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Right to Know Advisory Committee
Legislative Subcommittee
December 5, 2007
(Draft) Meeting Summary

Present:
Chris Spruce, Chair
Shenna Bellows
Karla Black
Suzanne Goucher
Linda Pistner

| Absent:
Mal Leary

Staff:
Colleen McCarthy Reid
Peggy Reinsch

Chris Spruce, Chair of the Legislative Subcommittee, called the meeting to order.

LD 1881

The legislative subcommittee continued its discussion and review of LD 1881, An Act to Improve Transparency and Accountability in Government. Staff distributed a chart outlining other state laws regarding the time to respond to requests for copying and inspection of public records. Staff noted that, for the states included in the chart, they reviewed each state's laws only and were not able to follow up with any states to determine actual practices. The subcommittee reviewed the chart and made the following comments:

- ◆ 29 states included on the chart had initial response times (for production of record, for acknowledgment of request and for denial) of 10 days or less
- ◆ The average time for response among the states seemed to be between 5 and 10 days
- ◆ Some state laws allow an extension of time in certain circumstances, e.g. large request, record is in active use or in storage, need to collect records from more than one site, need to consult with other public entity, need to review to redact confidential information, with some states setting a specific time limit to the extension, e.g. no more than 7 days, not to exceed 14 days and other states requiring that the agency set a date and time when the record will be available
- ◆ Some states require requests for public records in writing

Linda Pistner noted that current Maine law does not require requests in writing and does not require agencies to respond or acknowledge requests within a specific time frame, but that agencies are required to deny a request within 5 days. She remarked that it is reasonable to require a request in writing, but that it would not be fair to apply a deadline for a state agency to respond to a request if the request was not clear. She suggested applying a two-tiered approach:

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- ◆ require agencies to respond, deny or acknowledge a written request within 5 days; and
- ◆ if it takes longer than 5 days, agency must specify time for response in acknowledgement (also allow agencies to inquire about narrowing or clarifying request).

Shenna Bellows agreed that it made sense to require requests in writing so that requesters would be more specific about the records they were seeking. Mr. Spruce also agreed with requiring a written request and response within 5 days, but asked about the requests that would take longer than 5 days. How should these requests be addressed? Linda Pistner stated her expectation that the agency would provide a date to respond and allow the requester to have an opportunity to narrow the request and, perhaps, get a more timely response.

Jeff Austin of the Maine Municipal Association cautioned against a provision that requires the public entity to set the date and time for response. He agreed with a hard deadline for acknowledgement of requests, but suggested a soft deadline for requests that could not be produced within 5 days. He noted the subcommittee has 3 choices as to a deadline for responding to requests that needed additional time: 1) a hard deadline of a specific number of days; 2) agencies set the time for producing the record; or 3) agencies respond within “reasonable” period of time as in current law.

Mr. Spruce asked whether the Maine Municipal Association supported the provision in LD 1881 that requires a specific person to be named as contact person for records requests. Mr. Austin responded that a requirement that requests be made in writing may get at that. He noted that an Internet search turned up several examples of forms used by public entities for public records requests. Forms such as these would help identify the records requested and identify the person responsible for responding. He also presumed that any written acknowledgment of a request would have to by default identify the person responding to the request.

Ms. Bellows expressed reservations about the use of a form to make written requests because it would put a greater burden on Maine citizens to find and fill out the appropriate form. She also asked what would stop some public officials from responding to a request from a citizen by saying “I don’t have the form you need to use” and putting off a response. Mr. Austin replied that he wasn’t suggesting that the use of a form would be required, but that any written request would be satisfactory.

Suzanne Goucher suggested the subcommittee consider a combination of the Illinois and California laws. She proposed that the subcommittee recommend the following:

- ◆ Within 5-7 days, public entity must produce record (for small requests and readily available records), deny request or acknowledge request and explain why more time is needed;
- ◆ Within next 7-10-14 days, public entity must produce record or explain why more time is needed (for specific reasons set out in statute) and set time at which document will be available

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Ms. Pistner asked whether Ms. Goucher's proposal would allow public entities to give just one notice for large requests that will take a long time and give date. Ms. Goucher responded no, public entities would have to give 2nd specific notice if additional time is needed. Ms. Bellows agreed with the outline of the proposal, but suggested that the statute should set specific criteria for the definition of "voluminous" requests and other circumstances when the production of records need not meet the timeline. Mr. Spruce remarked that it might be preferable to leave the second deadline to a reasonable test. Karla Black said she was troubled by the 2nd step because of her experience in responding to requests. It is rare to get requests for a single document, it is more likely to get requests for any and all records for the last 2 years and these requests are time consuming and the 2nd step would be difficult to comply with. She explained that it usually takes over 20 hours to respond to requests and the largest request received by the Governor's Office to date took approximately 3 months to respond and resulted in 2 years of documents amounting to over 10,000 pages. Ms. Black agreed, however, that the law should require an acknowledgement of requests within a certain period of time. Mr. Spruce said he was worried about a one-size fits all approach---requests at the local level may be much smaller than requests made to state agencies.

Ms. Bellows commended Ms. Black and others in state government, but said that the subcommittee can't rely on them remaining in office. She said the law should safeguard the public's right to know and protect against public officials who may not be as concerned with the law. She would prefer an outside deadline for responding to all requests. Although she realizes that the outside limit would end up being the time for response, she believed it would be worth it. Mr. Spruce stated that it always comes back to "reasonableness" and asked whether a deadline like that would just allow public entities to stonewall for 4 months. Linda Pistner reminded the subcommittee that the provisions in the law that allow agencies to charge for large requests were thought to act as a deterrent but that, in reality, very few agencies charge the public.

After the discussion, Ms. Goucher proposed to modify her proposal so that public entities would be required to produce, deny or acknowledge response within 7 days and set the date to produce the record within a reasonable time, but not longer than 4 months. Mr. Spruce indicated that if the records could be made readily available, requesters should not have to request in writing. Ms. Bellows asked for more time to ponder the proposal and moved to table the discussion. Mr. Austin again cautioned against allowing public entities to determine "reasonableness" and suggested that the subcommittee keep it simple and easier to administrate by municipalities since the law would be a mandate.

Ms. Goucher asked if staff could prepare proposed statutory language based on the subcommittee's discussion and provide some options for the subcommittee to choose from at the next subcommittee meeting. Staff will e-mail a draft to the subcommittee before the close of business Monday.

Mr. Spruce asked the subcommittee if there were other provisions in LD 1881 that were of interest in including in any recommended language. Ms. Bellows reminded the

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subcommittee that the Maine Civil Liberties Union supported the whole bill, but specifically identified these provisions: 1) requirement for a public information officer; 2) accommodation in law that records can be provided in different medium if no additional cost involved; and 3) enforcement provision.

Ms. Goucher asked if the definitions were needed. Ms. Pistner replied that the current definitions were preferable and existing case law has interpreted the application of the law to public entities. She suggested waiting to review the draft and then determine if new or additional definitions were needed. Ms. Goucher also asked about the inclusion of a deadline on requesters for public records to inspect the records. Staff will include options in the draft.

Existing public records exceptions

The Subcommittee began its review of the existing public records exceptions identified in Titles 1, 2, 3, 4, 5, 6, 7, 8, 9, 9-A and 9-B. Prior to the subcommittee meeting, each subcommittee member reviewed the material compiled by staff, including the responses from public entities regarding the existing public records exceptions contained in the laws that are administered by those public entities. Mr. Spruce recommended that the subcommittee go through the chart prepared by staff and use the following process for the review:

- Move “in” those exceptions that the subcommittee has determined are appropriate and should continue in statute without change;
- Table those exceptions that a subcommittee member has questions about or wants further review of;
- Table those exceptions where the subcommittee has not had a chance to review the agency response or the response has not yet been received;
- Delay review of the exceptions in Title 1, section 402 until the subcommittee can review other proposed statutory changes to that section contained in LD 1881 and previous responses received from state agencies.

Ms. Pistner described that she categorized the exceptions in 3 categories: easy; those that need bigger discussion; and those that need more info. Ms. Bellows suggested that if the subcommittee did not get responses on certain exceptions the subcommittee should make its recommendations based on a reading of the statute.

Using the process recommended by the chair, the subcommittee initially reviewed all of the exceptions. The subcommittee recommended that 32 exceptions be continued in law with no changes; the subcommittee identified 2 of those exceptions in Title 9-A and Title 9-B as using inconsistent statutory language.

Before the next subcommittee meeting, members agreed to review the “tabled” items and identify their questions or concerns about each of those exceptions and e-mail them to staff. Staff will compile the comments and distribute prior to the next subcommittee meeting on December 12th. Staff will also follow up with agencies that have not responded and provide that information in advance of the meeting, if possible.

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Future meetings:

- ◆ Legislative Subcommittee, December 12, 2007, 9:30 am
- ◆ Full Advisory Committee, December 19, 2007, 10:00 am (tentative, pending determination of quorum)

Prepared by Peggy Reinsch and Colleen McCarthy Reid

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