

Right to Know Advisory Committee
October 3, 2013
Draft Meeting Summary

Convened 2:01 p.m., Room 126, State House, Augusta

Present:

Sen. Linda Valentino
Rep. Kim Monaghan-Derrig
Perry Antone
Joe Brown
Garrett Corbin (for Richard Flewelling)
Suzanne Goucher
Fred Hastings
Bill Logan
Judy Meyer
Chris Parr
Linda Pistner
Harry Pringle
Luke Rossignol

Absent:

Mal Leary
Mary Ann Lynch

Staff:

Henry Fouts
Colleen McCarthy Reid
Peggy Reinsch

Introductions

Senator Linda Valentino called the meeting to order and the members introduced themselves.

Public Access Ombudsman Update

Public Access Ombudsman Brenda Kielty provided the Committee with a quarterly update on the contacts she has received, including inquiries, complaints and suggestions. The data is categorized according to the type of inquiry and its status; the outcome of the inquiry; the person or entity making the request; the type of governmental entity the requester is seeking information from; and whether the inquiry relates to public records or public meetings. Ms. Kielty also provided a list of the Ombudsman's outreach efforts.

At the Advisory Committee's request, Ombudsman Kielty surveyed school districts throughout the State to determine if they have received requests for the email address lists for parents of students. Ms. Kielty reported that Falmouth was the only school district that received such a request.

Reports of Subcommittees

A. Public Policy Subcommittee

Chris Parr reported that the Subcommittee has met twice on September 10 and October 3 (jointly with Legislative Subcommittee). The next meeting will be held on November 12; the Subcommittee will meet jointly with the Legislative Subcommittee.

- Lowering the payment in advance threshold of 1 MRSA § 408-A (10)--The Subcommittee was not in favor of lowering the advance payment threshold and took no action.
- Anonymous FOAA requests-- The Subcommittee agreed to set this topic aside.
- FOAA as a discovery tool-- There are litigation discovery rules and procedures in place, but individuals still use FOAA as a discovery tool, for example, in traffic stop cases. If there are already ways for a defendant to seek out materials, should FOAA be available as an additional means to get information? It was noted in the discussions that this issue has been wrestled with in the past and the conclusion was that these are two separate processes – each with its own specific timelines, etc. The “reasonable time” for a response to a FOAA would not need to be relevant to any impending court deadlines. It was noted that over the years the committee has never recommended differentiating FOAA requests based on the purpose of the requestor – to do so in this context would be a big change to the current statute. The Subcommittee agreed to stay with the status quo regarding this issue.
- Abuse of FOAA and restrictions on FOAA requestor--The Subcommittee discussed draft legislation prepared by staff and examples of other states’ statutes that address FOAA-type abuses. Mr. Pringle noted that judges currently don’t have the power to enjoin abusive FOAA requests currently, and that the issues facing the Subcommittees were: 1) Should any additional limits on “abusive” FOAA requests be put into law; 2) If so, what is the standard?; and 3) Whether the burden should be on the agency or requesting member of the public to file for an injunction with the court. The joint Subcommittees unanimously agreed to move forward on developing draft legislation and to table the discussion until the next meeting.
- Unintended adverse impacts of FOAA-- An unintended adverse impact of FOAA results from the modern reluctance of government personnel to keep documents, and to put things in writing, because of the potential that the information will be disclosed pursuant to a FOAA request. This can have a negative impact on historical information, for example, and also takes away an important communicative tool at government’s disposal. The Subcommittee decided to put this issue aside.
- FOAA for commercial purposes--The Subcommittee will discuss at the next meeting.
- Public records versus public information--The joint Subcommittees discussed whether FOAA applies to information or just records, and how to clarify the Public Access Ombudsman’s task to track “information” requests directed to public agencies. The joint Subcommittees decided, together with Ms. Kielty, that she would create a draft tracking form to be used by the various agencies when FOAA requests are made, get feedback from various public access officers, and bring the form back to the Subcommittees for guidance.
- Compliance with new law (LD 1216, PL 2013, c. 350)-- LD 1216 created a new deadline for public agencies to respond within 5 working days of receiving a FOAA request with an acknowledgement of having received the request, and also providing a denial of the request if appropriate. If an agency fails to make its timely response, the request is treated as if it were denied and the requesting individual may appeal the denial through the court system. Linda Pistner circulated a draft prepared by the AG’s Office that makes the following suggested amendments: 1) allows agencies to respond that they “expect to deny” the request; 2) limits where an appeal to the courts may be taken to certain areas (in conformance with venue rules); and 3) allows the public agency to respond to a legal complaint with a “statement of

position” instead of a detailed legal answer. The discussion went back to the new 5-day deadline – 10 days was offered as an alternative. Also, the idea of a grace period was introduced, where an agency would have to acknowledge the request within 5 days, but would have more time to respond before the requester could go to court. The joint Subcommittees and Linda Pistner agreed that Ms. Pistner would come back to the Subcommittees with drafted legislation to amend LD 1216 (PL 2013, c. 350), specifically in regards to creating a grace period for FOAA denials and better defining when “receipt” of a FOAA request is considered to occur.

- Should government records containing personal information about private citizens be generally protected from public disclosure (or protect just the personal information in public records)? --If personal information is collected by the State, what are the State’s duties in regards to that information? Staff noted there are several places in ME statutes where private information is collected which the agency is not precluded from disclosing. Staff noted that the Federal Privacy Act is one model; for the next meeting, staff will research other state laws to see if there may be other models on the state level. The Subcommittees also discussed the specific issue of the Registers of Deeds wanting to redact personal information in public records they supply to the public. The Registers of Deeds have serious concerns with providing official records with personal information to the public. They asked for a law that would allow the Registers to reject a document for filing if it contains personal information. A member suggested amending the law to allow the Registers to redact Social Security Numbers; the Registers noted there would be costs, but thought it would be feasible and affordable, and that this change would address their concern. The joint Subcommittees unanimously agreed to draft legislation to authorize the Registers of Deeds to redact Social Security Numbers when they supply records to the public.

B. Legislative Subcommittee

Judy Meyer reported that the Subcommittee has met twice on September 9 and October 3. On October 3, the Subcommittee also met jointly with the Public Policy Subcommittee. The next meeting will be a joint meeting with the Public Policy Subcommittee on November 12. Ms. Meyer provided the following update on its discussions.

- Encryption of emergency communications--The subject of establishing a policy concerning the encryption of emergency radio communications among law enforcement and first responders was discussed in 2012. The Right to Know Advisory Committee wrote to the Board of Trustees of the Maine Criminal Justice Academy requesting that the Board consider creating a model encryption policy for consideration by local law enforcement agencies. The Chair of the Board of Trustees responded that the Board does not formulate model policies for law enforcement, although it does develop standards for law enforcement policies mandated by the Legislature. After discussion, the Subcommittee agreed to explore options for pursuing the original proposal of a policy that maintains the current practice. The Subcommittee voted to table the issue while staff develops language and checks with stakeholders. At the October 3rd meeting, the Subcommittee discussed the issue jointly with the Public Policy Subcommittee. The Maine Chiefs of Police Association expressed opposition to legislation regarding radio encryption because this would be legislation where there really is no issue. Additionally, the Maine Chiefs of Police Association position is that even though the public can hear live radio transmissions, there is no FOAA right to this information. After brief discussion, where the question was raised whether the issue was properly before the Right to Know Advisory Committee and some members expressed

satisfaction that the cost barrier alone ensures that encryption will not be an immediate issue, the joint Subcommittees unanimously voted to take no action on this issue.

- Appropriations Committee caucuses-- The Right to Know Advisory Committee has discussed the openness of legislative party caucuses in the past; there is some interest in addressing it in the statute to make it clear whether caucuses are open to the public or closed. The Subcommittee voted 7-2 (Mr. Brown and Mr. Parr dissenting) to ask Public Access Ombudsman Brenda Kielty to provide clarification regarding the public accessibility requirements under Maine law for party caucus meetings. Ms. Kielty agreed to try to provide guidance by the beginning of November.
- Protection of “personal information” within the data breach statute--The Notice of Risk to Personal Data Act (10 MRSA Chapter 210-B) requires that an entity that holds personal data provide notice when the entity is aware that the personal information has been subjected to a risk of disclosure. The Subcommittee agreed that, because the State has the same responsibility as private entities under the statute, no change and no further discussion are necessary.
- Review of statutes to determine whether records should be protected from disclosure -- The Subcommittee agreed that no discussion was necessary on the topic of requiring a regular review of records that are accessible to the public.
- *McBurney v. Young*, 569 U.S. ____ (2013) --The United States Supreme Court ruled that the Virginia Freedom of Information Act is constitutional even though it provides rights to public records to Virginia citizens and not to others from other states. The Subcommittee discussed whether it would be appropriate to limit the application of the Maine FOAA to Maine citizens, and quickly decided such a change would be setting up a barrier that would be easily crossed. The Subcommittee voted 8-0 (Mr. Parr abstained) to take no action.
- Permissive or mandatory --The Subcommittee discussed the question of whether the specific types of information listed as exceptions from the definition of “public record” (1 MRSA §403, sub-§3) must be redacted from records that are released to the public. Although there is some discomfort about the idea that a records custodian has discretion as to whether release records that are not “public records” but which have not been explicitly designated as “confidential,” the Subcommittee agreed to take no action. The Public Records Exceptions Subcommittee reviews all public records exceptions and tries to use consistent language to designate as confidential records that should be kept from being disclosed.
- Date of birth of public employees --The question of whether a public employee’s date of birth is public information was raised this summer. The Subcommittee agreed to table the discussion until the next meeting, at which point the members can review all the statutes that address the confidentiality of “age” and “date of birth” of public employees. At the October 3rd meeting, Mr. Parr agreed that current statutes’ protection of “age” is sufficient and no further action will be taken.
- Formal, standardized policy governing the storage, retention, and disposition of government emails-- The Subcommittee received a written update on the policy developed for State agencies. The Subcommittee agreed not to take action at this time, preferring to wait for other states to take the lead on this issue.

- Government records containing personal information about private citizens--The Subcommittee agreed to work with the Bulk Records (now Public Policy) Subcommittee to explore the question of whether and how to protect personal information about private citizens that is contained in public records. At the October 3rd joint meeting, the members agreed additional information about other states' practices would be useful.
- LD 549 as amended by the Judiciary Committee (bill carried over in Appropriations Committee): An Act To Provide for Special Restrictions on Dissemination and Use of Criminal History Record Information for Class E Crimes Committed by an Adult under 21 Years of Age --The Subcommittee discussed the proposal to "seal" the criminal history records relating to a single conviction of Class E theft when committed by a person under 21 years of age. The Subcommittee voted 9-0 to take no action.
- Post all FOAA requests--Ms. Kielty had received a request that all FOAA requests be posted online. The Subcommittee agreed to ask the Bulk Records Subcommittee (Public Policy) to add this issue in its discussions.
- Right to Know Advisory Committee and the Ombudsman -- Some of the duties originally proposed for the Public Access Ombudsman were shifted to the Advisory Committee when it became clear that no funding was available for the Ombudsman at that time. As the Ombudsman has now been funded, staff and Ms. Kielty agreed to review the original proposals and report back at the next meeting.
- Participation in public proceedings from remote locations, LD 258--The Subcommittee discussed LD 258 and the history of the Advisory Committee's work to address questions about electronic meetings. The Subcommittee had significant discussion about drawing distinctions between elected and appointed officials and on what the public body is doing. It was suggested that the issue be addressed incrementally: use LD 258 as a framework, but don't allow elected officials to meet remotely unless there is an emergency. The Subcommittee voted 6-2 in favor of the motion. The Subcommittee will review draft legislation for discussion at its next meeting and also review other state laws.

C. Public Records Exception Subcommittee

Suzanne Goucher reported that the Subcommittee has met twice on September 11 and September 25; the next meeting is scheduled for November 4, 2013. The Subcommittee provided the following update on its work.

- Title 22, section 8754, reporting of sentinel events-- The Subcommittee agreed to table discussion of this exception to the next meeting. Members have reviewed research on other state laws prepared by the Advisory Committee's extern, Stephen Wagner, and have asked for additional about the experience of other states, like California, Florida and Minnesota, which publicly disclose information about specific sentinel events. Members have also reviewed websites and other sources of publicly reported data about the quality of health care provided by hospitals, health care facilities and health care practitioners and have requested an analysis of the types of reports required under the sentinel event reporting law to federal reporting requirements for hospitals to determine if similar information is disclosed to the public by other measures.
- Exceptions Included in LD 420, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions--The Subcommittee

voted 3-0 to recommend that the provisions included in LD 420 to amend these public records exceptions move forward as proposed in the bill (and previously approved in 2012 by the Advisory Committee). The Subcommittee also agreed to recommend that Advisory Committee write a letter to the legislative policy committees concerning the two provisions in the Community Right-to-Know Act informing the committees that the Act has never been implemented and asking the committee to consider whether to recommend repeal of the Act. The Subcommittee will review a draft letter at their next meeting.

- Exceptions Tabled by Subcommittee in 2012 in Titles 26 through 39-A -- The Subcommittee is charged with review of 27 exceptions tabled by the Subcommittee in 2012; the previous Subcommittee did not make any recommendation with regard to any of these exceptions. As of September 25, 2013, the Subcommittee has taken the following actions by unanimous vote.

Continued without change

- 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 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 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

Amend, but approval of draft language pending

- Title 35-A, section 8703, subsection 5, relating to telecommunications relay service communications

Continue without change but will review in 2014

- 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

Tabled; no action taken

- Title 28-A, section 755, relating to liquor licensees' business and financial records
- Title 37-B, section 708, subsection 3, relating to documents collected or produced by the Homeland Security Advisory Council
- 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

No discussion by Subcommittee yet

- 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
- 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

Future Meetings

The Advisory Committee agreed to reschedule its December meeting from December 10 to December 17. The following meetings have been scheduled:

- Tuesday, November 12 at 1:00 pm, Room 438, State House; and
- Tuesday December 17 at 1:00 pm, Room 438, State House.

The following Subcommittee meetings were also scheduled:

- Public Records Subcommittee, Monday, November 4 at 1:00 pm; and
- Joint Meeting of the Legislative/Public Policy Subcommittees, Tuesday, November 12 at 10:00 am.

The meeting was adjourned at 2:55 p.m.

Respectfully submitted,
Peggy Reinsch, Colleen McCarthy Reid and Henry Fouts