

Right to Know Advisory Committee
Legislative Subcommittee
November 17, 2009
Room 438, State House, Augusta
Meeting Summary

Present:

Chris Spruce, Chair
Karla Black
Robert Devlin
Suzanne Goucher
Linda Pistner
Harry Pringle

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee at 10:33 a.m...

Serialized email issue

Rep. Dostie has proposed legislation (approved by the Legislative Council for introduction to the Second Regular Session of the 124th Legislature) to prohibit communications by members of governing bodies outside of public proceedings. At the last Legislative Subcommittee meeting, the members agreed that the offending activity that triggered Rep. Dostie's proposed bill is already illegal. The Subcommittee requested that staff prepare drafts for two approaches: 1) draft legislation making it explicitly clear that decisions can be made only in public proceedings; and 2) draft guidance on the issue to make use of the Advisory Committee's responsibility to provide information about "best practices" for public officials.

The Subcommittee considered two slightly different versions of statutory language, building on the law governing executive sessions ("An ordinance, order, rule, resolution, regulation, contract, appointment or other official action may not be finally approved at an executive session." 1 MRSA §405, sub-§2) and the definition of "public proceeding" ("The term "public proceedings" as used in this subchapter means the transactions of any functions affecting any or all citizens of the State by any" of listed or describe governmental boards and agencies. 1 MRSA §402, sub-§2). The members agreed that the drafts did not meet the needs of the Subcommittee. Everyone knows, Linda Pistner, asserted, that taking final action outside of a public proceeding is improper, and suggested instead language that applies to informal discussions used to circumvent the law. Bob Devlin agreed that the focus needs to be on improper discussions. Harry Pringle, noting that this is probably the most important issue the Advisory Committee has dealt with so far, reiterated that there are two factors that must be included in any discussion of limiting communications among public officials. First, the Constitution; the First Amendment protects Freedom of Speech, and the State must have a compelling interest in restricting such communications. Second, Mr. Pringle reminded the members of the long tradition of conversation between citizens in Maine, in particular talking with local legislators about issues of concern.

Mr. Pringle referred to a draft proposal prepared by Sigmund Schutz, Clerk of the Maine Freedom of Information Coalition and participant later in the meeting. The draft proposes a definition of

“meeting” that includes communication by a quorum with other members “contemporaneously or by the use of serialized or sequential telephone or electronic communication.” Those are the main factors, Mr. Pringle said: contemporaneous communications that substitute for decision-making at a public meeting. Mr. Spruce said he was not comfortable going forward with legislation on this issue. Karla Black agreed; if there is a problem with outside e-mail, address that through guidance and training. If it is still a problem, maybe consider legislation then.

The Subcommittee reviewed the draft question-and-answer document intended to be added to the Frequently Asked Questions webpage of the State’s Freedom of Access website. Mr. Spruce supported moving forward with a revision of the draft after making sure it is correct. He noted that e-mail is not the only problem, that other forms of electronic communication represent the same concerns; these technologies were not in existence when the Freedom of Access laws were first adopted, so their use was not contemplated by the statute. Mr. Pringle reminded the Subcommittee that local elected bodies have two roles: Legislative, in which they enact laws, ordinances, rules; and judicial, in which they reach judgments about certain issues, such as personnel. It is clear that there should not be communication outside the judicial proceedings, but part of the legislative job is talking with people and gathering information. Mr. Pringle voiced concern about the “Scarlet Letter” approach employed by some state laws (and incorporated into the guidance text), in which any communications between meetings must be disclosed at the next meeting. He reiterated the focus: e-mail among a quorum cannot be used to substitute for decision-making at a public meeting. Mr. Devlin recommended including, along with e-mail, discussion in any format, if it takes the place of making decisions in public meetings.

Suzanne Goucher suggested amending §403 (“Meetings to be open to the public”) to add a prohibition on circumventing the open meeting requirement by using e-mail or other methods of electronic communications. Mr. Spruce said he preferred not to go the statutory route, and suggested working with the Attorney General and Ms. Black to come up with language for the FAQs. Mr. Pringle agreed to put his comments in writing and share them with the staff. Ms. Goucher agreed with that route because Rep. Dostie’s bill will keep alive the debate about a legislative solution; she was concerned that the guidance materials would not be utilized as a resource by enough people.

The Subcommittee agreed with Mr. Spruce that there was consensus to proceed with further development of the guidance language.

Bulk data

The Subcommittee turned to Dick Thompson, Chief Information Officer, to start the discussion on bulk data requests. He provided a packet of information that included the InforME (Maine’s web portal) statute, a list of the bulk data services currently provided through the web portal, a copy of the portal contractor’s parent corporation’s position on bulk data as a portal service, and a sample of bulk data requests (crash reports, employee contact information, request for non-resident IF&W licenses, request for IF&W licenses by town). Mr. Thompson characterizes bulk data requests in several ways:

- Premium bulk data requests - where data is managed through software to provide format, appropriate character, content, sort and other value-added services;
- Bulk data requests against existing databases;
- Bulk data requests across several databases; and
- Bulk data requests for protected information (in whole or in part).

A significant concern is that when InforME was originally conceived, the statute provided that the revenue it produced would support its operation, and there was no provision for the General Fund to

support the portal and its operation. If the fees for premium services cannot be collected, InforME will have to scale back or ask for General Fund support. Mr. Thompson said that most uses of the premium services have been for commercial purposes. The data provided is approved by the agency before the response is provided. The main subscriber for Bureau of Motor Vehicle data is interested in vehicle damage, not any personal information contained in the reports.

Mr. Thompson explained that a law firm request for the crash reports originated with a request through InforME, but the requestor instead made a Freedom of Access request for the same data after finding out how much the data would cost. The Office of Information Technology and the Bureau of the State Police believed they had to comply, and did so. Mr. Thompson included a copy of the letter from the Maine Information Network (the InforME contractor) to Attorney General Mills asserting that the provision of the data without going through InforME and paying the fees violated the InforME law.

Mr. Thompson discussed the request for a laundry list of state employee information, which is difficult to provide because not all the data elements are kept by the State, and those that are do not reside in a single database. The request is clearly for a commercial purpose, and he is unwilling to undertake the complex chore of providing the information as requested for \$10 per hour. He will not be able to verify the accuracy of individual data points because of the nature of some of the databases. Mr. Pringle said he has never understood the Freedom of Access law to require anyone to create a document; the State should give the requestor the documents and let the requestor make what it will out of it. Mr. Thompson explained that the data is not in documents, but in databases. He could, however, give the requestor a couple of lists. Mr. Pringle said that it is fine to be responsive, but it should not be confused with what is required by the law.

Mr. Thompson moved on to the requests to the Department of Inland Fisheries and Wildlife. The information available through InforME about licenses included only those licenses transacted via the web portal. In addition, a request sorted by town was not accurate because the town of North Yarmouth was listed in different ways. This brings up the question, Mr. Thompson said, of what the Public Records law is all about: sunshine on the things we do. But not all data in government's hands is really about what government does and how government does it. Some of this data is extremely valuable. And all the data is collected and housed at taxpayer expense. Mr. Thompson said he will put together information about how other states are dealing with similar bulk data requests. He also said that the Office of Information Technology has begun the practice of posting information that is the subject of requests if the information is generic and there is public benefit in having it available easily, rather than only through a request.

The Subcommittee then welcomed Sigmund Schutz, at attorney at Preti Flaherty in Portland, who serves as the Clerk for the Maine Freedom of Information Coalition and who has extensive experience in media law and Freedom of Access issues. He serves as counsel to MacImage of Maine, LLC, in its lawsuits against Hancock County and other counties, seeking digital registry of deeds information. He explained how access to public records is critically important, and much of that information is collected through bulk data. Law enforcement can use bulk data for important public safety and criminal investigation purposes. Journalists investigating all sorts of issues, including fraud, correction, bias, etc., make use of bulk data. Many other professions and governmental workers access the information, including public health researchers and real estate professionals. Public land records are used by many entities for many purposes. As an example, the records must be accessible to support our credit system. Commercial requestors serve a necessary public purpose - they collect raw data, then add value. Most business transacted is based on public record databases.

Mr. Schutz explained that public access to real estate databases is critically important. Many private companies provide access to digital land records in other states, but not so much in Maine so far. These private companies are important to the continuation of records: A fire in Chicago wiped out all of a county's files, but the title company had copies and was able to repopulate the database. A glitch affected some of the digital records in Hancock County, and MacImage was able to fill in the gaps. Mr. Schutz mentioned the Property Records Industry Association (PRIA) as a national resource for information about property records access and preservation.

Mr. Schutz spoke about the MacImage litigation. First, public databases are public records. He said that was decided by Justice Marden in a Superior Court case. Second, what is a "reasonable fee" for digital records - can you charge a "per page" fee when it has no relation to the electronic database? He likened MacImage's request to a request for the contents of a library: All the books on the shelves (all the land records) and the card catalog (the indices the registries keep). The judge in the case said there are three possible ways to charge fees:

1. The actual cost (based on the Freedom of Access law);
2. Modified actual cost, related to the response costs (more than just the incremental costs of copying); and
3. Fee set by county, which may have no relation to the request.

The court chose option 2; no state agency that is subject to the Freedom of Access law can set a fee that is unrelated to the costs.

MacImage wants to collect all the land records in the state and make them available in a useful way. The counties will remain the only place to obtain a certified record. Since the lawsuit against Hancock County, that county is now making the records available online for free. MacImage has filed requests with other counties, and no county has provided the records as requested so far. MacImage filed a second lawsuit because the counties did not comply quickly enough.

Mr. Schutz provided as a handout excerpts from a PRIA Power Point presentation. He focused on a few points. First, the ownership of public records. Mr. Schutz asserted that public records are owned by the people, and the people have the ability to profit from those records, and the government serves as custodian of the records. Mr. Spruce asked about whether there is any recognition of the cost in transferring records from paper format to electronic databases. Mr. Schutz referred to the registries of deeds covering their costs through filing fees. Mr. Pringle tried to focus on Mr. Schutz's position on recovery of digitizing costs; Mr. Schutz elevated the importance of making records available over the need to cover costs. If the government thinks it is important to have a database for efficiency or other purposes, not to create revenue, it is presumed that there is an offsetting public benefit to having the database. He noted that there are some states that look at the commercial value of data, but then there is no guarantee that it won't be provided to the next person.

Mr. Devlin, who is the county administrator for Kennebec County, wanted to make clear that Kennebec County is no longer part of the MacImage lawsuit.

Mr. Devlin asked what is "reasonable" in setting fees for digitized records. The governmental entity is investing in security and preservation of information, not necessarily to sell records and make money. Mr. Schutz pointed to the handout, which suggested a list of factors appropriately taken into account when setting fees:

- Cost to set up access to a FTP secure website between county and requestor (if used);
- Fee for Programmer's time to set up electronic request;
- Fee for actual time of additional service personnel;
- Cost of Delivery Media – External Hard Drive, DVD, CD, etc.;

- Fee for CPU time; and
- Additional charge of 10 percent of the actual charges above for additional overhead.

Mr. Schutz mentioned an additional benefit that the governmental entity reaps from digitizing records: it saves storage space. Mr. Devlin assured the Subcommittee that Kennebec County has its digitized records backed up in three physically separate locations.

Ms. Pistner asked whether a company that is making money in making public records available has any responsibility to protect private information. And how does such a company decide who to disseminate information to? Mr. Schutz's response pointed out that all the registries of deeds, except Oxford County East, provide online access to their records 24/7. All the data is already out there. He recognized that isn't necessarily true for other agencies, and mentioned a white paper by PRIA on Social Security Numbers and redacting them from public records. He also noted that there is no study that shows that identity thieves are obtaining data from public records, but such thieves are using other sources. If a state imposes a restriction on the release of personally identifying information, it should be done prospectively because of the cost of going back to address existing records. The State can always allow people to request a redaction of their own information, and the requestor can pay for that work.

Ms. Pistner disagreed with Mr. Schutz's characterization of public records being "owned" by the public. The public has the right to access, she said, but holds no other indicia of ownership. Mr. Schutz said he agreed from a legal perspective, but it is really a question of perception: the public must be able to always access, always inspect. And the government has the custodian's responsibilities.

Beverly Bustin Hatheway, Register of Deeds for Kennebec County, and President of the Registers of Deeds Association was given the opportunity to make a few comments. She mentioned that the Registry of Deeds no longer has any paper copies of records, except for maps that are required to be recorded. The registries' job is to make sure the records are intact; she said it is the county commissioners' job to make decisions about contracts, hiring, fees, etc. She asserted that the bulk sales issue is a big one; maybe everyone should have access for free. Mr. Simpson (MacImage) stipulated in the most recent litigation that since Hancock County has been providing its records for free, his business has been ruined. Ms. Hatheway said there is nothing anywhere in the nation that mandates that registries sell records in bulk. She mentioned that Representative Treat is submitting legislation on this issue on behalf of the Registers of Deeds Association. Digitizing the data is an incredible amount of work, and it needs to be recognized. The Oklahoma FOIA law says public records are not for commercial purposes. Diane Godin, the Register of Deeds in Somerset County explained that her registry is getting all the data into a digital database. It is to their detriment if they can't recoup their transfer costs, and they lose revenue because other businesses provide the documents. The counties will end up going to the taxpayers to cover costs.

Mr. Schutz wrapped up his comments by cautioning against getting into the very dangerous game of selling public records to profit, to fund other government activities. States and municipalities can't do that; counties shouldn't be able to do so either.

The Subcommittee agreed to meet at 10:30 a.m. before the full Advisory Committee meeting on December 1st to try to develop recommendations to the full Advisory Committee. At Ms. Hatheway's request, the Subcommittee will provide 15 minutes for the county commissioners association to respond to Mr. Schutz comments, if need be. Any additional information should be shared with staff prior to the meeting.

Staff will contact Representative Treat and Representative Crockett about making their bill proposals available to the Advisory Committee.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Next Legislative Subcommittee meeting

Tuesday, December 1, 2009

10:30 a.m., Room 438, State House

Full Advisory Committee

Tuesday, December 1, 2009

12:30 p.m., Room 438, State House