of the Secretary of State, the Department of Health and Human Services, the Bureau of Insurance, the Maine Department of Transportation, the Maine Emergency Medical Services Board, the Nursing Board, the Bureau of Consumer Credit Protection, the Department of Public Safety, the Bureau of Securities Regulation of the Department of Professional and Financial Regulation, the Board of Licensure in Medicine, the Maine Real Estate Commission, the State Treasurer, the Department of Corrections, the Judicial Branch, the Public Utilities Commission, Maine Revenue Services, the Department of Conservation, the Wild Blueberry Commission, the Bureau of Veterans' Affairs and the Maine Emergency Management Agency within the Department of Veterans and Emergency Management, the Department of Environmental Protection, the Board of Environmental Protection, the Workers' Compensation Board, the Maine Hospital Association, the Maine Trial Lawyers' Association and the Medical Mutual Insurance Company of Maine. Many municipalities also provided the Subcommittee with quantitative and practical information and recommendations.

*See discussion of Advisory Committee's recommendations in Section VI.*

**Bulk Records Subcommittee.** The Bulk Records Subcommittee's focus is to continue the Advisory Committee's consideration of how the freedom of access laws apply to bulk records requests. Michael Cianchette is the chair of the subcommittee and the following serve as members: Perry Antone, Percy Brown, Richard Flewelling, Mal Leary and Judy Meyer.

During 2012, the Bulk Records Subcommittee held one meeting on August 23, 2012, and at the request of the Advisory Committee reviewed the Law Court Decision in *MacImage of Maine LLC, et al. v. Androscoggin County, et al.* 2012 ME 44 (see Section III of this report). In light of that case, the Subcommittee considered whether additional action on the subject was needed.

The Subcommittee reviewed an outline of the Bulk Data Services offered by InforME on behalf of several state agencies, including information about the number of requests, fees for access and the number of records sold.

The Subcommittee noted that the Law Court's decision settled the issues of fees that may be charged for complying with bulk record requests with regard to the Registries of Deeds but did not provide any particular guidance for the State and local governments with regard to requests under FOAA for bulk records. The Subcommittee was also informed that the state courts faced similar issues with bulk records requests and are struggling to find resources to respond to requests in the spirit of openness while maintaining the court's ongoing operations. It was pointed out that State agencies make available various categories of bulk data through InforME and establish fees for access to that data through rulemaking.

The Subcommittee discussed recent legislative changes (endorsed by the Advisory Committee) that clarify an agency's responsibility under FOAA is to provide information in the medium in which it is stored. Members of the Subcommittee felt the new law strikes the appropriate balance for both the person making the request for records and the agency fulfilling the request.

The Subcommittee unanimously agreed to recommend that the Advisory Committee take no action; additional statutory changes are not needed at this time.

*See discussion of Advisory Committee's recommendations in Section VI.*

**Encryption Subcommittee.** The Advisory Committee established the Encryption Subcommittee to review and consider the concerns outlined in the Maine Freedom of Information Coalition's letter of April 27, 2012 regarding the possible increase in the encryption (scrambling) of radio transmissions by public safety agencies after switching from the current analogue radio system to a digital radio system. Linda Pistner is the chair of the subcommittee and the following serve as members: Rep. Joan Nass, Perry Antone, Joe Brown, Mike Cianchette, AJ Higgins, Mal Leary and Judy Meyer.

In 2012, the Encryption Subcommittee held two meetings on July 16 and August 15 and heard testimony from the Maine Freedom of Information Coalition, Maine Association of Broadcasters and the Department of Public Safety.

### Testimony on the use of Encryption

Suzanne Goucher representing the Maine Freedom of Information Coalition and Maine Association of Broadcasters reiterated the concerns, outlined in the Maine Freedom of Information Coalition's letter of April 27, 2012, to the Maine Right to Know Advisory Committee regarding the possible increase in the encryption of radio transmissions by public safety agencies after switching from an analogue radio system to a digital radio system. Ms. Goucher said the media uses analogue scanners as its primary tool to monitor public safety matters and stated that there are not any objections about continuing to encrypt those communications that are currently encrypted (hostage negotiations, tactical, SWAT Team transmissions, etc.). She felt that expanding the use of encryption would cause headaches for the media and create a public relations issue.

Representing the Department of Public Safety were Col. Robert Williams, Lt. Col. Raymond Bessette, Major Chris Grotton, and Lt. Donald Pomelow. Col. Williams stated that currently there isn't an issue with encryption and there are no plans to increase its use because the police derive benefits from having transmissions open to the public. He stated that the department only uses encryption for public safety and the safety of the department's officers. The FCC mandated that states narrowband communications by January 2013.

Lt. Col. Bessette said the Department does not have any protocols or rules on encryption and each agency has the ability to decide what transmissions should be encrypted. He said no one is asking for additional encryption because each entity wants the ability to know what the others are doing. He said that the Maine Criminal Justice Academy provided training only for radio system operation not for encryption.

Major Grotton said the goal of the department is to keep general radio transmissions open and transparent to the public and that there are no plans to encrypt anything beyond what has always been encrypted. Moving to a digital system will require people who want to listen in on those calls to use a compatible scanner but nothing new will be encrypted.

Major Grotton estimated that approximately 1-2% of all radio transmissions (approximately 55 tactical operations annually) are encrypted. He said that the on-scene commander makes the decision to switch to an encrypted frequency.

Wayne Gallant representing the Office of Information and Technology said there is a common misunderstanding that digital implies encryption which it does not; encryption is done in addition to going to digital.

### Federal and state law review

The Subcommittee with the assistance of Laura Yustak Smith of the Office of the Attorney General discussed the potential applicability of federal and state laws to the encryption of certain police and first responder radio transmissions. The Subcommittee discussed the potential applicability of Maine's Freedom of Access Act (1 MRSA, chapter 13) and Maine's law regarding the interception of wire and oral communications (15 MRSA, chapter 102). Ms. Smith



said that encrypted radio transmissions might be considered “oral communications” as defined in the statute because the act of encrypting radio transmissions could indicate an expectation that the communications are not open to the public. Title 15 MRSA, section 709, subsection 5 defines “oral communications” to mean “any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”

General discussion by the Subcommittee

Some Subcommittee members felt there was a valid concern about the potential for the increased use of encryption and that there should be a balance between the needs of the police and first responders and public access. Other members stressed that there currently is no problem to fix and that changing the law now may have an unforeseen impact on police and first responders.

The Subcommittee recognized that there was a considerable amount of confusion caused by the switch from analogue to digital, but the switch itself would not increase encryption. The Subcommittee also acknowledged that there are no laws or rules that prevent the agencies or first responders from increasing the use of encryption. Historically encryption was used sparingly, because freely sharing information with other entities and the public creates efficiencies.

One Subcommittee member made the point that, if en route radio transmissions become “public records” under the law, then confidential information sent via these transmissions would have to be protected en route which is not feasible. Another member noted that the Freedom of Access Act was not intended to deal with oral communications and if there is a policy issue to resolve it may be better dealt with under some other provision of law.

Subcommittee recommendations

The Encryption Subcommittee voted unanimously to recommend to the Advisory Committee that no changes be made to current law. The Subcommittee unanimously agreed to recommend to the Advisory Committee that it send a letter to the Board of Trustees of the Maine Criminal Justice Academy requesting that it consider creating an encryption policy for law enforcement that reflects the current practices and to have the Board report back to the Advisory Committee on any decisions or actions taken pursuant to this request.

*See discussion of Advisory Committee’s recommendations in Section VI.*

**V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN SIXTH ANNUAL REPORT**

The Right to Know Advisory Committee made several recommendations in its sixth annual report. The actions taken in 2012 as a result of those recommendations are summarized below.

<b>Recommendation:</b> Continue without modification, amend and	<b>Action:</b> The Judiciary Committee accepted the recommendations of the Advisory Committee with regard to specific public
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repeal the specified existing public records exceptions in Titles 22 through 25;	records exceptions as proposed in <i>LD 1804, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions</i> , enacted as Public Law 2011, chapter 524.
<b>Recommendation:</b> Support the revision of the Criminal History Record Information Act proposed by the Criminal Law Advisory Commission;	<b>Action:</b> The Criminal Law Advisory Commission postponed submitting the legislation until the 126th Legislature.
<b>Recommendation:</b> Make no distinction under the freedom of access laws for a request for bulk records with regard to the fees for access or the purpose for which the request is made;	<b>Action:</b> The Legislature enacted Public Law 2011, chapter 508 (SLG), which the Law Court interpreted as applicable to the requests for records of the county registries of deeds that were the subject of the pending litigation. See <i>MacImage of Maine LLC, et al. v. Androscoggin County, et al.</i> , 2012 ME 44. No further legislation was considered.
<b>Recommendation:</b> Enact legislation to require an agency or official to provide an estimate of the time within which the agency or official will comply with a public records request (alternative minority recommendation);	<b>Action:</b> At the end of the First Regular Session of the 125th Legislature, the Judiciary Committee requested the Right to Know Advisory Committee to review <i>LD 1465, An Act To Amend the Laws Governing Freedom of Access</i> , and make recommendations to the Second Regular Session of the 125th Legislature. The Judiciary Committee reported out LD 1465 Ought to Pass as Amended, the Committee Amendment consisting of the recommendations of the Right to Know Advisory Committee. Public Law 2011, chapter 662, Section 5, includes this recommendation as Title 1, section 408-A, subsection 3.
<b>Recommendation:</b> Enact legislation to increase the hourly fee that may be charged for the actual cost of searching for, retrieving and compiling the requested public record from \$10 per hour to \$15 per hour request;	<b>Action:</b> At the end of the First Regular Session of the 125th Legislature, the Judiciary Committee requested the Right to Know Advisory Committee to review <i>LD 1465, An Act To Amend the Laws Governing Freedom of Access</i> , and make recommendations to the Second Regular Session of the 125th Legislature. The Judiciary Committee reported out LD 1465 Ought to Pass as Amended, the Committee Amendment consisting of the recommendations of the Right to Know Advisory Committee. Public Law 2011, chapter 662, Section 5, includes this recommendation as Title 1, section 408-A, subsection 8.
<b>Recommendation:</b> Enact legislation to clarify that an agency or official shall provide access to an	<b>Action:</b> At the end of the First Regular Session of the 125th Legislature, the Judiciary Committee requested the Right to Know Advisory Committee to review <i>LD 1465, An Act To</i>

<p>electronically stored record in the available medium of the requester's choice, which is defined as a printed document of the public record or the medium in which the record is stored, except that an agency or official is not required to provide access to a computer file if the agency or official has no ability to separate or prevent disclosure of any confidential information contained in the file;</p>	<p><i>Amend the Laws Governing Freedom of Access</i>, and make recommendations to the Second Regular Session of the 125th Legislature. The Judiciary Committee reported out LD 1465 Ought to Pass as Amended, the Committee Amendment consisting of the recommendations of the Right to Know Advisory Committee. Public Law 2011, chapter 662, Section 5, includes this recommendation as Title 1, section 408-A, subsection 7.</p>
<p><b>Recommendation:</b> Enact legislation to require each State agency, county, municipality, school unit, school board and regional or other political subdivision to designate an existing employee as public access officer and require public access officers to complete the same training in the freedom of access laws as elected officials;</p>	<p><b>Action:</b> At the end of the First Regular Session of the 125th Legislature, the Judiciary Committee requested the Right to Know Advisory Committee to review <i>LD 1465, An Act To Amend the Laws Governing Freedom of Access</i>, and make recommendations to the Second Regular Session of the 125th Legislature. The Judiciary Committee reported out LD 1465 Ought to Pass as Amended, the Committee Amendment consisting of the recommendations of the Right to Know Advisory Committee. Public Law 2011, chapter 662, Section 8, includes this recommendation as Title 1, section 413.</p>
<p><b>Recommendation:</b> Enact legislation to increase the maximum penalty to \$5,000 for willful violation of the freedom of access laws (minority recommendation);</p>	<p><b>Action:</b> The Judiciary Committee did not include this recommendation in the Committee Amendment to <i>LD 1465, An Act To Amend the Laws Governing Freedom of Access</i>.</p>
<p><b>Recommendation:</b> Support funding for a full-time Ombudsman position within the Department of Attorney General; and</p>	<p><b>Action:</b> At the end of the First Regular Session of the 125th Legislature, the Judiciary Committee requested the Right to Know Advisory Committee to review <i>LD 1465, An Act To Amend the Laws Governing Freedom of Access</i>, and make recommendations to the Second Regular Session of the 125th Legislature. Governor LePage included one-half of the</p>

	<p>funding in the Supplemental Budget, LD 1903, Public Law 2011, chapter 655, Part A, section A-3. The Judiciary Committee reported out LD 1465 Ought to Pass as Amended, the Committee Amendment consisting of the recommendations of the Right to Know Advisory Committee, that included full-funding. Senate Amendment "A" revised the funding to one-half. Public Law 2011, chapter 662, Section 25 includes funding to increase the part-time Ombudsman position to a full-time position.</p>
<p><b>Recommendation:</b> Enact legislation concerning the confidentiality of working papers of the Office of Governor to mirror the existing confidentiality exception available for working papers of the Legislature (majority recommendation).</p>	<p><b>Action:</b> The Judiciary Committee considered <i>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</i>. The Judiciary Committee split three ways. Committee Report A, provided a limited, temporary exception; Committee Report B was Ought Not to Pass; and Committee Report C replaced the bill and proposed to repeal the Legislature's working papers confidentiality provision (Title 1, section 402, subsection 3, paragraph C). LD 1805 died in concurrence.</p>

## VI. RECOMMENDATIONS

During 2012, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

**Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A**

As required by law, the Advisory Committee began its review of the existing public records exceptions identified in Title 26 through Title 39-A. The Advisory Committee's recommendations are summarized below and are also posted at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm).

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification.

- ◆ Title 26, section 43, relating to the names of persons, firms and corporations providing information to the Department of Labor, Bureau of Labor Standards
- ◆ Title 26, section 665, subsection 1, relating to records submitted to the Director of Labor Standards within the Department of Labor by an employer concerning wages
- ◆ Title 26, section 685, subsection 3, relating to substance abuse testing by an employer
- ◆ Title 26, section 939, relating to information disclosed by a party to the State Board of Arbitration and Conciliation

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- ◆ Title 26, section 939, relating to information disclosed by a party to the State Board of Arbitration and Conciliation
- ◆ Title 26, section 1082, subsection 7, relating to employers' unemployment compensation records concerning individual information
- ◆ Title 27, section 121, relating to library records concerning identity of patrons and use of books and materials
- ◆ Title 27, section 377, relating to the location of a site in possession of a state agency or subject to a preservation agreement for archeological research. The Maine State Museum and the Maine Historic Preservation Commission recommend amending the statute to protect a broader range of sites; the Advisory Committee suggests that such legislation, not within the purview of the Advisory Committee, be pursued by the supporting entities. See the letter to the Director of the Maine State Museum in Appendix D.
- ◆ Title 29-A, section 255, subsection 1, relating to motor vehicle records when a protection order is in effect
- ◆ Title 29-A, section 1258, subsection 7, relating to a person's competency to operate a motor vehicle
- ◆ Title 30-A, section 503, subsection 1, relating to county personnel records
- ◆ Title 30-A, section 2702, subsection 1, relating to municipal personnel records
- ◆ Title 30-A, section 4706, subsection 1, relating to municipal housing authorities
- ◆ Title 30-A, section 5242, subsection 13, relating to tax increment financing districts
- ◆ Title 32, section 85, subsection 3, relating to criminal history record information for an applicant seeking initial licensure by the Emergency Medical Services Board
- ◆ Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee
- ◆ Title 32, section 85, subsection 3, relating to criminal history record information for an applicant seeking initial licensure by the Emergency Medical Services Board
- ◆ Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee
- ◆ Title 32, section 85, subsection 3, relating to criminal history record information for an applicant seeking initial licensure by the Emergency Medical Services Board
- ◆ Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee
- ◆ Title 32, section 91-B, subsection 1, paragraph A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board
- ◆ Title 32, section 91-B, subsection 1, paragraph B, relating to confidential information as part of application for credentialing by Emergency Medical Services Board
- ◆ Title 32, section 91-B, subsection 1, paragraph C, relating to information submitted to the trauma incidence registry under section 87-B
- ◆ Title 32, section 91-B, subsection 1, paragraph D, relating to examination questions used for credentialing by Emergency Medical Services Board
- ◆ Title 32, section 2105-A, subsection 3, relating to information provided by a health care facility to the State Board of Nursing that identify a patient

- ◆ Title 32, section 2109, relating to personal contact and health information of nurse applicants and licensees
- ◆ Title 32, section 2600-A, relating to personal contact and health information of osteopathic physician applicants and licensees
- ◆ Title 32, section 3300-A, relating to Board of Licensure in Medicine personal contact and health information about applicants and licensees
- ◆ Title 32, section 6115, subsection 1, relating to financial information provided to the Director of the Office of Consumer Credit Regulation within the Department of Professional and Financial Regulation: money transmitters
- ◆ Title 32, section 9418, relating to applications for private security guard license
- ◆ Title 32, section 11305, subsection 3, relating to administration of the Maine Commodity Code by the Securities Administrator
- ◆ Title 33, section 1971, subsection 4, relating to information derived from unclaimed property reports
- ◆ Title 34-A, section 1212, relating to personal information of Department of Corrections employees and contractors
- ◆ Title 34-A, section 1216, subsection 1, relating to orders of commitment, medical and administrative records, applications and reports pertaining to any person receiving services from Department of Corrections
- ◆ Title 34-A, section 1216, subsection 6, relating to documents used to screen or assess clients of the Department of Corrections
- ◆ Title 34-A, section 9877, subsection 4, relating to the release by the Interstate Commission for Adult Offender Supervision of records that adversely affect personal privacy rights or proprietary interests
- ◆ Title 34-A, section 9903, subsection 8, relating to the release by the Interstate Commission for Juveniles of records that adversely affect personal privacy rights or proprietary interests
- ◆ Title 34-B, section 1207, subsection 1, relating to mental health and mental retardation orders of commitment and medical and administrative records, applications and reports pertaining to any DHHS client
- ◆ Title 34-B, section 1223, subsection 10, relating to information about a person with mental retardation or autism accessed by the Maine Developmental Services Oversight and Advisory Board
- ◆ Title 34-B, section 1931, subsection 6, relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board
- ◆ Title 34-B, section 3864, subsection 5, relating to mental health involuntary commitment hearings
- ◆ Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification
- ◆ Title 34-B, section 5005, subsection 6, relating to records and accounts related to request for action by Office of Advocacy for person with mental retardation or autism
- ◆ Title 34-B, section 5475, subsection 3, relating to mental retardation judicial certification hearings
- ◆ Title 34-B, section 5476, subsection 6, relating to mental retardation judicial commitment hearings

- ◆ Title 34-B, section 5605, subsection 15, relating to records of persons receiving mental retardation or autism services
- ◆ Title 34-B, section 7014, subsection 1, relating to court proceedings concerning sterilization
- ◆ Title 35-A, section 114, subsection 1, relating to utility personnel records, not open to the Public Utilities Commission
- ◆ Title 35-A, section 704, subsection 5, relating to utility records concerning customer information, Consumer Assistance Division
- ◆ Title 35-A, section 1311-A, relating to Public Utilities Commission protective orders
- ◆ Title 36, section 191, relating to tax returns
- ◆ Title 36, section 581-G, subsection 3, relating to addresses, telephone numbers, electronic mail addresses of forest landowners owning less than 1,000 acres
- ◆ Title 36, section 841, subsection 2, relating to property tax abatement application information and proceedings
- ◆ Title 36, section 4315, subsection 1-A, relating to the transportation of wild blueberries
- ◆ Title 36, section 4316, subsection 4, relating to wild blueberries audits by Department of Agriculture
- ◆ Title 36, section 6760, relating to employment tax increment financing
- ◆ Title 37-B, section 506, relating to Department of Defense, Veterans and Emergency Management, Bureau of Maine Veterans' Services benefits
- ◆ Title 38, section 100-A, subsection 1, relating to complaints and investigative records concerning vessel pilots
- ◆ Title 38, section 345-A, subsection 4, relating to information submitted to the Department of Environmental Protection and Board of Environmental Protection concerning trade secrets

The Advisory Committee recommends, with one dissenting vote, that the following exceptions in Titles 26 through 39-A be continued without modification.

- ◆ Title 29-A, section 1401, subsection 6, relating to driver's license digital images (Ms. Bellows would amend to remove exception for law enforcement)
- ◆ Title 29-A, section 253, relating to motor vehicle records concerning certain nongovernmental vehicles (Ms. Bellows would repeal the confidentiality because it appears redundant)

The Advisory Committee recommends that the following public records exceptions be amended. *See draft legislation in Appendix C.*

- ◆ Title 26, section 3, relating to information, reports and records of the Director of Labor Standards within the Department of Labor
- ◆ Title 26, section 934, relating to report of the State Board of Arbitration and Conciliation in labor dispute
- ◆ Title 29-A, section 152, subsection 3, relating to the Secretary of State's data processing information files concerning motor vehicles
- ◆ Title 29-A, section 517, subsection 4, relating to motor vehicle records concerning unmarked law enforcement vehicles

- ◆ Title 38, section 585-B, subsection 6, paragraph C, relating to mercury reduction plans for air emission source emitting mercury
- ◆ Title 38, section 585-C, subsection 2, relating to the hazardous air pollutant emissions inventory

The Advisory Committee recommends that the following public record exception be repealed because the general confidentiality provision protecting information technology systems in Title 1, section 402, subsection 3, paragraph M covers the information technology concerns, and the federal Driver Privacy Protection Act covers the digital and other personal information contained in the system. *See draft legislation in Appendix C.*

- ◆ Title 29-A, section 257, relating to the Secretary of State's motor vehicle information technology system

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification for now so that the Advisory Committee can continue to evaluate the exceptions in 2013.

- ◆ Title 28-A, section 755, relating to liquor licensees' business and financial records
- ◆ Title 30-A, section 503, subsection 1-A, relating to county personnel records concerning the use of force
- ◆ Title 30-A, section 2702, subsection 1-A, relating to municipal personnel records concerning the use of force
- ◆ Title 32, section 2599, relating to medical staff reviews and hospital reviews – osteopathic physicians
- ◆ Title 32, section 3296, relating to Board of Licensure in Medicine medical review committees
- ◆ Title 32, section 13006, relating to real estate grievance and professional standards committees hearings
- ◆ Title 32, section 16607, subsection 2, relating to records obtained or filed under the Maine Securities Act
- ◆ Title 34-A, section 5210, subsection 4, relating to the State Parole Board report to the Governor
- ◆ Title 35-A, section 1311-B, subsections 1, 2 and 4, relating to public utility technical operations information
- ◆ Title 35-A, section 1316-A, relating to Public Utilities Commission communications concerning utility violations
- ◆ Title 35-A, section 8703, subsection 5, relating to telecommunications relay service communications
- ◆ Title 35-A, section 9207, subsection 1, relating to information about communications service providers
- ◆ Title 36, section 575-A, subsection 2, relating to forest management and harvest plan provided to Bureau of Forestry and information collected for compliance assessment for Tree Growth Tax Law
- ◆ Title 36, section 579, relating to the Maine Tree Growth Tax Law concerning forest management plans



- ◆ Title 36, section 1106-A, subsection 3, paragraph D, relating to forest management and harvest plan made available for Farm and Open Space Tax Law
- ◆ Title 37-B, section 708, subsection 3, relating to documents collected or produced by the Homeland Security Advisory Council
- ◆ Title 37-B, section 797, subsection 7, relating to Department of Defense, Veterans and Emergency Management, Maine Emergency Management Agency reports of hazardous substance transportation routes
- ◆ Title 38, section 414, subsection 6, relating to records and reports obtained by the Board of Environmental Protection in water pollution control license application procedures
- ◆ Title 38, section 470-D, relating to individual water withdrawal reports
- ◆ Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans
- ◆ Title 38, section 1610, subsection 6-A, paragraph F, relating to annual sales data on the number and type of computer monitors and televisions sold by the manufacturer in this State over the previous 5 years
- ◆ Title 38, section 1661-A, subsection 4, relating to information submitted to the Department of Environmental Protection concerning mercury-added products
- ◆ Title 38, section 2307-A, subsections 1 and 5, relating to information submitted to the Department of Environmental Protection concerning toxics use and hazardous waste reduction (REPEALED 7/1/12)
- ◆ Title 39-A, section 153, subsection 5, relating to the Workers' Compensation Board abuse investigation unit
- ◆ Title 39-A, section 153, subsection 9, relating to the Workers' Compensation Board audit working papers
- ◆ Title 39-A, section 355-B, subsection 11, relating to records and proceedings of the Workers' Compensation Supplemental Benefits Oversight Committee concerning individual claims
- ◆ Title 39-A, section 403, subsection 3, relating to workers' compensation self-insurers proof of solvency and financial ability to pay
- ◆ Title 39-A, section 403, subsection 15, relating to records of workers' compensation self-insurers
- ◆ Title 39-A, section 409, relating to workers' compensation information filed by insurers concerning the assessment for expenses of administering self-insurers' workers' compensation program

**□ Communicate to the Department of Health and Human Services about repealing two programs never implemented**

In 2011, the Advisory Committee identified two programs, both containing confidentiality provisions, which were enacted and never implemented: the Maine Managed Care Insurance Plan and the Community Health Access Program. The Right to Know Advisory Committee asked for information about both of these programs from the Health and Human Services Committee. In a letter to the Advisory Committee in January 2012, HHS recommended that both programs be repealed. Although the Department of Health and Human Services supported the repeals, the Judiciary Committee chose not to include the repeals in LD 1804,

An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Public Records Exceptions, because the proposed repeals had not had a public hearing. The Advisory Committee recommends keeping the confidentiality provision while sending a letter to the Department of Health and Human Services about the programs, with the suggestion that if the Department believes the statutory language is not necessary, then perhaps the Department is best situated to propose repeal in departmental legislation.

*See correspondence in Appendix D.*

**Amend the Community Right-to-Know Act to provide for more public access to information about hazardous substances**

The “Community Right-to-Know Act” was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public’s right to access information collected by the Department of Health and Human Services. Trade secrets are completely protected. The Advisory Committee recommends amending the Act to provide for public access to information collected under the program. Rather than allowing the claim that information is a “trade secret” to prohibit access, the burden should be on the entity using or storing the toxic or hazardous substance to show that it would be subject to confidentiality under the general discovery provisions of the Freedom of Access Act. The Advisory Committee also supports removing the 50-mile radius residency restriction on access to the information collected by DHHS under this program.

*See draft legislation in Appendix C.*

**Continue discussion and consideration of the confidentiality provision in the sentinel events reporting law**

The Advisory Committee will continue discussion and consideration of the confidentiality provision in the sentinel events reporting law in 2013. Additional time is needed to gather information from other states and to have further discussions with hospitals and quality care professionals to identify common ground for an expansion of the information about publicly reported sentinel events. While full disclosure of all information provided through the sentinel events reporting program would probably be counter-productive, the challenge is to find what information is helpful to people in making informed health care decisions.

**Make no changes to the law regarding the encryption of radio transmissions from police and first responders**

The Advisory Committee recognized that while there is a valid concern that law enforcement and first responders may increase the use of encryption of radio transmissions at any time, the federally-mandated switch from an analogue to a digital radio system itself will not result

in additional radio transmissions being encrypted beyond current practices. It acknowledged that there are no laws or rules that would prevent agencies or first responders from increasing the use of encryption but historically encryption is used sparingly because freely sharing information with other entities and the public creates important efficiencies. The Advisory Committee noted that if en route transmissions become “public records” under FOAA then confidential information sent via those transmissions would have to be protected en route, which is not feasible. It also noted that the FOAA was not intended to deal with oral communications and it would not be the place to resolve any such policy issue. With that in mind, the Advisory Committee agreed that no changes should be made to current law at this time.

- ❑ **Request that the Board of Trustees of the Maine Criminal Justice Academy consider creating a model encryption policy for consideration by local law enforcement agencies that reflects the current practices, and request that the board report back to the Advisory Committee on any decisions or actions taken pursuant to the request**

Currently, the decision to encrypt a radio transmission is largely up to the entity making the transmission. The Advisory Committee believed it may be beneficial to both the public and the emergency agencies to have the Board of Trustees of the Maine Criminal Justice Academy explore developing a statewide policy that memorializes the current encryption practices. The Advisory Committee agreed to send a letter to the Board of Trustees requesting that the Board consider an encryption policy for police that reflects the current practice and to have the Board report back to the Advisory Commission on any decisions or actions taken pursuant to this request.

*See correspondence in Appendix D.*

- ❑ **Request that the Public Access Ombudsman look at the confidentiality of email addresses collected by schools and municipalities and report back to the Advisory Committee**

The Advisory Committee understands the concerns around the collection and dissemination of email addresses, particularly when those email addresses belong to parents of school children and are collected in the process of educational programming. The Advisory Committee agreed to postpone any action on potential draft legislation and requests that the Public Access Ombudsman research the issue, collect information and report back to the Advisory Committee next year. The Advisory Committee understands that legislation addressing some of these concerns may be introduced in the 126th Legislature and will be prepared to assist the Legislature in attending to the proposal.

*See correspondence in Appendix D.*

**Make no changes to the application of the Freedom of Access laws to the Maine Public Broadcasting Corporation**

The existing Freedom of Access Act requires that certain meetings of the Maine Public Broadcasting Corporation be open to the public, and that those meeting materials be made available. The Act is otherwise silent as to its application to MPBN. Upon the assurances from the President of MPBN that the entity would be sensitive to requests for information about finances and activities, the Advisory Committee believed the current law struck a good balance for both MPBN and the public. The Advisory Committee recommends no changes.

**Provide guidance through updates to the Frequently Asked Questions webpage and training for legislators with regard to the storage, management and retrieval of public officials' communications, including email**

Recognizing that public officials, particularly legislators, struggle with the task of identifying and maintaining for public access those communications that are public records, the Advisory Committee suggests that the Public Access Ombudsman revise the Frequently Asked Questions section of the FOAA website to address the guidelines for retention of emails and digital records and to include links to the manuals developed by the State Archives and Records Center. The Advisory Committee recommends that the Legislature revise its training and education for legislators to include an explanation of the benefits of using the State-provided email addresses.

**Make available to agencies and legislative drafters templates for drafting specific confidentiality statutes**

The Advisory Committee recommends that the templates for confidentiality statutes concerning applications for state and local financial and technical assistance be used as guidance for drafting new statutes.

*See draft templates in Appendix G.*

**Make no additional modifications to the Freedom of Access Act concerning bulk requests or bulk transfers of public records, with the understanding that concerns about bulk requests and bulk data transfers will most likely be revisited in the future (divided report)**

A majority of the Advisory Committee believes that recent legislative changes that clarify an agency's responsibility under FOAA in providing information in the medium in which it is stored address part of the issues surrounding requests for bulk data. The new law strikes the appropriate balance for both the person making the request for records and the agency fulfilling the request. The changes to the registry of deeds statute, as interpreted by the Law Court, have resolved the most pressing need for legislation. With the exception of Shenna

Bellows, the Advisory Committee agreed to take no additional action; further statutory changes are not needed at this time.

**□ Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)**

A majority of the Advisory Committee recommends enactment of legislation to govern the ability of public bodies to allow the use of technology for remote participation of a member. Although there are a small number of public bodies specifically authorized by law to conduct meetings through the use of technology, there is concern that current law does not allow members of other public bodies who are not physically present to be counted as part of a quorum or to vote in a public proceeding. The draft legislation supported by the Advisory Committee is permissive - it allows boards and commissions on an individual basis to decide whether to authorize members to participate remotely and set the conditions for that participation, including whether the need to participate remotely is in good faith. The Advisory Committee agreed that the draft legislation should exempt those agencies currently authorized by statute to conduct meetings through the use of technology from having to comply with the new provisions: the Finance Authority of Maine (FAME); the Small Enterprise Growth Fund Board (SEGF); the Commission on Governmental Ethics and Election Practice; the Emergency Medical Services Board (EMS); and the Workers' Compensation Board.

Advisory Committee members supporting the proposal disagreed about one provision of the recommended draft legislation which would permit a participant in a proceeding who is not physically present to vote at a meeting. The draft provides that as long as the participant has received prior to the meeting any documents and materials that will be discussed with substantially the same content as those documents actually presented, the member participating from a remote location may vote. The majority of members believed that a requirement that participants have the exact same documents and materials as those physically present at a meeting was too limiting and could lead to lawyers and others to take advantage of the provision to stall government action. The majority thought the provision that requires a member of a public body in a quasi-judicial or judicial proceeding to be physically present to vote was an important additional protection. The minority of the Advisory Committee contended that, before voting, those participating in a meeting remotely should have access to all of the same materials as those physically present. Requiring that all materials be provided to all members of a body by the time of the vote compels that public officials have all information available to them before voting. The minority felt that permitting a public official to vote without having access to all available information provides unspoken approval of uninformed voting.

Not all members were in favor of going forward with the draft legislation. Ms. Meyer recommended sending the proposal back to the Legislative Subcommittee for more discussion and to gather more data and input from stakeholders as not all boards and commissions were asked for comments on the draft. Mr. 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 four state agencies are currently authorized by law as well. Ms. Lynch thought the draft should move forward to the Legislature as amended and the Legislature could determine whether additional changes are needed. Senator 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. Commissioner 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.

The Advisory Committee voted 8-5 to include the amended draft as a recommendation to the Judiciary Committee, but as a stand-alone piece of legislation. (In favor: Representative Nass, Chief Antone, Ms. Bellows, Mr. Flewelling, Mr. Higgins, Mr. Leary, Ms. Lynch and Mr. Pringle; Opposed: Senator Hastings, Commissioner Brown, Ms. Meyer, Ms. Morgan and Ms. Pistner).

*See draft legislation in Appendix E.*

- Enact legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a transportation project (divided report);**

A majority of the Advisory Committee recommends enactment of legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a transportation project in accordance with Title 23, section 4251. Under current law, all information that the Department of Transportation has about a public-private partnership project is confidential until the Department determines whether the plan meets the statutory standards. Approved projects are then submitted to the Legislature for approval. At several meetings, the Public Records Exception Subcommittee discussed whether documents associated with public-private partnership projects should be open to the public and at what point in the process those documents should be made available. The majority view of the Public Records Exceptions Subcommittee was 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. The minority view of the Subcommittee was that the confidentiality provision regarding these projects should be repealed entirely.

During its discussions, some Advisory Committee members felt the public did not have adequate time to review proposals, because once the Department of Transportation determines a private entity meets certain standards its proposal is turned into a bill for submission to the Legislature. Others stressed 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. The Department of Transportation expressed concern to the Advisory Committee 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 the department. In the Department's view, the current law strikes a good balance between protecting proprietary information and the public's interest in an open process.

Ms. Bellows moved that the Advisory Committee accept the Public Records Exceptions Subcommittee's minority report to repeal the provision that makes information provided to the Department of Transportation confidential until the project proposal is complete. While there was some support among the Advisory Committee for the motion, others felt an outright repeal of the confidentiality provision went too far and would deter private parties from participating in the process. By a vote of 5 to 8, the Advisory Committee failed to support full repeal of the confidentiality provision. (In favor: Ms. Bellows, Mr. Higgins, Mr. Leary, Ms. Meyer and Ms. Morgan; Opposed: Senator Hastings, Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette, Mr. Flewelling, Mr. Logan and Mr. Pringle.)

Mr. Pringle recommended amending the law to add a provision that would require the Department of Transportation to give notice of the project at least 30 days prior to introducing a bill to the Legislature. During discussion, it was noted that, as a practical matter, this may already occur but requiring 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. The Department's representative indicated his belief that the proposed 30-day waiting period would not negatively affect public-private partnerships.

The Advisory Committee voted 7-6 to recommend draft legislation to the Judiciary Committee as a separate piece of legislation. (In favor: Senator Hastings, Ms. Bellows, Mr. Flewelling, Mr. Leary, Ms. Meyer, Ms. Morgan and Mr. Pringle; Opposed: Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette, Mr. Higgins and Mr. Logan.)

Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette and Mr. Logan stated that they supported making no changes to the law. Ms. Bellows stated that she preferred to repeal the entire confidentiality provision.

*See draft legislation in Appendix F.*

## **VII. FUTURE PLANS**

In 2013, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.

The Advisory Committee looks forward to a full year of activities and working with the Public Access Ombudsman, the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its seventh annual report.



**APPENDIX A**

**Authorizing Legislation, 1 MRSA §411**

**CURRENT LAW GOVERNING RIGHT TO KNOW ADVISORY COMMITTEE**

**1 §411. Right To Know Advisory Committee**

**1. Advisory committee established.** The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

**2. Membership.** The advisory committee consists of the following members:

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and
- M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

**3. Terms of appointment.** The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.
- B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.
- C. Members may serve beyond their designated terms until their successors are appointed.

**4. First meeting; chair.** The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

**5. Meetings.** The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

**6. Duties and powers.** The advisory committee:

- A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;
- B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;
- C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;
- D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics;
- E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;
- F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;
- G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;
- H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;
- I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;
- J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and
- K. May undertake other activities consistent with its listed responsibilities.

**7. Outside funding for advisory committee activities.** The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other

than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

**8. Compensation.** Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

**9. Staffing.** The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

**10. Report.** By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

**APPENDIX B**

**Membership List, Right to Know Advisory Committee**

**RIGHT TO KNOW ADVISORY COMMITTEE**

**P.L. 2005, Chapter 631**

**Thursday, December 13, 2012**

**Appointment(s) by the Governor**

**Michael Cianchette**

33 Winn Road  
Cumberland, ME 04021

Representing State Government Interests

**Richard P. Flewelling**

Maine Municipal Assoc  
60 Community Drive  
Augusta, ME 04330

Representing Municipal Interests

**Harry Pringle**

Drummond Woodsum & MacMahon  
245 Commercial St, PO Box 9781  
Portland, ME 04104-5081

Representing School Interests

**Appointment(s) by the President**

**Sen. David R. Hastings III**

955 Main Street  
Fryeburg, ME 04037

Senate Member of Judiciary Committee

**Perry B. Antone Sr.**

Chief, Brewer Police Dept.  
151 Parkway South  
Brewer, ME 04412

Representing Law Enforcement Interests

**Shenna Bellows**

ACLU of Maine  
121 Middle St., Suite 301  
Portland, ME 04101

Representing the Public

**Percy L. Brown Jr.**

County Commissioner, Hancock County  
97 Sunset Road  
Deer Isle, ME 04627

Representing County or Regional Interests

**A. J. Higgins**

18 West Street  
Manchester, ME 04351

Representing Broadcasting Interests

**Kelly Morgan**

90 Loggin Road  
Cape Neddick, ME 04072

Representing the Press

**Appointment(s) by the Speaker**

**Mal Leary**  
Capitol News Service  
17 Pike Street  
Augusta, ME 04330

Representing a Statewide Coalition of  
Advocates of Freedom of Access

**William P. Logan**  
6 S. Chestnut Street  
Augusta, ME 04330

Representing the Public

**Judy Meyer**  
Lewiston Sun Journal  
104 Park Street  
Lewiston, ME 04243-4400

Representing Newspaper Publishers

**Mike Violette** (resigned May 30, 2012)  
WGAN  
420 Western Ave  
South Portland, ME 04102

Representing Broadcasting Interests

**Rep. Joan M. Nass**  
PO Box 174  
Acton, ME 04001

House Member of the Judiciary Committee

**Attorney General**

**Linda Pistner**  
Chief Deputy Attorney General  
6 State House Station  
Augusta, ME 04333

Designee

**Chief Justice**

**Mary Ann Lynch**  
State Court Administrator  
PO Box 4820  
Portland, ME 04112

Member of the Judicial Branch

**Staff:**  
Curtis Bentley – 287-1670  
OPLA  
Colleen McCarthy Reid – 287-1670  
OPLA  
Margaret Reinsch – 287-1670  
OPLA

**APPENDIX C**

**Recommended Draft Legislation for Statutory Changes to Public Records Exceptions (Title 22, Sections 1696-D and 1696-F and Public Records Exceptions in Titles 26-39-A)**



RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation:  
Proposing Statutory Changes to Public Records Exceptions, Title 22 and Titles 26-39-A

**Sec. 1.**            **22 MRSA § 1696-D** is amended to read:

**§1696-D. Response to requests**

When requested under this subchapter, the director shall provide, ~~at a minimum, the identity of information about~~ chemical substances in use or present at a specific location, ~~unless the substance is a trade secret. For purposes of this section, "trade secret" means any confidential formula, pattern, process, device, information or compilation of information, including chemical name, that is used in any employer's business that gives the employer an opportunity to obtain any advantage over competitors who do not know or use it. The director may provide information on~~ must include the identity of the chemical substance, the chronic and acute health hazards posed by the substance, potential routes of exposure, emergency procedures and other subjects as appropriate. The director shall report in writing annually by January 1st to the joint standing committee of the Legislature having jurisdiction over human resources on the number and type of requests received and on the director's response to these requests.

~~In the case of a request for information from a municipality or individual concerning chemicals in use or present at a specific site, the director shall be required to provide information pursuant to this Act only if the specific site is within a 50-mile radius of the municipality or within a 50-mile radius of a residence of the individual requesting the information.~~

**Sec. 2.**            **22 MRSA § 1969-E** is amended to read:

**§1696-E. Cooperation with state agencies**

The director may obtain, upon request, information from and the assistance of the Bureau of Labor Standards, Department of Environmental Protection, Bureau of Pesticides Control and other state agencies as appropriate in the conduct of investigations under this chapter. ~~Information obtained under this section shall be subject to the trade secret provisions governing the agencies supplying the information.~~

**Sec. 3.**            **22 MRSA § 1969-F** is amended to read:

**§1696-F. Provision of information; ~~trade secrets~~**

~~A person may withhold the identity of a specific toxic or hazardous substance, if the substance is a trade secret. For purposes of this section, "trade secret" means any confidential formula, pattern, process, device, information or compilation of information, including chemical name, that is used in any employer's business that gives the employer an opportunity to obtain any advantage over competitors who do not know or use it. All other information about a toxic or hazardous substance, including its identity, routes of~~

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exposure, effects of exposure, type and degree of hazard and emergency treatment and response procedures, must be provided if requested by the Director of the Bureau of Health and is considered a public record. All information about a toxic or hazardous substance is a public record.

**Sec. 4.**        **26 MRSA § 3** is repealed and replaced:

**§ 3. Confidentiality of records**

**1. Confidential records.** Except as provided in subsections 2 and 3, all information and reports received by the director or the director's authorized agents under this Title are confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

**2. Exceptions** Reports of final bureau action taken under the authority of this Title are public records for the purposes of Title 1, chapter 13, subchapter 1.

**3. Authorized disclosure.** The director shall make or authorize any disclosure of information of the following types or under the following circumstances with the understanding that the confidentiality of the information will be maintained:

A. Information and reports to other government agencies if the director believes that the information will serve to further the protection of the public or assist in the enforcement of local, state and federal laws; and

B. Information and records pertaining to the work force, employment patterns, wage rates, poverty and low-income patterns, economically distressed communities and regions and other similar information and data to the Department of Economic and Community Development and to the Governor's Office of Policy and Management for the purposes of analysis and evaluation, measuring and monitoring poverty and economic and social conditions throughout the State and to promote economic development

**Sec. 5.**        **26 MRSA §934** is amended to read:

**§934. Conciliation; notification of dispute; proceedings in settlement; report**

Whenever it appears to the employer or employees concerned in a labor dispute, or when a strike or lockout is threatened, or actually occurs, he or they may request the services of the board.

If, when the request or notification is received, it appears that a substantial number of employees in the department, section or division of the business of the employer are involved, the board shall endeavor, by conciliation, to obtain an amicable

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settlement. If the board is unable to obtain an amicable settlement it shall endeavor to persuade the employer and employees to submit the matter to arbitration.

The board shall, upon notification, as soon as practicable, visit the place where the controversy exists or arrange a meeting of the interested parties at a convenient place, and shall make careful inquiry into the cause of the dispute or controversy, and the board may, with the consent of the Governor, conduct the inquiry beyond the limits of the State.

The board shall hear all interested persons who come before it, advise the respective parties what ought to be done by either or both to adjust the controversy, and shall make a confidential written report to the Governor and the Executive Director of the Maine Labor Relations Board. The Governor or executive director ~~may~~ shall make the report public if, after 15 days from the date of its receipt, the parties have not resolved the controversy and the public interest would be served by publication. In addition, either the Governor or the executive director may refer the report and recommendations of the board to the Attorney General or other department for appropriate action when it appears that any of the laws of this State may have been violated.

**Sec. 6.**           **29-A MRSA §152, sub-§ 3** is amended to read:

**3. Central computer system.** Notwithstanding any other provisions of law, purchase and maintain a central computer system for purposes of administering this Title and conducting departmental operations. All other uses must be approved by the Secretary of State. ~~The Secretary of State shall adopt rules regarding the maintenance and use of data processing information files required to be kept confidential and shall distinguish those files from files available to the public;~~

**Sec. 7.**           **29-A MRSA § 257** is repealed.

**Sec. 8.**           **29-A MRSA §517, sub-§4** is amended to read:

**4. Unmarked law enforcement vehicles.** An unmarked motor vehicle used primarily for law enforcement purposes, when authorized by the Secretary of State and upon approval from the appropriate requesting authority, is exempt from displaying a special registration plate. Records for all unmarked vehicle registrations are confidential.

~~Upon receipt of a written request by an appropriate criminal justice official showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.~~

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**Sec. 9.**           **38 MRSA §585-B, sub-§ 6** is amended to read:

**6. Mercury reduction plans.** An air emission source emitting mercury in excess of 10 pounds per year after January 1, 2007 must develop a mercury reduction plan. Except as provided in subsection 7, the mercury reduction plan must be submitted to the department no later than September 1, 2008. The mercury reduction plan must contain:

- A. Identification, characterization and accounting of the mercury used or released at the emission source; and
- B. Identification, analysis and evaluation of any appropriate technologies, procedures, processes, equipment or production changes that may be utilized by the emission source to reduce the amount of mercury used or released by that emission source, including a financial analysis of the costs and benefits of reducing the amount of mercury used or released.
- ~~C. The department may keep information submitted to the department under this subsection confidential as provided under section 1310-B.~~

The department shall submit a report to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than March 1, 2009 summarizing the mercury emissions and mercury reduction potential from those emission sources subject to this subsection. In addition, the department shall include an evaluation of the appropriateness of the 25-pound mercury standard established in subsection 5. The evaluation must address, but is not limited to, the technological feasibility, cost and schedule of achieving the standards established in subsection 5. The department shall submit an updated report to the committee by March 1, 2013. The joint standing committee of the Legislature having jurisdiction over natural resources matters is authorized to report out to the 126th Legislature a bill relating to the evaluation and the updated report.

**Sec. 10.**           **38 MRSA §585-C, sub-§ 2** is amended to read:

**2. Emissions inventory.** The commissioner shall carry out and maintain an inventory of the sources in the State emitting any substance that may be a hazardous air pollutant.

A. This inventory must include the following data for each of those substances:

- (1) The number of sources;
- (2) The location of each source or category of source;

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- (3) The quantity emitted by each source or category of source;
- (4) The total emissions; and
  
- (5) The percentage of total emissions generated by sources with existing air licenses.

B. In conducting this inventory, the commissioner may rely upon questionnaires or other reasonable methods, including those established by the United States Environmental Protection Agency, for the purpose of carrying out this duty as promptly and efficiently as possible. The commissioner shall clearly indicate on any requests for information the minimum amount of emissions that must be reported. The commissioner may not require reporting of this information more frequently than every other year.

C. In carrying out this inventory, the commissioner may require persons to provide information on forms supplied by the commissioner. Refusal to provide the information subjects the person of whom it is requested to a civil penalty of not more than \$100 for each day's delay. Submission of false information constitutes a violation of section 349, subsection 3, in addition to being subject to remedies otherwise available by law.

~~D. Information relating to the emissions inventory submitted to the commissioner under this section may be designated by the person submitting it as being only for the confidential use of the commissioner. Designated confidential information must be handled as confidential information is handled under section 1310-B, with the exception of emissions data which is public record.~~

### Summary

This proposed legislation implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Title 22 and Titles 26 to 39-A. The legislation does the following.

Sections 1 to 3 clarify that all the information provided upon request to the Director of the Bureau of Health about toxic or hazardous substances in use or present at a specific location are public. These sections require the director to release the information that is public upon request to any requester, and repeal the requirement that the requester reside within 50 miles of the specific location.

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Proposing Statutory Changes to Public Records Exceptions, Title 22 and Titles 26-39-A

Section 4 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.

Section 5 relates to reports of the State Board of Arbitration and Conciliation in a labor dispute. The amendment makes 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.

Section 6 repeals 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.

Section 7 repeals a provision relating to the Secretary of State's motor vehicle information technology system because the confidentiality of the system is already addressed in another provision of law.

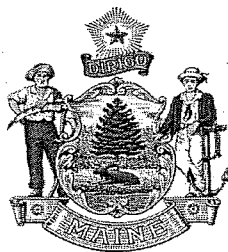
Section 8 removes language that is redundant with another section of law.

Section 9 repeals language making mercury reduction plans for air emission source emitting mercury confidential.

Section 10 repeals language making hazardous air pollutant emissions inventory reports confidential.

**APPENDIX D**  
**Correspondence**

Hon. David R. Hastings III, Chair  
Hon. Joan M. Nass  
Perry Antone  
Shenna Bellows  
Percy L. Brown, Jr  
Michael Cianchette  
Richard Flewelling  
Mary Ann Lynch



A. J. Higgins  
Mal Leary  
William Logan  
Judy Meyer  
Kelly Morgan  
Linda Pistner  
Harry Pringle  
Mike Violette

STATE OF MAINE  
**RIGHT TO KNOW ADVISORY COMMITTEE**

November 15, 2012

Mary C. Mayhew  
Commissioner  
Department of Health and Human Services  
221 State Street  
Augusta, Maine 04333-0040

Dear Commissioner Mayhew:

The Public Records Exceptions Subcommittee of the Right to Know Advisory Committee reviews existing public records exceptions in the statutes. The Subcommittee is expected to review and evaluate each public records exception and make a recommendation for keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation.

As part of its review of exceptions in Titles 22 through 25 during 2011, the Subcommittee considered 2 exceptions in Title 22 relating to records collected or maintained by programs authorized within the Department of Health and Human Services that have never been implemented:

- Title 22, section 3188, subsection 4 relating to the Maine Managed Care Insurance Plan Demonstration program for uninsured individuals; and
- Title 22, section 3192, subsection 13 relating to medical data of the Community Health Access Program.

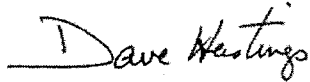
Last year, the Department of Health and Human Services and the Legislature's Health and Human Services Committee recommend to the Subcommittee that all of sections 3188 and 3192 be repealed, including the specific confidentiality provisions, because the statutes have never been used. However, the Subcommittee did not include language to repeal these sections in proposed legislation because the underlying policy issues are beyond the scope of the Subcommittee's charge. We are writing to inform you of the Subcommittee's decision so the department may consider whether to recommend that the statutory provisions authorizing the Maine Managed Care Insurance Plan Demonstration program and the Community Health Access Program be repealed in any proposed legislation put forward by the department for consideration by the 126<sup>th</sup> Legislature.



DHHS Letter  
November 15, 2012

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Sincerely,

A handwritten signature in cursive script that reads "Dave Hastings". The signature is written in black ink and is positioned above the typed name.

Sen. David R. Hastings III, Chair  
Right to Know Advisory Committee

Hon. David R. Hastings III, Chair  
Hon. Joan M. Nass  
Perry Antone  
Shenna Bellows  
Percy L. Brown, Jr  
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STATE OF MAINE  
**RIGHT TO KNOW ADVISORY COMMITTEE**

November 15, 2012

Brenda Kielty  
Public Access Ombudsman  
Department of Attorney General  
6 State House Station  
Augusta, Maine 04333-0006

Dear Ms. Kielty:

Earlier this year, the Advisory Committee received a letter from Rep. Mary Nelson concerning the confidentiality of parent email addresses collected by schools. The issue arose from a request made to the Falmouth School Department for the home email addresses of all parents of students in the Falmouth school system. For Rep. Nelson and others, the request raised serious concerns about privacy for students, parents and their families. Because parent email addresses are maintained as part of student education records and are provided by parents to allow them to access other confidential student records, the Falmouth School Department believes they are confidential under the Federal Family Educational Rights and Privacy Act (FERPA). However, since the issue was not clear as a matter of State law, Rep. Nelson asked the Advisory Committee to consider whether our statutes should be clarified to protect the confidentiality of parent email addresses.

The Advisory Committee agreed to review Rep. Nelson's request and referred the issue to the Legislative Subcommittee for further consideration. The Legislative Subcommittee met 3 times to discuss the issue. Subcommittee members considered whether email addresses are confidential under federal law, whether State law should be changed and what practical problems might result from redacting email addresses from otherwise public documents. While the Subcommittee did consider draft legislation, the members were not able to make a unanimous recommendation on the proposal. As a result, the Subcommittee recommended that no changes be made in the statute, but agreed to revisit the issue after gathering information about whether the issue is a widespread concern or if this is an issue for one school system. Although we understand that Rep. Nelson may propose legislative changes to the 126<sup>th</sup> Legislature, the Advisory Committee supported the Subcommittee's recommendations. Shenna Bellows abstained from the Advisory Committee's vote because the ACLU of Maine is likely to support any legislation proposed by Rep. Nelson.


We are writing to ask if you could assist the Advisory Committee in this effort by surveying school departments throughout the State and gathering information about any complaints or

Ombudsman Letter  
November 15, 2012

concerns brought to your attention related to the confidentiality of parent email addresses. We ask that you submit your findings, and any recommendations you may have, to the Advisory Committee by July 1, 2013 so we may consider them as part of our 2013 activities.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Sincerely,

A handwritten signature in black ink that reads "Dave Hastings". The signature is written in a cursive style with a large, stylized "D" at the beginning.

The Honorable David R. Hastings III  
Chair, Right to Know Advisory Committee

Cc: Rep. Mary Pennell Nelson

Hon. David R. Hastings III, Chair  
Hon. Joan M. Nass  
Perry Antone  
Shenna Bellows  
Percy L. Brown, Jr  
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STATE OF MAINE  
RIGHT TO KNOW ADVISORY COMMITTEE

November 15, 2012

Brian MacMaster, Chair, Board of Trustees  
Maine Criminal Justice Academy  
15 Oak Grove Road  
Vassalboro, Maine 04989

Dear Mr. MacMaster:

The Right to Know Advisory Committee requests that the Board of Trustees consider establishing a model encryption policy for radio transmissions by law enforcement agencies and first responders that reflects current practices.

As you may know, the Right to Know Advisory Committee was created by the Legislature as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Recently, the Maine Freedom of Information Coalition informed us of its concern that public safety agencies and first responders may begin encrypting radio transmissions that are not currently encrypted as part of the federally mandated switch from an analogue to a digital radio system.

As part of our work on this matter, we established the Encryption Subcommittee to study the issue and report its findings and recommendations to us. The Subcommittee was composed of Linda Pistner, chair (Office of the Attorney General), Rep. Joan Nass, Perry Antone (representing law enforcement interests), Joe Brown (representing county or regional interests), Mike Cianchette (representing State Government interests), AJ Higgins (representing broadcasting interests), Mal Leary (representing a statewide coalition of advocates of freedom of access), and Judy Meyer (representing newspaper publishers).

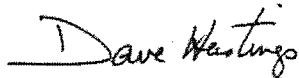
The Encryption Subcommittee held two meetings this summer and heard testimony from the Maine Freedom of Information Coalition, Maine Association of Broadcasters, and the Department of Public Safety. After considerable discussion, the Subcommittee made the following recommendations to us: 1) That no changes be made to existing law regarding the encryption of radio transmissions by public safety agencies and first responders; and 2) That we send a letter to the Board of Trustees of the Maine Criminal Justice Academy asking that it consider creating a model encryption policy for consideration by local law enforcement agencies.

MCJA Letter  
November 15, 2012

The Advisory Committee has adopted those recommendations and this letter is our formal request that you consider establishing a model encryption policy that reflects current practices for consideration by local law enforcement agencies. We also request that you please inform us of any decisions or actions taken pursuant to this letter.

Thank you for your consideration of our requests.

Sincerely,

A handwritten signature in cursive script that reads "Dave Hastings". The signature is written in dark ink and is positioned above the typed name.

Senator David Hastings III  
Chair

cc: Suzanne Goucher, MFOIC

**APPENDIX E**

**Recommended Draft Legislation: Remote Participation in Public Proceedings**

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation:  
Remote participation in public proceedings

**PART A**

Sec. A-1. 1 MRSA § 403-A is enacted to read:

**§403-A. Public proceedings through other means of communication**

This section governs public proceedings, including executive sessions, during which public or governmental business is discussed or transacted through telephonic, video, electronic or other means of communication.

**1. Requirements.** A body subject to this subchapter may conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or governmental business through telephonic, video, electronic or other means of communication only if the following requirements are met.

A. The body has adopted a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other means of communication in accordance with this section. The policy may establish circumstances under which a member may participate when not physically present.

B. Notice of the public proceeding has been given in accordance with section 406.

C. A quorum of the body is assembled physically at the location identified in the notice required by section 406.

D. Each member of the body participating in the public proceeding is able to hear each other and speak to each other during the public proceeding. Members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations.

E. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication identifies the persons present in the location from which the member is participating.

F. All votes taken during the public proceeding are taken by roll call vote.

G. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation:  
Remote participation in public proceedings

if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.

**2. Voting, quasi-judicial or judicial proceeding.** A member of a body who is not physically present and who is participating in the public proceeding through telephonic, video, electronic or other means of communication may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.

**3. Exception to quorum requirement.** A body may convene a public proceeding by telephonic, video, electronic or other means of communication without a quorum assembled physically at one location if:

A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742;

B. The public proceeding is necessary to take action to address the emergency; and

C. The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency.

**4. Annual meeting.** If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other means of communication from a different location.

**PART B**

**Sec. B-1.** 10 MRSA §384, sub-§5 is enacted to read:

**5. Meetings.** The board shall have a physical location for each meeting. Notwithstanding Title 1, section 403-A, board members may participate in meetings by teleconference. Board members participating in the meeting by teleconference are not entitled to vote and are not considered present for the purposes of determining a quorum, except in cases in which the chair of the board determines that the counting of members participating by teleconference and the allowance of votes by those members is necessary to avoid undue hardship to an applicant for an investment.

**Sec. B-2.** 32 MRSA §88, sub-§1, ¶D is amended to read:



RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation:  
Remote participation in public proceedings

D. A majority of the members appointed and currently serving constitutes a quorum for all purposes and no decision of the board may be made without a quorum present. A majority vote of those present and voting is required for board action, except that for purposes of either granting a waiver of any of its rules or deciding to pursue the suspension or revocation of a license, the board may take action only if the proposed waiver, suspension or revocation receives a favorable vote from at least 2/3 of the members present and voting and from no less than a majority of the appointed and currently serving members. ~~The Notwithstanding Title 1, section 403-A, the board may use video conferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1.~~ Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.

**Sec. B-3. 39-A MRSA §151, sub-§5** is amended to read:

**5. Voting requirements; meetings.** The board may take action only by majority vote of its membership. ~~The Notwithstanding Title 1, section 403-A, the board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.~~ Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

**Summary**

This proposed legislation implements the majority recommendation of the Right to Know Advisory Committee.

Part A authorizes the use of technology to conduct public proceedings. The legislation applies to public proceedings, including executive sessions, during which public or governmental business is discussed or transacted through telephonic, video, electronic or other means of communication. Subject to the following requirements, it authorizes a body

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation:  
Remote participation in public proceedings

to conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or government business through telephonic, video, electronic, or other means of communication.

1. The body must adopt a policy that authorizes such participation and establishes the circumstances under which a member may participate when not physically present.
2. Notice of any proceeding must be provided in accordance with the freedom of access law.
3. A quorum of the body must be physically present.
4. Members of the body must be able to hear and speak to each other during the proceeding.
5. A member who is participating remotely must identify the persons present in the location from which the member is participating.
6. All votes taken during the public proceeding are taken by roll call vote.
7. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication must have received, prior to the proceeding, any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented.
8. A member of a body who is not physically present may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.
9. Under certain emergency circumstances, a body may convene a public proceeding by telephonic, video, electronic or other means of communication without a quorum assembled physically at one location.
10. If a body conducts one or more public proceedings using technology, the board must also hold at least one public proceeding annually during which all members of the body in attendance are physically assembled at one location.

Under current law, the following state agencies are authorized to use technology to conduct meetings: the Finance Authority of Maine, the Maine Commission on Governmental Ethics and Election Practices, the Emergency Medical Services Board and the Worker's Compensation Board. Part B ensures that these agencies may conduct meetings as authorized by current law and provides a specific exemption from the new requirements for the Small Enterprise Growth Fund Board, the Emergency Medical Services Board and the Worker's Compensation Board.

**APPENDIX F**

**Recommended Draft Legislation:  
Public Notice Requirements for Public-private Partnerships**

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Draft Legislation (Majority Report):  
Public-Private Partnership Projects

**Sec. 1. 23 MRSA §4251, sub-§ 9** is amended to read:

**9. Legislative approval.** If the department determines that a public-private partnership proposal and draft agreement meets the standards of this subchapter, the department shall publish a notice of the determination on the department's publicly accessible website or through advertisements in newspapers as required in subsection 5, paragraph A. At least 30 days after providing the public notice, the department shall submit to the Legislature a bill that authorizes the agreement. The bill must include a statement that the proposal meets the standards in subsection 4, a summary of the substance of the draft agreement and a description of the nature and amount of state investment, if any, including effects on programmed capital work.

**SUMMARY**

This proposed legislation implements the majority recommendation of the Right to Know Advisory Committee.

Current law provides that the Department of Transportation shall submit to the Legislature a bill that authorizes the agreement that implements a public-private partnership for a transportation project under the Maine Revised Statutes, Title 23, section 4251. This bill requires the department to publish public notice when it has determined that a public-private proposal and agreement meets the standards of the subchapter. The same notice requirements that exist under subsection 5, paragraph A - that the determination be published on the website or in newspapers - apply to public notice of the determination. The department shall submit the bill to the Legislature, but it must wait for at least 30 days after the public notice has been published.

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## **APPENDIX G**

### **Recommended Templates for Drafting Specific Confidentiality Statutes**

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Drafting Template:  
General Agency Confidential Individual and Business Records

**Sec. X. XX MRSA §XXX-X**, as amended by PL XXXX, c. XXX, §XX and affected by §XX, is repealed.

**Sec. X. XX MRSA §XXX-X** is enacted to read:

**§ XXX-X. Freedom of access; confidentiality of records**

The records of the [board, agency, authority, etc.] are public records, except as specifically provided in this section.

**1. Confidential records.** The following records are designated as confidential for purposes of Title 1, section 402, subsection 3, paragraph A:

A. A record containing information acquired by the [board, agency, authority, etc.] or a member, officer, employee or agent of the [board, agency, authority, etc.] from an applicant for or recipient of financial assistance provided pursuant to a program administered or established by the [board, agency, authority, etc.] if the applicant or recipient is an individual;

B. A record obtained or developed by the [board, agency, authority, etc.] that:

(1) A person, including the [board, agency, authority, etc.], to whom the record belongs or pertains has requested be designated confidential; and

(2) The [board, agency, authority, etc.] has determined contains information that gives the owner or a user an opportunity to obtain a business or competitive advantage over another person who does not have access to the information, except through the record, or contains information access to which by others would result in a business or competitive disadvantage, loss of business, invasion of privacy, or other significant detriment to the person to whom the record belongs or pertains;

C. A financial statement or tax return;

D. A record that contains an assessment by a person who is not employed by the [board, agency, authority, etc.] of the creditworthiness or financial condition of a person or project;

E. A record obtained or developed by the [board, agency, authority, etc.] prior to receipt of a written application or proposal if the application or proposal is for financial assistance to be provided by or with the assistance of the [board, agency, authority, etc.], or a record obtained or developed in connection with a transfer of property to or from the [board, agency, authority, etc.]. After receipt

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Drafting Template:  
General Agency Confidential Individual and Business Records

by the [board, agency, authority, etc.] of the application or proposal, a record pertaining to the application or proposal is a public record and not confidential unless it is otherwise confidential pursuant to this subsection; and

F. Nonpublic, personally identifiable information of an individual.

The [board, agency, authority, etc.] shall provide to a legislative committee, on written request signed by the chairs of that committee, the information or record, including information designated confidential under this subsection, specified in the written request. The information or record may be used only for the lawful purposes of the committee and in any action arising out of any investigation conducted by the committee and may not be released for another purpose.

**2. Exceptions.** Notwithstanding subsection 1, the following are public records and are not confidential:

A. Otherwise confidential information the confidentiality of which the [board, agency, authority, etc.] determines to have been satisfactorily and effectively waived;

B. Otherwise confidential information that has already lawfully been made available to the public; and

C. Impersonal, statistical or general information [ , including:

(1) The names of recipients of or applicants for financial assistance provided by the [board, agency, authority, etc.], including principals, where applicable;

(2) The amounts, types and general terms of financial assistance provided by the [board, agency, authority, etc.], to those recipients or requested by those applicants;

(3) The descriptions of projects and businesses benefiting or to benefit from the financial assistance provided by the [board, agency, authority, etc.];

(4) The names of transferors or transferees, including principals, of property to or from the [board, agency, authority, etc.], the general terms of transfer and the purposes for which the transferred property will be used;

RIGHT TO KNOW ADVISORY COMMITTEE  
Recommended Drafting Template:  
General Agency Confidential Individual and Business Records

(5) The number of jobs and the amount of tax revenues projected or resulting in connection with a project;

(6) Upon the [board, agency, authority, etc.]'s, satisfaction of its loan insurance liability, the amount of any loan insurance payments the recipients or applicants must make with respect to a loan insurance contract; and

(7) The names of financial institutions participating in providing financial assistance and the general terms of that financial assistance].

**3. Disclosure prohibited; further exceptions.** A person may not knowingly divulge or disclose records designated confidential by subsection 1, except that the [board, agency, authority, etc.], in its discretion and in conformity with statutory freedom of access criteria under Title 1, chapter 13, subchapter 1-A, may make or authorize a disclosure of information of the following types or under the following circumstances:

A. Information necessary to process a person's application for financial assistance or to a person's obtaining or maintaining financial assistance provided by the [board, agency, authority, etc.];

B. Information requested by a financing institution or credit reporting service;

C. Information necessary to comply with any federal or state law or rule or with any agreement pertaining to financial assistance;

D. Information necessary to ensure collection of an obligation in which the [board, agency, authority, etc.] has or may have an interest;

E. In any litigation or proceeding in which the [board, agency, authority, etc.] has appeared, information introduced for the record that is obtained from records designated confidential under this section;

F. Pursuant to a subpoena, a request for production of documents, warrant or other order by competent authority as long as the order appears to have first been served on the person to whom the confidential information sought pertains or belongs and as long as the order appears on its face or otherwise to have been issued or made upon lawful authority; and

G. Information necessary to acquiring, maintaining, or disposing of property by the [board, agency, authority, etc.].