

Right to Know Advisory Committee
August 17, 2016
Meeting Summary

Convened 1:12 p.m., Room 438, Maine State House, Augusta

Present:

Sen. David Burns
Rep. Kim Monaghan
Stephanie Grinnell
A. J. Higgins
Richard LaHaye
Mary Ann Lynch
Judy Meyer
Kelly Morgan
Chris Parr
Linda Pistner
Harry Pringle
Helen Rankin
William Shorey
Eric Stout

Absent:

Luke Rossignol
Suzanne Goucher

Staff:

Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

Hazardous material transported by railroads

Staff discussed a draft letter from the Advisory Committee to the Legislature's Judiciary Committee, in response to the Judiciary Committee's request for the committee to review the public records exception at 1 MRSA §402, sub-§3, ¶U, protecting as confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, fire department or other first responder.

The Advisory Committee's letter recommends that the Judiciary Committee consider submitting a committee bill to the Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation from stakeholders and other members of the public, and from state and local government entities. The letter iterates the Advisory Committee's interpretation of the current law, that it is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by

rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or accidental discharge of hazardous materials.

The Advisory Committee laid out a number of questions and concerns that may help guide the Judiciary Committee's formation of a committee bill, including whether disclosure of the information sufficiently jeopardizes public safety to outweigh the public interest in disclosure, whether disclosure disadvantages a business interest sufficiently to outweigh the public interest in disclosure and whether the language of the current exception is as narrowly tailored as possible.

After the summary, Mr. Pringle made a motion, seconded by Mr. Parr, to send the letter as written to the Judiciary Committee. Mr. Stout pointed out that the federal regulations cited in this public records exception for the definition of "hazardous materials" do not point directly to the 150-plus pages of materials in 49 Code of Federal Regulations § 172.101, which should be clarified. He also wanted mention of the extensive record keeping and retention requirements in Part 172 of the federal regulations. The motion was amended to include Mr. Stout's suggested change and was voted unanimously.

Personal contact information for professions and occupations licensed by the State

Staff summarized their research into examples of models that could guide the formation of policy recommendations for a more consistent approach to adding protections for the personal information of professional and occupation licensees and license applicants. Research was condensed into a chart distributed to the Advisory Committee, and Staff reviewed this document outlining examples of policy options. The examples drew from various public records exceptions from Maine law, e.g., those protecting the residential address and telephone numbers of emergency medical services, nursing, osteopathic and medicine licensees and applicants when professional contact information has been provided. Examples from other states were also included in the document, including personal information protections for licensees in California, Indiana, Missouri and North Dakota.

Staff provided information on LD 1171 from the 127th Legislature. At the last meeting, a member had pointed to the amended version of this bill as providing an example of a reasonable compromise between privacy interests of individuals and the public interest of the public. This bill dealt with the confidentiality of the investigative records of the Maine Human Rights Commission, and the majority amendment of the Judiciary Committee would have designated certain information confidential, including medical records, the identity of a minor, personnel records, personal telephone numbers and home addresses.

The Advisory Committee invited up Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England. Ms. Clegg, who had been asked by the Committee for more information at its prior meeting, distributed a number of handouts: a memo from Planned Parenthood, a report from the National Abortion Federation on violence and disruption against abortion providers, a statement filed in Superior Court in the State of Washington by the National Director for Affiliate Security at Planned Parenthood Federation of America outlining

the history of violence and harassment against abortion providers and abortion-providing facilities, and a copy of Maryland law (MD Code, General Provisions, §4-333) making all licensing records confidential except for certain specified categories of information.

Ms. Clegg reiterated that the only non-public information in Maine licensing records is an individual's Social Security Number. She pointed out that even a licensee's federal Drug Enforcement Administration (DEA) drug authorization card is released pursuant to public records request, creating a security risk in itself. She noted that sometimes home addresses are redacted.

Mr. Pringle expressed his view that it would be better to say what isn't public than to specify what is public. Otherwise, he noted, the Advisory Committee would have to look through entire licensing files deciding what was useful to the public and what should be confidential. He stated his belief that home address, home phone and fax numbers and personal cellphone numbers should be confidential. He opined that 1 MRSA §402(3)(O) should be used as a starting place for designating what should be designated confidential in licensing records. Mr. Parr suggested an opt-in type of system, where certain licensing information would be confidential unless the subject of the records affirmatively allowed public disclosure.

Ms. Pistner voiced concern that increased agency costs to redact new categories of information in licensing records would create a fiscal note, likely dooming any bill seeking this increased confidentiality. To reduce agency time and costs, Ms. Pistner suggested perhaps developing a certain document containing information most valuable to the public that did not include private information, and then making that document a public record while the rest of the licensing files would be confidential. Mr. Parr reminded the Committee that there were other categories of licenses regulated by other departments, including 3 by the Department of Public Safety.

Ms. Clegg from Planned Parenthood asked the Advisory Committee to consider a notification system that would notify licensees if their file was requested by a member of the public.

Ms. Meyer, Rep. Monaghan and other Committee members noted that the Committee should keep in mind that there are many categories of licenses other than those commonly subject to harassment as illustrated by Planned Parenthood, expressing hesitancy at applying the same level of confidentiality to all license categories. Mr. Higgins, Ms. Meyer and Ms. Morgan variously expressed the idea that in general, the more the public knows about licensees the better, except in certain circumstances of concern, and that it was important that the public be able to verify the address of a licensee. Several members voiced support for the earlier idea of a form that would be public that contained certain licensee contact information as a solution to the potential harassment issues facing certain licensees.

Mr. Parr asked staff to review what the original request from the Judiciary Committee was on this topic. Staff replied that the Advisory Committee had been asked to develop guidance to assist the Judiciary Committee when it considered proposed confidentiality provisions for licensing information. Sen. Burns stated that the clearer the guidelines, the better, and that the Advisory Committee should err on the side of transparency.

Ms. Clegg from Planned Parenthood suggested that photographs and DEA authorization cards be kept confidential. She noted that DEA cards contain the licensee's name, address, drugs that can be prescribed, date of card issue, expiration date and DEA number.

Ms. Lynch expressed interest in communicating to other license categories to see if there were other concerns with DEA authorization information being released as public records.

Mr. Parr made a motion, seconded by Mr. Pringle, that the Advisory Committee send a letter to the Judiciary Committee with guidance for considering proposed confidentiality provisions applicable to licensing records. The letter would support the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402(3)(O) for protecting public employee personal information, except for cases in which the licensee or license applicant has only provided a personal address and not a public business address. Licensees and license applicants must either be presented with an opt-in approach to personal contact information disclosure, or else the regulating body should have a form that would be public but would exclude non-public private information about the individual.

The Committee voted in favor of the motion, 11-2.

Public Access Ombudsman update & recap of Public Access Officer training

Brenda Kielty, Public Access Ombudsman, addressed the Advisory Committee, beginning with a summary of the preliminary report distributed to members. Ms. Kielty noted that the upward trend for number of contacts from the public since 2013 has continued. Of the contacts, most are inquiries about Maine's Freedom of Access Act (FOAA) as opposed to complaints. When she receives suggestions for FOAA improvements, which happens seldomly, she said that she refers these suggestions on to the Advisory Committee. Most contacts, she noted, are from private citizens as opposed to government officials.

Ms. Kielty suggested that issues of perceived delay in FOAA response time by public bodies is often due to the expectations of the public requestors not aligning with reality. Executive sessions seem to create the most FOAA inquiries and complaints. Another popular topic is what constitutes a public meeting, especially in the context of remote participation.

Mr. LaHaye asked if Ms. Kielty contacts an agency when a member of the public complains about the agency. She replied that her goal is conflict resolution, and her intervention all depends on the particular case. She may encourage the requestor to work with the agency, as her intervention may sometimes escalate a conflict.

Ms. Kielty next discussed the recent Public Access Officer training she had given. The focus of the training was on the process of searching for records. She noted that this is an area in which FOAA is silent, and that searches for electronic records are much different than searches for paper record. The procedure begins with proper record retention, actually searching the records, assembling the records, reviewing the records and finally providing access to the requestor. Ms. Kielty noted that Advisory Committee member Mr. Stout provided assistance with the email

search portion of the training, which will be offered to each State agency as a follow-on to the initial group meeting.

Ms. Meyer asked if this information was also being provided to the Maine Municipal Association and the Maine School Management Association, and Ms. Kielty replied that she does do outreach to those organizations and will continue to do so. The information from the training will need to be customized somewhat to better address the needs of the other public bodies which these organizations represent.

Sen. Burns asked about records retention training, to which Ms. Kielty replied that the Maine State Archives provides such training. She acknowledged that more can be done in the area of records retention, and must be done.

Right to Know Advisory Committee public hearing

Staff distributed and reviewed the draft public hearing notice for the potential upcoming Advisory Committee public hearing about how FOAA is working and how it might be improved. Staff pointed out that the notice specifically states that the hearing is not a forum for the resolution of specific complaints about meetings or records.

Mr. Higgins wondered if the Advisory Committee or specific members had received any requests from the public to hold a public hearing. Several members noted that they had. Ms. Lynch noted that government officials are feeling some FOAA requests are burdensome and she expect to hear from these officials who bear the burden of responding to FOAA requests as well as from members of the general public.

Ms. Lynch suggested that staff be ready to take up the Advisory Committee's normal business in case there is little testimony provided at the public hearing.

Mr. LaHaye made a motion, seconded by Ms. Lynch, that the public hearing be held, set for September 14th. Sen. Burns added that the public hearing should take place at 1:00 p.m. while the subcommittee could meet at 10:00 a.m. The vote was unanimous.

Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee, including recommendations from its December 2015 meeting and its July 20th meeting. The Committee approved of the Subcommittee's recommendations in all instances, except for the following.

With respect to the public records exception at 1 MRSA §402(3)(R) (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, the Advisory Committee moved to set aside the item until further information could be gathered

from the Secretary of State's Office by staff regarding why this public records exception was needed given that paragraph N of the same statute already exempts all Social Security Numbers from the definition of public records under FOAA.

Regarding 22 MRSA §1711-C(20) (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee hesitated to take the recommendation of the subcommittee to repeal the provision. Staff provided an explanation of Maine's statewide health information exchange, which serves as a hub for connecting healthcare providers with electronic patient medical records from participating healthcare providers. HealthInfoNet is the state-designated organization managing this exchange. Staff relayed that through contacts with this organization they had expressed the belief that this public records exception had no effect because they were not a public body that falls within the requirements of FOAA. Additionally, HealthInfoNet communicated that it had never received a request for information from the public and saw no value in maintaining this public records exception. Staff offered that according to the criteria currently used by the Maine Supreme Court to determine whether an organization is a public body subject to FOAA, HealthInfoNet would very likely not be considered subject to FOAA. This organization is a private non-profit company established independently from any State action, the organization does not receive State funding and the State have any involvement or control over the exchange besides imposing certain security and confidentiality provisions. Staff offered that HealthInfoNet as a health information exchange is covered by two federal confidentiality laws, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act.

Mr. Pringle expressed his concern about repealing this provision, citing the law of unintended consequences. Other members echoed this concern over unintended consequences and being uncomfortable with repealing the provision unless it was certain that this information could never be released under FOAA. Several members were of a contrary position, taking the view that if the public records exception was not needed then it should be eliminated. The Advisory Committee voted to table this item and staff agreed to gather further information.

With respect to the public records exception found at 29-A MRSA §1301 (Advisory Committee reference number 55), relating to the social security number of an applicant for a driver's license or nondriver identification card, this provision is similar to the other tabled item relating to Social Security Numbers in the possession of the Secretary of State. The Advisory Committee voted to also table this item in order for staff to get further information from the Secretary of State's Office.

Proposal to require local boards and committees to record and retain the recordings of executive sessions

Staff reviewed current Maine law regarding open meetings and executive sessions, 1 MRSA §§403, 405, 407. Staff pointed out additionally that the Maine Supreme Court has held that when the propriety of an executive session is challenged, the burden is on the public body to establish that the executive session was proper.

The Advisory Committee invited Rep. Hubbell to explain his proposal. Rep. Hubbell's described his proposal, which is to require local boards and committees to record executive sessions and preserve those records so that they may be legally discoverable in case of a dispute about the content or propriety of the discussion held during these executive sessions. Rep. Hubbell then suggested the Advisory Committee hear from his constituent, Robert Garland, former Town Councilor for Bar Harbor, who had brought the issue to his attention. The Advisory Committee then invited up Mr. Garland, who explained his experience with executive sessions and a personnel matter in Bar Harbor. During litigation involving the matter, Mr. Garland noted that what had transpired during the executive sessions was recalled much differently than how he had remembered it.

Mr. Higgins asked if an attorney can be present during an executive session and whether they can request that a transcript be made. Mr. Pringle addressed the question, stating that an individual who is the subject of an executive session has the right to request to be present, have their attorney present and can request that the meeting be public. This also includes the right to have a court reporter be present to take a transcript of the proceeding, he said. Mr. Higgins asked if the transcript would then be considered a public record, to which Mr. Pringle replied that it would not be, as it would be in the possession of that person and their attorney, though it could always be released at the prerogative of that individual.

Mr. Pringle acknowledged the concern prompting the proposal, but stated that he would be extremely reluctant to have executive sessions recorded. He stated that in his view, coming from his experience in the school board context, the administrative burden of recording and indefinitely keeping these recordings and ensuring their confidentiality into perpetuity outweighed the potential for abuse of executive sessions. He reiterated that the courts place the burden on the agency or public body holding an executive session to justify the propriety of that executive session if there is a legal challenge. A judge would make the determination regarding truthfulness and reliability of participants' recollections.

The Advisory Committee invited up a representative from the Maine Municipal Association, Garrett Corbin, to provide a municipal perspective on the issue. Mr. Corbin posited that it is important to balance the law so that the public interest does not outweigh privacy interests. This proposal, he noted, would discriminate against municipalities and local government in a way that is not done elsewhere in FOIA. He referred to the portion of the executive session statute that details what constitutes proper subject matter for an executive session, 1 MRSA §405(6-A)(1), noting that an executive session is only held if an individual's right to privacy or potential damage to reputation is involved. Mr. Corbin stated that making and keeping records of these executive sessions increases the likelihood of inadvertent disclosure of this sensitive information. He added that the law as it currently stands provides a remedy through the court system.

Ms. Lynch noted that executive sessions involve much more than just personnel matters, which seems to be the focus of the discussion. She asked Mr. Corbin whether, in these other contexts, were executive sessions to be recorded and legally discoverable, would that chill the candor of these municipal discussions? Mr. Corbin agreed that it would, relating feedback from some

municipal representatives that had told him they would not hold executive sessions if this proposal went through.

After a bit more discussion, Mr. Higgins made a motion, seconded by Mr. Pringle, that the Advisory Committee not move forward to recommend any changes to the current law around executive sessions. The vote was unanimous.

The Criminal History Record Information Act (CHRIA) and the Judicial Branch

The Advisory Committee opened up discussion on a topic raised at earlier meetings, regarding the Criminal History Record Information Act (CHRIA) and the Judicial Branch's recent reversal of its policy of making confidential case files for dismissed cases. Ms. Meyer stated that she was satisfied with the Judiciary's current policy. There was no interest by members in having any further discussion.

Anonymous FOAA requests

In response to the Advisory Committee's request at its prior meeting for more information on the extent to which, if any, an agency may ask for the purpose of a FOAA requestor's request, staff began by reviewing current Maine law. Staff related that 1 MRSA §408-A provides the general principle that "a person has the right to inspect and copy any public record", and subsection 3 of that section provides that an agency or official "may request clarification concerning which public record or public records are being requested." Staff continued that an individual may be required to clarify their public records request by an agency, and that while nothing in FOAA prohibits an agency or public body from asking additional questions to a requestor, the requestor is not obligated to provide any other information to the agency and the agency may not discriminate in its response to the request regardless. Staff then directed the Advisory Committee to a handout with a comparison of other states' public records laws in regard to how they handle requestor identity and purpose.

Mr. Stout noted that often in the context of email requests, a requestor is anonymous by sheer virtue of their obscure email address and not by any intention of anonymity by the requestor. Mr. Pringle offered his opinion that a requestor should not be required to give their name or purpose when making a request for public records. Sen. Burns wondered if members thought a change should be made to FOAA to prohibit agencies from asking a requestor's name or purpose, with several members disagreeing that this was needed. Mr. LaHaye posed to the group whether there should be a distinction between commercial and non-commercial purposes of requestors. Mr. Higgins shared his view that if a record is open, it should be allowed to be used for whatever purpose the requestor wants. Mr. Pringle shared that the Advisory Committee has wrestled with the commercial/non-commercial distinction in the past, and could never work out how to precisely define the difference between the two. Mr. Parr noted that as a practical matter, even if there were a distinction made, a person can have someone else request a public record for them, in order to get around the restriction. He also wondered what the State's policy would be for what to do with requestor information if collected.

The Advisory Committee voted unanimously to take no action on this topic. Rep. Monaghan noted that if there were major concerns regarding anonymous FOAA requests, such as voiced by Planned Parenthood, then those parties could raise this with their legislators to bring legislation forward in the next legislative session.

Future meetings

The Advisory Committee's fourth meeting is scheduled for Wednesday, September 14th at 1:00 p.m. in Room 228 (Appropriations Committee Room) of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, September 14th in Room 438 (Judiciary Committee Room) of the State House.

The meeting was adjourned at 4:57 p.m.