

Joint Standing Committee of Inland Fisheries and Wildlife

Interim meeting – fact finding meeting regarding an undercover warden investigation in the Allagash in 2014.

Wednesday, June 1, 2016 at 9:00am
Room 228 of the State House
Augusta, Maine

SUMMARY

IFW committee members. Present: Sen. Davis, Sen. Cryway, Sen. Susan Deschambault, Rep. Lyford, Rep. Corey, Rep. Reed, Rep. Crafts, Rep. Short, Rep. Wood, Rep. Alley, Rep. Duchesne, Rep. Martin, Rep. Hilliard. Absent: Rep. Dana.

Presenters/Responders: Chandler Woodcock, Commissioner, Department of Inland Fisheries and Wildlife; Colonel Joel Wilkinson, Maine Warden Service; and Brenda Kielty, Maine's Public Access Ombudsman.

Proceedings:

Senator Davis began the meeting by introducing committee members and the Commissioner of the Department of Inland Fisheries and Wildlife, Chandler Woodcock, and the Colonel of the Warden Service, Joel Wilkinson who were seated in front of the committee. Sen. Davis reiterated that the while the meeting was open to the public, it was not a public hearing but a fact-gathering endeavor and that comments and questions from the public would not be taken at any time during the meeting. Later in the proceedings, Maine's Public Access Ombudsman, Brenda Kielty was introduced and she also took a seat in front of the committee.

Sen. Davis provided background information about the controversy stemming from the Portland Press Herald's May 8, 2016 article "North Maine Woods Lawless" and why the IFW committee was conducting its fact-finding meeting. Sen Davis stated that after several discussions with the department regarding assertions made in the article, he and Rep. Short decided to bring the matter before the full committee. Sen. Davis proffered several documents to the committee and the public that included:

1. The May 8, 2016 Portland Press Herald article "North Maine Woods lawless;"
2. The department's May 11, 2016 press release responding to statements in the Press Herald article;

3. The department's May 11, 2016 memorandum to Sen. Davis responding to 4 questions posed by the senator regarding certain aspects of the 2014 Allagash investigation;
4. A letter from District Attorney Todd Collins responding to questions about the legal concept of entrapment;
5. The sections of the Maine Revised Statutes that addresses limitations on the dissemination of intelligence and investigative record information; and
6. A December 1, 2015 letter from the department acknowledging the receipt of a November 30, 2015, Freedom of Access Act request for certain public records and setting forth how the department planned to proceed to meet the request.

These documents can be found on the Joint Standing Committee of Inland Fisheries and Wildlife's webpage at: <http://www.maine.gov/legis/opla/ifwallagashmeetingmaterials.pdf>

Sen. Davis conducted the fact-finding proceeding by reading the "North Woods lawless" article verbatim stopping periodically to allow committee members to pose questions to the department or Brenda Kielty. Once Sen. Davis had finished reading through the article, he turned the committee's attention to a list of 34 questions submitted to him that morning by certain members of the Joint Standing Committee on Judiciary for the department's consideration. Sen. Davis read most of the questions verbatim and when appropriate, as determined by the senator, allowed the department to respond to each question in turn.

The following is a summarization of the subject areas discussed at the meeting and addressed by the department or Brenda Kielty during the proceedings. This is not a transcript and most of the discussion is not included in the summary. The complete audio recording of the meeting can be found at: <http://www.maine.gov/legis/opla/comitinfoFW.htm>

The 2014 covert investigation, duration, warrants, and costs

The 2014 covert operation in the Allagash stemmed from numerous complaints the department received from people in the area about the suspects committing numerous fish and wildlife violations. The investigation was conducted over 2 years using an undercover warden who was embedded with the subjects for as long as 9 days at a time totaling approximately 30 days over the course of the investigation. The undercover agent was a Maine game warden and has worked for the department for approximately 25 years. There were 6 warrants issued and each warrant was served (knock-and-talk) by four to five department staff in accordance with best practices. There were no "blue lights" involved in serving the warrants and the television show North Woods Law was not involved in serving the warrants or during the ensuing search. Operation expenditures for this case totaled approximately \$2,500. The department stated that is very hard

to respond to this type of newspaper article but hoped the meeting would help clarify the facts and set the record straight.

Undercover operations policies and practices

The current undercover operations policy manual was initially released in 2005 and while the department does periodically review the policy, it hasn't been updated since 2008. In general, when the department receives tip from the public about alleged violations a case investigator follows up by checking the history of individual in question and might send an officer to talk to the individual to see if that person has a predisposition to commit violations. Determining predisposition is very important. A supervisor of the investigator reviews the investigator's report and brings it to the major for approval. If the major approves, the case can go forward. Sometimes a district attorney will also review the case before operations begin.

Title 12 of the Maine Revised Statutes authorizes wardens to conduct activities that would otherwise be a violation of fish and wildlife laws but it is the department's policy to use this authority sparingly. If a covert agent is tested by the subject of an undercover operation, the officer may have no choice but to commit an otherwise illegal activity to avoid being discovered. Undercover officers do their best to prevent offenses and in this case, the warden prevented the poaching of numerous game animals.

Col. Wilkinson gave a brief explanation of how undercover operations work and stated that undercover agents befriend suspects and become a part of their lives; when suspects find out the person is an undercover agent they often feel deeply betrayed and angry. Undercover wardens often stay with suspects because that is where violations occur. The covert warden has full discretion to drop out of a case at any time or to take actions necessary for the warden's safety. It is almost impossible for an agent to avoid being caught up in illegal activity during undercover work.

Prosecution rates in undercover operations are extremely high and often more effective than uniformed officers. The department has just a few wardens who work in covert operations because it takes a certain kind of person to do that type of work.

The paper published the identity and a picture of the undercover warden in the Allagash case and as a result, the officer received calls threatening him and his family. Col. Wilkinson stated that there are no covert operations going on now because of safety concerns for undercover officers.

Warden supplying suspects with hunting equipment

The undercover warden was posing as a hunter so necessitated possessing hunting equipment including firearms. The warden's truck was used about 50% of the time in the commission of violations as were his weapons. This is not uncommon because poachers know that if they use their own equipment and get caught, they'll lose that equipment.

Activity by the undercover warden that may otherwise have been illegal

It is very common for the suspect to challenge an undercover officer about why the officer isn't participating in poaching or committing other illegal acts. When the warden in this case shot a deer, the suspect told the warden it was his turn to shoot a deer, put the warden in the driver seat and told him to shoot the deer. The deer the warden shot had previously been wounded by the suspect; the warden did not shoot the first deer.

The defendants were heavy drinkers and it was common practice to bring alcohol on a hunt. The undercover warden provided one beer during the day but it wasn't hunting related; there was a common cooler of beer that everyone drank from over time. The undercover warden in this case does not drink alcohol and often feigned drinking or drank very limited amounts to fool the suspects. In a majority of covert cases there is drug and alcohol use/abuse by subjects. When working in covert operation, the best resource an operative has is his/her mind and ability to react quickly so no operative is going to drink to the point where they put themselves in jeopardy or risk the admissibility of their eye witness testimony in court.

Evidence

One defendant stated that illegal game was brought to Ms. Kelly's house where she processed it. Wardens served a search warrant on Ms. Kelly (no lights or swat team) and seized many jars of what appeared to be canned meat. Wardens divided up the evidence and photographed it before taking it out of her house. A warden accidentally took two extra cases of vegetables (no peaches were taken) but once the error was discovered the cases were returned to Ms. Kelly and she signed for them. Ms. Kelly's claim that some vegetables had not been returned is inaccurate. The picture published by the paper of what it claimed to be canned vegetables and "peaches" were from another location and not Ms. Kelly's house. No peaches were taken into evidence in this case.

The paper suggested that the department fabricated evidence regarding the number of illegal trout displayed in a photograph with a defendant. The picture was only documenting the 22 fish they had caught that day in total. The warden had witnesses the subject taking 6 trout over the limited and the subject was convicted for taking that number of fish, not for all of the 22 fish in the photograph.

Cancelling the North Maine Woods Show

The department initially decided to do the show so that the public could see what game wardens do for them and while the show offered the department money, the offer was declined. The decision to end the contract with the show was made before search warrants were served in this case. A year ago or so, the department felt the show had run its course and that is was an

appropriate time to shut it down. The show was at a high point and didn't want to run the risk of it going the way that so many other reality shows have gone when their rating began to slip.

The show's footage supports the department's claim that they performed a low profile warrant search. The field producer of show contacted Col. Wilkinson asking if he should talk to the newspaper and the Col. responded affirmatively.

Entrapment

The warden service has always had a policy against entrapment; looking to catch the unwary criminal with a predisposition to commit the offenses not an unwary innocent person. The department is not looking to make people criminals and doesn't target anyone who isn't predisposed to criminal activities. In determining predisposition, we look at any prior convictions, documented consistent complaints from the public, as well as other evidence; it is based on the totality of the information.

The entrapment defense was not raised in this case which is kind of unusual in covert cases.

The district attorney won't take case where a warden overstepped the warden's bounds. There were steps in place to make sure inducement wouldn't be an issue.

Seasonal worker; employment issue

One of the subjects under investigation was a seasonal worker for the North Maine Woods and was not rehired after the investigation. She was not rehired by North Maine Woods because she had been issued a summons for theft of services for accessing the north Maine woods without paying proper gate fees; it was not a result of game violations.

Outcome of investigation

The initial target of investigation was convicted of several serious fish and wildlife violations as well as several other actors resulting in jail time, fines, license revocations and suspensions and the loss of firearms, vehicles and other equipment used in illegal fish and wildlife activities. The violations are major violations in the IFW arena even if not felonies; there are very few fish and game violations that are felonies. The department stated that the thought that taking any game illegally is not a major offense is baffling.

In this case, the department was supported by the district attorney and well as the trial court and law court. The department heard from many people in the Allagash area that were happy with the investigation and not until the article was published nearly three years later, did the department get complaints about the operation.

Going undercover in this case was a good use of department resources because there were significant crimes being committed that had substantial negative impacts on wildlife and wildlife related revenue.

The Commissioner characterized the newspaper article as just a story and not investigative reporting because it contained numerous inaccuracies.

Freedom of Access Request

While the department works diligently with limited staffing to meet FOA requests in a timely manner it can be a significant challenge. In this case, the department's response time was longer than it should have been for three main reasons; limited staff, inefficient record search capabilities and the scope of the request changed over time. The agency also had trouble establishing estimates for costs and the time it would take in producing the requested documents. The department worked with the Attorney General to redact information from requested documents. When the Freedom of Access Ombudsman (Ms. Kielty) received complaints about how the department was responding to FOA requests, she began working with the department to resolve the issue. The department did everything Ms. Kielty suggested without any push back.

This case involved requests for large amounts of documents made by different entities and those requests narrowed and changed in scope over time. The department provided a good faith estimate of costs and did a good faith search of records but still took too long and the estimates were too high. It needs a better approach to finding records and determining the appropriate fees. While it took too long for the department to provide the documents, it was not the result of intentional delays by the department. This is a common area of difficulty for agencies as statute is not detailed about how to go about meeting requests so departments need to establish a workable procedure.

The scope of the request changed over time and a recent request is still outstanding but being worked on. It is not unusual for the scope of a request to change over time to save time and money. The November request was focused on one person but subsequently changed to incorporate 11 others thereby increasing response time.

The department had trouble searching for responsive records; they did searches with keywords that weren't sufficient to get all relevant documents and exclude voluminous nonresponsive documents. Ms. Kielty had the department do another search using better search terms which gave much better results.

In determining cost estimates, the department basically asked each of 11 staff members subject to the FOA requests how long it would take to produce the documents and got varied responses because of differing skill subsets. This methodology does not yield an accurate estimate of costs. However, finding electronic records is not as easy as it may seem. The department worked with OIT staff remotely and OIT walked the department through a step-by-step process to ensure all responsive documents were identified. OIT also gave the department better software so redactions could be done electronically to improve response time; won't have to print out and physically redact each record.

There were objections raised to Ms. Kielty by the record requesters about prepaying the fee for copies of the documents, in particular the cost estimate given by the department seem exorbitant. Statute allows for prepayment of certain things but mainly involves the work the agency has to do to get ready to provide documents. Most agencies have billing practices that require prepayment. Ms. Kielty reads the statute to allow for the prepayment of costs associated with complying with FOA requests. The department's initial estimates were too high because of the way the department determined the costs (as described above). It is within the discretions of agency to waive these fees.

Text messages, if they contain government business, are subject to FOA. Col. Wilkinson said the department produced everything they were asked for or gave reasons why the department didn't produce certain records.

While responding to FOA request is a priority of the department, it is one of many responsibilities the department must reprioritize on a daily basis.