Right to Know Advisory Committee
Bulk Records Subcommittee
September 12, 2011
Meeting Summary

Convened 9:04 a.m., Room 438, State House, Augusta

Present:	Absent:
Michael Cianchette, Chair	none
Rep. Joan Nass	
Perry Antone	
Joe Brown	
Richard Flewelling	
Judy Meyer	
Mal Leary	

Staff:
Colleen McCarthy Reid
Peggy Reinsch

Michael Cianchette, subcommittee chair, called the meeting to order at 9:04 a.m. and asked the members to introduce themselves.

Background
Staff provided an overview of the bulk records issue and called attention to the documents generated by the Judiciary Committee and the Bulk Records Subcommittee that met in 2010. The Legislature adopted legislation (PL 2009, chapter 567, section 11) directing the Right to Know Advisory Committee to examine specific issues concerning bulk records. At the same time, litigation was filed and pending that implicated the application of the Freedom of Access laws, especially the fee provisions, to requests for the databases of the counties' registries of deeds. The State and Local Government Committee of the 124th Legislature had directed the Office of Information Technology to convene a stakeholders group to examine issues that were raised in the consideration of legislation concerning fees charged by the county registries of deeds.

The 2010 Bulk Records Subcommittee held three meetings in 2010. Draft legislation incorporating cost factors was prepared and circulated for comments, but the Subcommittee did not make specific recommendations because of the complexity of the issues and because of the pending litigation involving MacImage of Maine and John Simpson against several counties. The principles the Subcommittee had agreed on were: the fact that records are requested or provided in bulk doesn't change their status as public; that bulk records are not free, and a reasonable cost can be recovered; and that personal information, which is often included in bulk records, needs to be protected.

OIT stakeholders group
Chief Information Officer Greg McNeal explained the process that the Office of Information Technology pursued to carry out the request of the State and Local Government Committee to convene a stakeholders group relating to county registry records and bulk data. Mr. McNeal provided a copy of the documents from the stakeholders group as well as his talking points. The group was directed to consider: defining bulk data transfers; evaluating the best way to handle such requests; and developing a web portal for 18 county registry offices. The group met once in June 2010 and discussed issues relating to privacy, transparency of government-held data

balanced with privacy concerns, fees and access versus ownership. The group did not meet again because of the pending litigation that involved several members of the group as opposing litigants. The Superior Court decision in that case, MacImage of Maine LLC v. Androscoggin County et al., was finally handed down in February 2011.

Discussion of scope and issues

The Subcommittee moved into discussion, using the four elements listed on the agenda as a guide: What is bulk data? Access to bulk data - costs, management and format of data, restrictions on use; balance of interests (public v. private); and development of consistent guidance for all government agencies.

Joe Brown asserted that the registry of deeds was a different issue from bulk data because the registries are open to look at and inspect all the public records within. Most other government offices, police departments as an example, don't have that type of access to their records. IN addition, registries of deeds spent lots of money to preserve deeds; deeds were digitized to preserve them, not to commercialize them, he said. Mr. Brown agreed that a definition of "bulk data" is needed for the discussion.

Chief Perry Antone explained that all of the Brewer Police Department's data is in one system. Although public information is contained in the system, he is concerned about releasing personal information, nonconviction data or intelligence and investigative information. He is not aware of any law enforcement system that allows anyone to just access the system for the public information they seek. He agreed with Representative Nass that they would need a new system and one or two new people if they were expected to provided information in the manner requested of the counties.

Mal Leary stated that we should start with the premise that all are public records, although the systems will probably contain some confidential records. Why can't the system be sorted once to filter out the confidential information, and then use that sorted data going forward? Chief Antone explained that the vendor Brewer uses is the same one used by many law enforcement agencies in the state, and it does not have those capabilities. Some reports, not just data fields, contain confidential information that must be redacted after each report is individually reviewed. Mr. Leary recommended that, going forward, all governmental data systems and programs must be easily usable for public access as well as for the governmental purpose; he is not advocating retrofitting existing systems.

Mr. Cianchette drew attention to Christopher Parr's draft submitted last year that focused on a definition for bulk records, establishing that bulk data and electronic information go hand in hand. Mr. Leary noted that when a database is structured, the confidential information should be easy to segregate. The real issue, Mr. Leary said, is going to come down to commercial versus personal (or noncommercial) use. For example, a company downloading 90,000 records as opposed to an individual asking for IF&W's fish stocking database.

Mr. Brown again drew a distinction between county registries and other databases. Anyone can inspect the deeds in Hancock County for free. You need to pay only if you want an official copy. Chief Antone explained that law enforcement is making changes; some departments have accident reports online where the vendor has structured the program so confidential information is not included in what is accessible. He noted funding issues to make that happen.

Mr. Cianchette agreed with Mr. Leary about the distinction between commercial and noncommercial. He emphasized that this Subcommittee does not need to explore the content or define what is confidential. He asked for ideas about the definition of bulk records, and reviewed the forays into definitions attempted by other states. Staff noted that Ohio has taken a step by defining "bulk commercial special extraction requests" and defining "commercial" as meaning "profit-seeking production, buying, or selling of any good, services, or other product." Mr. Cianchette asked staff to continue research in this area, and recommended it as a topic for public comment.

Mr. Leary expressed his disappointment with the Legislature's changes to the fees provisions for county registries of deeds, explaining that the new law is so broad it can include any costs. He explained that a fee could be set so high so as to result in "constructive denial" of access. He said the Maine Freedom of Information Coalition has filed an amicus brief in the appeal of the MacImage decision to the Maine Supreme Judicial Court. There needs to be a way to establish what is a reasonable charge.

Chief Antone reminded the Subcommittee that records custodians are prohibited from asking why a person wants a public record, but if a distinction will be drawn between commercial and noncommercial use, then that question will have to be asked. Mr. Leary agreed, and said that is why it is so important to write the law carefully and make people declare that the information is for a commercial use; don't put the burden of discerning that on the government employee. We need to look at other states' experience to determine what is a reasonable fee. The best legislation would allow rulemaking but within set limits. A lot of factors will have to be factored into the equation.

Public hearing

Mr. Cianchette sought consensus on holding a public hearing to collect comments and suggestions about handling bulk data requests. He identified three questions: 1) What is bulk data and how should it be defined? 2) What is the appropriate method of determining the cost that a requestor must pay? And 3) To what format and access should a requestor be entitled?

Mr. Cianchette allowed comments about the public hearing concept from those in the audience. Members of the public raised questions about defining "commercial," about proprietary and nonproprietary systems, about bad management resulting in high costs for copies, about defining how bulk data is defined, and the need for the protection of personal privacy. Representative Terry Hayes raised the distinction between access and ownership. As a member of the public, she said, she can access for free; but if she wants to own the information, then she should have to pay for it. She said she sees it like the reference section in the library.

Judy Meyer agreed with Mr. Cianchette that the discussion needs to be kept at a high level, and not devolve into talking about just county deeds charges. We provide commercial entities with all sorts of resources: realtors access deeds records, Cabela's buys the IF&W's list, and there's company that takes water from Lake Auburn and sells it for a large profit. She would like to see a consistent approach.

Mr. Leary moved that the Subcommittee hold a public hearing, Richard Flewelling seconded. The Subcommittee voted unanimously to hold a public hearing on the three questions listed above, plus a fourth question about drawing a distinction in treatment for public records sought for commercial versus noncommercial use. Staff will work with Mr. Cianchette for the specific wording of the notice for the hearing. The members agreed to hold the public hearing on Friday, October 14, 2011, starting at 9:00 a.m.

Future meetings

In addition to the public hearing on October 14th, the Subcommittee agreed to hold a meeting on Friday, October 21, 2011, starting at 9:00 a.m.

The Subcommittee meeting was adjourned at 10:28 a.m.

Future Scheduled Meetings:

- Thursday, September 29, 2011, 9:00 a.m., Public Records Exceptions Subcommittee
- Thursday, September 29, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, October 6, 2011, 12:00 noon, Legislative Subcommittee
- Friday, October 14, 2011, 9:00 a.m., Bulk Records Subcommittee PUBLIC HEARING
- Friday, October 21, 2011, 9:00 a.m., Bulk Records Subcommittee

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Legislative Subcommittee
September 1, 2011
Meeting Summary

Convened 1:00 p.m., Room 438, State House, Augusta

Present:	Absent:
Judy Meyer, Chair	Shenna Bellows
Joe Brown	Ted Glessner
Mike Cianchette	Linda Pistner
Richard Flewelling	
Mal Leary	
Kelly Morgan	
Harry Pringle	

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Judy Meyer, subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Letter from Dwight Hines Regarding Participation of Maine Municipal Association

Ms. Meyer noted the letter received from Dwight Hines objecting to the participation of any representative from the Maine Municipal Association on the RTKAC and its subcommittees. For the record, on behalf of Sen. Hastings, Ms. Meyer stated that this issue will not be taken up at the full committee or subcommittee level as the RTKAC member representing municipalities has been duly appointed pursuant to law by the Governor. Richard Flewelling, who currently represents the Maine Municipal Association on the RTKAC, stated on the record that the association does not have any bias on the Freedom of Access Act, but noted that the association does have a legislative perspective on issues affecting municipalities.

Progress Report on Criminal History Record Information Act Revision

Staff reminded the subcommittee of past discussions of the Advisory Committee related to public records exceptions contained in the Criminal History Record Information Act, Title 16, chapter 3, subchapter 8. The Advisory Committee delayed its recommendations on the exceptions to the Judiciary Committee in 2009 to allow the Criminal Law Advisory Commission (CLAC) to propose a draft revision of the entire Act. Special Assistant Attorney General Charles Leadbetter, the primary drafter for the Criminal Law Advisory Commission, presented the draft revision to the subcommittee.

Mr. Leadbetter provided an overview of the revised draft, noting that the terms “public criminal history record information” and “confidential criminal history record information” are used in place of the terms “conviction data” and “nonconviction data” as these terms are more easily understood by criminal justice agencies and the public. He explained that the definition of criminal history record information is clearly defined and is tied to a specific, identifiable person.

In the proposed § 626, the draft revision maintains the provision in current law that public criminal history record information is subject to FOA and recognizes the current interpretation of the law that there is no time limitation on the dissemination of public criminal history record information. However, Mr. Leadbetter noted that the draft includes a new provision that requires Maine criminal justice agencies to query the State Bureau of Identification prior to disseminating public criminal history record information for a noncriminal justice purpose to ensure that the most up-to-date information is being disseminated.

With regard to confidential criminal history record information, Mr. Leadbetter noted that the proposed § 627 authorizes release of confidential criminal history record information only to authorized persons or entities as defined in the provision. He explained that the authorized persons or entities identified in paragraphs A to D are found in current law and that paragraph E recognizes the "citizen who knows too much" and allows a criminal justice agency to respond to a specific inquiry in order to provide accurate information related to a final disposition of a criminal proceeding.

Mr. Leadbetter also pointed out a new provision in paragraph F which is important to CLAC. Paragraph F permits a criminal justice agency to disclose confidential criminal history record information to the public for the purpose of announcing the fact of a specific disposition within 30 days of the date of the disposition (or at any point in time if authorized by the person to whom the disposition relates). Mal Leary asked why the 30-day time limit was included. Mr. Leadbetter responded that CLAC thought a narrow time limit was appropriate but that the Legislature might decide on a different time limit. Judy Meyer noted the difficulties of persons charged with crimes that are later dismissed in finding employment as Internet searches will bring up articles on the charge but not include information on the dismissal of those charges. Mr. Leadbetter explained that paragraph F would permit that person to request the information related to the dismissal of discharges be disclosed.

The second part of the draft revision focuses on intelligence and investigative information. Mr. Leadbetter explained that CLAC has suggested removing the provisions related to intelligence and investigative information outside of the Criminal History Record Information Act subchapter (as in current law) to remove any confusion. As in current law, the definition of intelligence and investigative information includes information that relates to both criminal and civil activities so there are separate definitions included in the proposed revision. He also noted that the definition does not include information related to juvenile matters as that is addressed by the Maine Juvenile Code.

Mr. Leadbetter pointed out that the revision in § 642 includes the same criteria for release of intelligence and investigative information as in current law (Title 16, §614). In § 643, the specific exceptions are listed which permit the dissemination of intelligence and investigative information. Mr. Leadbetter highlighted that current law limits dissemination to Maine entities and that CLAC suggests the Legislature may want to broaden some provisions (but perhaps not subsection 5) to include other states. He also highlighted the alternatives presented for subsection 6 with regard to release of intelligence and investigative information to government entities that license entities or individuals for certain services or occupations. Harry Pringle inquired if CLAC considered whether this information should be released to public employers. Mr. Leadbetter explained that there was not a specific exception but that, under current law and the proposed revision, criminal justice agencies would do an analysis of the criteria under § 642 to determine if information can be released. He further noted that CLAC did not consider adding further exceptions, but agreed that an exception for public employers may be a worthwhile exception for the Legislature to consider.

Ms. Meyer thanked Mr. Leadbetter and CLAC for their work to make the Criminal History Record Information Act more user-friendly with the draft revision. At the next meeting, the subcommittee will review the draft revision and consider recommendations to CLAC relating to the public records exceptions included within the revision.

LD 1465, An Act To Amend the Laws Governing Freedom of Access

At the subcommittee's request, Chris Cinquemani of the Maine Heritage Policy Center (MHPC) provided an overview of LD 1465, An Act to Amend the Laws Governing Freedom of Access. The Maine Heritage Policy Center worked with Sen. Rosen and other stakeholders in drafting LD 1465 but was the leading proponent of the bill before the Legislature. Mr. Cinquemani expressed his appreciation for the sponsorship and support of Sen. Rosen, LD 1465's sponsor, and noted the letter sent by Sen. Rosen to the subcommittee. He also acknowledged the bill's lead cosponsor, Sen. Dawn Hill, the bipartisan group of legislative cosponsors and the other entities supporting the bill, including the Maine Civil Liberties Union and the Maine Press Association. Mr. Cinquemani explained that, in the Maine Heritage Policy Center's view, the current law lacks accountability and LD 1465 has been proposed to add accountability so that the public can have peace of mind related to requests for public information and the response to those requests by government entities. The overview focused on 3 reforms included in LD 1465: timelines, form of requests and public access officers.

Timelines provision in LD 1465. Mr. Cinquemani noted that under current law there are no specific timelines to acknowledge or comply with FOA requests. By example, he used a Maine Heritage Policy Center request to the Maine Turnpike Authority that took 184 days before a response. He explained that LD 1465 proposes timelines, but allows additional time to government agencies to comply with requests when needed. 30 states were identified by MHPC as having timeline in their FOA laws; Maine and Connecticut are the only New England states without a timeline in their statute.

Form of Requests provision in LD 1465. Under current law, there is no specific mention of the form of records provided in response to a FOA request. Mr. Cinquemani highlighted the provisions in LD 1465 that permit a requester to ask for a copy of a record in any form; require the government entity to provide the copy in that form if it can be produced in that manner; allow a requester to pay an agency's cost to purchase and install capability to produce records in requested form; and require agency to identify to requesters every form in which a record can be produced if an agency is not able to produce a record in the form requested. Mr. Cinquemani provided several examples of responses to FOA requests that did not provide the record in the form requested by the requester. Ms. Meyer noted the difficulties that smaller towns and government entities might have with training personnel on specific software needed to respond to FOA requests for records in a certain form. Mr. Cinquemani noted that LD 1465 allows for the full cost of providing the record in the requested form to be charged to the requester, but agreed that this provision and the issues raised by Ms. Meyer may need further discussion. 16 states were identified by MHPC as having statutory provisions allowing requesters to specify the form of the record requested.

Public Access Officers provision in LD 1465. As drafted, LD 1465 proposes to require each government entity to designate an employee as the public access officer for that entity and allows the entity to designate an existing staff person to meet the provision's requirement. It is intended to put someone with FOA expertise in every entity to assist the public. MHPC identified 8 states

with laws that require a designated public access officer with varying responsibilities in each state law.

Mr. Leary inquired whether the timelines are workable for all towns and suggested that there may be a need to identify different categories and timelines depending on the entity. Mr. Cinquemani responded that he believed the timeline in LD 1465 is open-ended and allows flexibility when needed but requires government entities to communicate with a requester and develop a process to respond to a request.

Mr. Pringle asked about the drafting process used to develop the bill and whether the bill is modeled on a particular state law. Mr. Cinquemani explained that the skeleton of the draft was inspired by Texas law but changes were made to make it unique to Maine. He noted that Texas, Mississippi and Idaho are examples of other states with strong FOA laws.

Mr. Pringle also asked whether the current law that requires a response to be provided in a "reasonable" amount of time wasn't adequate to address the MTA example of 184 days. Did the MHPC consider using the current law's provision allowing a requester to recover attorneys' fees? Couldn't that provision be used to resolve future cases? Mr. Cinquemani responded that MHPC was reluctant to pursue a lawsuit without a specific timeline in the law.

Michael Cianchette expressed his opinion that the issue of "form" of requests may be addressed through the Bulk Records Subcommittee, but stated his concern about the language in LD 1465 as written relating to requiring a record to be made "immediately available" and the difficulties that would place on agencies. Mr. Cinquemani responded that the language was consistent with laws of other states; he reiterated that some records should be immediately available and perhaps public access officers could develop lists of those records. Mr. Cianchette noted that the current policy in State government requires FOA contacts and asked about the specific inclusion of subsection 6 which states that the unavailability of a public access officer may not delay a request. Mr. Cinquemani explained that it is important for all levels of government to have employees responsive to FOA requests and not to impair the public's access to records.

Richard Flewelling said he believed it was inaccurate to state that current law did not contain a timeline to respond as the current law requires the response with a reasonable amount of time, which in his opinion works well. Mr. Flewelling also stated his belief that the first deadline in LD 1465 that requires a record to be "immediately available" upon request would be very difficult for local governments to implement. Ms. Meyer agreed with the concerns expressed about the burdens on small towns to comply with the timelines and other requirements in LD 1465. Ms. Meyer remarked that a one size fits all approach may not work and suggested that perhaps the provisions in the bill could be separated so those provisions that have more support could move forward. Mr. Cinquemani said MHPC would support the enactment of some of the easier provisions, but reaffirmed the need and importance of timelines in the law as well.

Mr. Leary expressed his support for funding the ombudsman position, which is included in LD 1465, and explained his belief that the ombudsman could be really important in lieu of strict deadlines to make the FOA laws more effective. Mr. Flewelling agreed that the ombudsman may help solve problems but also indicate his support for the public access officer provision rather than fixed deadlines.

Ms. Meyer suggested that the subcommittee revisit LD 1465 at the next meeting, focusing on all of the provisions but the timelines as that provision raises the most concern among subcommittee members. Ms. Meyer also suggested deferring until the next meeting any discussion of the

Governor's letter asking for consideration of 2 issues: 1) the definition of what constitutes a public record…does it include grocery receipts from the Blaine House; and 2) the statutory rate of $10.00 per hour for staff time responding to FOA requests. Mr. Pringle asked if staff could research the average hourly pay for state employees as a frame of reference when the subcommittee considers this issue.

E-mail Inquiry from Chris Parr, Maine State Police---What is a FOA request?

Chris Parr, Staff Attorney and FOA contact for the Maine State Police in the Department of Public Safety, described the email inquiry he made to the RTKAC asking whether a request for records under FOA must specify that and cite the law. Mr. Parr explained that, if the provisions proposed in LD 1465 move forward that spell out the process for responding to requests, then it would be helpful to know what a FOA request is. Is it any request for a document or information from a government entity or is FOA a special vehicle?

Ms. Meyer stated that the press prefers an informal approach and does not usually cite FOA, but that they are willing to specifically cite FOA when requested. She asked Mr. Parr how many requests are received that invoke FOA. Mr. Parr responded that he didn't know as he does not personally review each request as the FOA contact for the Department of Public Safety, which has 9 bureaus, and that, if LD 1465 moves forward, it would be important to know type of request because compliance would be difficult.

Mr. Leary remarked that all records maintained by government entities are the public's records although the statute makes certain records confidential and that if someone asks for a record, the person should get it without having to cite FOA. Mr. Parr stated he was not advocating any position and agreed that someone should not be required to cite FOA. At present, all requests are considered FOA requests but LD 1465 raises certain implications. Mr. Pringle affirmed that under current law it is not necessary to cite FOA when making a request, but agreed that if LD 1465 were enacted then a requirement to invoke the statute in a request may become more important.

Ms. Meyer stated she had hoped that the subcommittee could address this issue through an FAQ on the website, but suggested that the issues raised by Chris Parr be considered at the next meeting as part of the subcommittee's discussion of LD 1465.

Next meeting

The next meeting was scheduled for Thursday, October 6th at 1:00 pm. After reviewing his calendar, Richard Flewelling asked if the meeting could be rescheduled because of a conflict with a presentation at the Maine Municipal Association convention. To accommodate this request, the time of the meeting on October 6th was changed to 12:00 noon.

Future Scheduled Meetings:

- Monday, September 12, 2011, 9:00 a.m., Bulk Records Subcommittee
- Monday, September 12, 2011, 2:30 p.m., Public Records Exceptions Subcommittee
- Thursday, September 29, 2011, 9:00 a.m., Public Records Exceptions Subcommittee
- Thursday, September 29, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, October 6, 2011, 12:00 pm, Legislative Subcommittee

The meeting was adjourned at 3:12 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
September 29, 2011
Draft Meeting Summary

Convened 9:09 a.m., Room 438, State House, Augusta

Present:	Absent:
Shenna Bellows, Chair	none
Chief Perry Antone	
Joe Brown	
Ted Glessner	
AJ Higgins	
Linda Pistner	

Staff:
Peggy Reinsch, Colleen McCarthy Reid

Public Records Exceptions Subcommittee Chair Shenna Bellows convened the meeting and asked the members to introduce themselves.

Review of existing public records exceptions tabled at last meeting

54	22 MRSA §8754: sentinel events

Renee Guigard, Assistant Attorney General, engaged in a lengthy discussion with the Subcommittee members. She explained the sentinel events reporting program and explained the purpose of the complete confidentiality of the reports to the Sentinel Events Team within DHHS. "Sentinel events" are serious medical errors and must be reported by hospitals; failure to report may result in a fine of up to $10,000 imposed by DHHS. The purpose of the reporting is to identify individual and systemic problems and to ensure the errors do not occur again. The only situation in which the confidential information is released is when it is determined the information indicates immediate jeopardy, in which case the Sentinel Events Team reports to the DHHS licensing office. The Department submits a report to the Legislature every year. DHHS is concerned that if the reports are not kept confidential, the hospitals will not report the occurrence of sentinel events, "near misses" or other instances which may or may not be sentinel events.

Sentinel event information reported to DHHS is not released to anyone, including law enforcement and family members of affected patients. Patients or their personal representatives may be able to receive specific information from the hospitals themselves, or from other sources. Information about the imposition of fines is not available. The licensing function carried out by DHHS is handled by a completely different office and there is no overlap or sharing of information (except in the case of immediate jeopardy).

Ms. Bellows was concerned that members of the public do not have information about possibly underperforming hospitals, and information that would be useful in making medical and economic decision is not available. Perry Antone understood both sides: there is an accountability factor and if the information is made public, events would not be reported; but after an investigation, there should be some information available that helps people make medical decisions. AJ Higgins mentioned that if people had

known about the long-standing problems at Downeast Community Hospital, maybe they would have made different medical decisions. Linda Pistner agreed that people should have information and pointed out that the need to provide that information is addressed by the Maine Quality Forum that is part of Dirigo Health.

The Subcommittee voted to ask the full Advisory Committee for advice on how to proceed with the review and evaluation of the sentinel events confidentiality provisions.

21	22 MRSA §1828: licensing of medical facilities

Renee Guigard, Assistant Attorney General explained that some of the information collected in the licensing process is subject to mandatory disclosure and other information is confidential. This provision addresses complaints made to the Department, and is handled on a case-by-case basis. Ms. Pistner pointed out that the statute protects the patient, but allows other disclosures. It is fairly consistent with other licensing statutes.

The Subcommittee agreed to recommend no changes.

66	24 MRSA §2510: professional competence reports

Randal Manning, the Executive Director of the Board of Medical Licensure, said that the Board thinks of itself on the public's side - the Board's job is to protect the public. The Board collects as much information as possible to regulate the practice of medicine, but many of the records are about individuals. The current statute works well except for one problem. There is interplay between each licensing board's statute and the general regulatory statutes of Title 10. Although Title 24, section 2505 provides that all complaints received by the Board, whether submitted by a physician's colleague or anyone else, are treated as confidential, Title 10 provides generally that once a board makes a decision to prosecute a licensee, the records become public. The Board has received an interpretation that the Title 10 provision requires the release of the records when anyone other than a physician complains about another physician. The Board would like clarification that Title 10 does not apply to any complaints filed under §2505. Mr. Manning asked that 24 §2510 be amended to allow the Board to release the confidential records to appropriate state and federal agencies when the records contain evidence of possible violation of laws enforced by those agencies or other medical issues. Currently, the statute prohibits this sharing of information. Mr. Manning described the open nature of the actions and decisions of the Board. The policy is to give out as much information about physicians' behavior as possible and to protect patients.

The Subcommittee voted to amend 24 §2505 to clarify that the Title 10 general provisions do not apply, and to amend 24 §2510 to allow the Board to share investigative information with enforcement agencies. Staff will work with Mr. Manning and AAG Dennis Smith to draft language for review at the next Subcommittee meeting.

67	24 MRSA §2510-A: professional competence review records

Mr. Manning explained that 24 MRSA §2506 requires hospitals to report to the Board when a medical provider's privileges have been revoked, suspended, limited or terminated. The Board ensures that reports are complete and compares them with federal reports. Representatives of physicians claim that credentialing and the extension of privileges by hospitals and other entities fall into "peer review' and

are therefore confidential and cannot be shared with the Board. The Board wants to be careful - it does not want to get too deeply into peer review - but the Board believes credentialing and privilege information should be available to the licensing boards. The scope should be restricted to specific investigations of the Board when a complaint is open; the Board is not looking for sentinel events reports.

The Subcommittee asked that Mr. Manning and staff work with the Maine Medical Association and the Maine Hospital Association to develop language for review at the next Subcommittee meeting.

68	24 MRSA §2604: liability claims reports

Mr. Manning explained that physicians are required to report to the Board any liability claims filed against them when they renew their licenses, so the Board will have this information. The Board has no authority or jurisdiction to provide remedies to a patient. By the time a medical malpractice case makes it to court, the Board should have known of the incident. Criminal convictions of physicians, however, sometimes come as a surprise. Ms. Bellows said the statute was acceptable to her because the information can be introduced through other methods.

The Subcommittee agreed to recommend no changes.

57	23 MRSA §63: MTA and DOT records

Deputy Commissioner Bruce Van Note spoke on behalf of the Maine Department of Transportation and Dan Morin represented the Maine Turnpike Authority in discussions about old language making confidential certain records of both the DOT and the MTA. Section 63 contains two separate exemptions for two separate public purposes.

1. Appraisals of property. The reason to keep confidential the appraisals of property that the agency wants to acquire is to allow negotiation with the landowner awhile keeping costs to the taxpayer as low as possible. The information is no longer confidential after nine months after the completion date of the project. The Subcommittee discussed the fairness of the process, and Mr. Van Note explained the State's obligation under the federal Uniform Acquisition of Property Act to pay fair market value for land that is acquired. Joe Brown was concerned that offers are not public when made, but only after nine months after completion. Mr. Van Note agreed to research the federal law to see if the information could be released sooner.

The Subcommittee agreed to not change the confidentiality of negotiations for and appraisals of property.

2. Engineering estimates. Mr. Morin and Mr. Van Note explained that the engineering estimates are kept confidential until a bid is awarded, in which case all the information is open to the public. They pointed out that the statute specifically ties the confidentiality to whether the project is "out to bid." Once a bid is accepted - and the project is no longer "out to bid" - both MaineDOT and MTA release the engineering estimates. There was agreement that the current language could be clarified.

The Subcommittee agreed to amend the statute to clarify that engineering estimates are public once a contract is awarded. Staff will redraft and share with MaineDOT and MTA for the next Subcommittee meeting.

61	23 MRSA §4251: public-private transportation projects

Mr. Van Note explained the purpose of 23 §4251, which is only a couple of years old. It allows confidentiality for the project plans of a private company that develops a project proposal for a longstanding transportation need and submits the plans to the Department of Transportation. Until the Department determines that the proposal meets the standards of the Department or until the proposal is rejected, the entire submission is confidential. The idea is to get the private sector involved in developing new or alternative ways to solve transportation needs, such as the Wiscassett bypass. No one will invest the time, effort and money if, as soon as a proposal is submitted to DOT, it must be made public and competitors can copy. There have been no official proposals but a few telephone inquiries have been fielded.

The Subcommittee agreed to recommend no changes.

15	22 MRSA §1555-D: lists of unlicensed tobacco sellers

Ms. Pistner reported that the Office of the Attorney General believes that 23 MRSA §1555-D should be repealed. The statute was enacted to address the purchase of tobacco products by mail by underage buyers. The U. S. Supreme Court ruled in 2007 that the recipient-verification requirement of the law was pre-empted by federal law, and struck down the entire strategy. The statute is not in use.

The Subcommittee agreed to amend the statute to delete the confidentiality provision and to send a letter to the Legislature's Health and Human Services Committee pointing out that the entire law can be repealed.

53	22 MRSA §8707: Maine Health Data Organization, MHCFC records

Staff relayed the information provided by the Maine Health Data Organization concerning information that was treated as confidential by the former Maine Health Care Finance Commission. The information - used to review hospital rates - is no longer maintained and the confidentiality provisions can be repealed. The confidentiality that applies to MHDO information should remain intact.

The Subcommittee agreed to repeal the two sentences that apply to MHCFC information confidentiality.

62	23 MRSA §8115: NNEPRA

Staff provided a copy of redrafted language applicable to the Northern New England Passenger Rail Authority. The existing statute was redrafted to make the confidentiality provisions consistent with current law in similar situations. The NNEPRA staff asked for additional time to review and to answer a question of the existing laws declaration of a lawyer-client privilege.

The Subcommittee agreed to table Exception 62 until the NNEPRA can respond. The Subcommittee indicated general agreement with the redraft (which should be consistent with 23 §63 as well as other laws).

73	24-A MRSA §216: Bureau of Insurance general confidentiality statute

The Subcommittee had delayed taking action on 24-A §216 until the Maine Trial Lawyers had an opportunity to comment. The Subcommittee had found no reason to make changes, and the representative of the MTLA agreed.

The Subcommittee agreed to recommend no changes.

18 and 19	22 MRSA §§1696-D and 1696-F: Community Right to Know Act

Staff reviewed the inconsistent drafting of this section with the Subcommittee, and explained that the program to provide information about toxic and hazardous substances had never been implemented. Other programs have developed that address some of the same concerns, in the Department of Environmental Protection and the Maine Emergency Management Agency's State Emergency Response Commission. Staff is working with the Office of the Attorney General to develop options.

The Subcommittee agreed to table Exceptions 18 and 19 until the Office of the Attorney General and Staff can develop options for proceeding.

37	22 MRSA §3034: Missing persons

Current law prohibits the Chief Medical Examiner from releasing information collected about missing persons except to use to identify deceased persons and to identify persons who are unable to identify themselves. Dr. Greenwald, the Chief Medical Examiner, requested a change in the statute to allow her office to release some information to be used to help locate missing persons. The Department of Justices currently runs a clearinghouse, including a website, that uses information supplied by medical examiners and coroners to help locate missing persons, but Maine's statute prohibits Dr. Greenwald's participation. Staff provided draft language, but requested time for feedback from Dr. Greenwald, the Attorney General and the DOJ.

The Subcommittee agreed to table Exception 37 until comments are received from the Chief Medical Examiner and the Office of the Attorney General.

38 and 39	22 MRSA §3188 and 22 MRSA §3192

The Subcommittee had voted at the September 12th meeting to write to the Health and Human Services Committee about two programs that were never implemented but that are still in statute and contain confidentiality provisions. Title 22, section 3188 establishes the Maine Managed Care Insurance Plan Demonstration Program for uninsured individuals. Title 22, section 3192 describes the Community Health Access Program. The initial thought was to propose repeal of the confidentiality provisions and encourage the Health and Human Services Committee of the Legislature to repeal the programs if they are not going forward. Upon reflection, the Subcommittee decided to not recommend repeal of just the confidentiality provisions - if the information is ever collected, it would be important to protect individual medical and insurance information from public release - but to notify the HHS Committee that DHHS has recommended repeal of both statutes.

The Subcommittee agreed to send a letter to the Legislature's Health and Human Services Committee explaining the Department's recommendation to repeal the programs.

94	24-A MRSA §2393: Workers' Compensation Residual Market Pool

The Subcommittee had originally asked Staff to redraft this section because it was thought the program was obsolete, although there may be records whose confidentiality should continue to be protected. Staff worked with the Bureau of Insurance and determined that although the number of employers to which the section applied is diminishing, the law still has some current applicability. Staff therefore redrafted part of the statute to provide for confidentiality of the records beyond the completion of the program until the records are destroyed. This language is modeled on the confidentiality provisions that apply to the former Baxter Compensation Program records.

The Subcommittee agreed to amend the statute as drafted.

112	24-A MRSA §6807: life settlement/viatical settlement examination reports

Existing law provides for the confidentiality of examination reports of life settlement/viatical settlement companies. These provisions were the product of lengthy legislative negotiations which resulted in confidentiality provisions that are not consistent with other laws concerning other examination reports of the Bureau of Insurance. At the request of the Subcommittee, Staff drafted a letter to the Legislature's Insurance and Financial Affairs Committee to flag the issue for the Committee. Under normal circumstances, the Subcommittee would have recommended amending the law to be consistent with other provisions.

The Subcommittee agreed to send the letter to the Legislature's Insurance and Financial Services Committee, but agreed to recommend no changes. (The Subcommittee was not unanimous; Shenna Bellows had voted in previous meetings to recommend changes to narrow the exception, consistent with her recommendations for similar exceptions.)

The Subcommittee agreed to meet Thursday, October 27, 2011, starting at 9:00 a.m. (Full Right to Know Advisory Committee meets at 1:00 p.m.)

Adjourned 12:08 p.m.

Note that the Right to Know Advisory Committee met at 1:00 p.m. on September 29th, and cancelled its meeting scheduled for October 27th. **The Public Records Exceptions Subcommittee changed its next meeting to October 27, 2011, starting at 1:00 p.m.**

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee
Legislative Subcommittee
October 6, 2011
Meeting Summary

Convened 12:06 p.m., Room 438, State House, Augusta

Present:
Judy Meyer, Chair
Shenna Bellows
Joe Brown
Richard Flewelling
Ted Glessner
Kelly Morgan
Linda Pistner
Harry Pringle

Absent:
Mike Cianchette
Mal Leary

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Judy Meyer, subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Criminal History Record Information Act Revision

Charlie Leadbetter, Special Assistant Attorney General, walked the Subcommittee through the side-by-side of Part 1 of Criminal History Record Information Act revision drafted by the Criminal Law Advisory Commission (CLAC) e. The side-by-side is a comparison of the proposed language with the existing law, with the confidentiality provisions highlighted. Mr. Leadbetter reminded the Subcommittee that this law applies to criminal history record information generated in other jurisdictions, in addition to Maine information. Ms. Meyer questioned the application to court records; Mr. Leadbetter pointed out the new §657, sub-§3 (which carries over current law), providing that the CHRIA does not apply to the dissemination of court records.

Mr. Leadbetter explained that the change in terminology to "public criminal history record information" and "confidentiality criminal history record information" is to make clear to the public what can be shared and what is not generally available. The existing terms are "conviction data" (which are public) and "nonconviction data" (which are generally not public). The existing law was originally based on a federal regulation, and changes in Maine law have been grafted on over time as necessary.

The new definition of "criminal history record information" appears broader than the current definition, but only to be more accurate and specific in describing what information falls within the application of the Act. CLAC believes it is important to identify what criminal history record information is, and also what it is not. The draft tries to accomplish that without making significant changes in the current law.

The question as to whether the courts should be considered a "criminal justice agency" for all purposes of this law is still open to discussion, although the draft continues the current practice of

including the courts in that definition. Mr. Leadbetter explained the redrafting of the definition of "criminal justice agency" tries to capture any unit of government that has enforcement authority. This Act would control just that unit, not the whole department.

This draft also describes "noncriminal justice purposes" - such as tenant checks, employee checks and credit checks. Before any criminal justice agency releases public criminal history record information for a noncriminal justice purpose, the agency must check with the State Bureau of Information to ensure the information is accurate and complete. Shenna Bellows noted that the ACLU-Maine receives complaints about situations in which a person shares the same name and birthdate with someone with a criminal record.

Mr. Leadbetter explained two new situations in which confidential criminal history record information may be released. Section 654, subsection 2, paragraph F allows a criminal justice agency to release information about a disposition that is confidential within 30 days of the disposition. The criminal justice agency may also release the information at the request of the person the record is about. There may be some discussion about whether the 30 days is the appropriate length for the ability to release the information; Ms. Meyer thought 12 months would be consistent with the length of time an arrest remains public without an active prosecution.

The Subcommittee discussed why CLAC had not included new language on criminalizing the further release of confidential criminal history record information by someone other than a criminal justice agency. Mr. Leadbetter explained that CLAC believes this type of conduct is hard to follow, investigate and prosecute.

Other language in the chapter has been updated and takes into account the fact that records are very often no longer kept on paper and in logbooks.

Ms. Bellows focused on the provisions concerning the right to review and ask for corrections in records. The Subcommittee agreed that it is important that InforME provide accurate information and follow up when inaccurate information has been released.

The Subcommittee agreed to review Part 2 of the Criminal History Record Information Act revision, which covers intelligence and investigative information, at a future meeting.

Diana DeJesus, Law School Extern

Linda Pistner introduced Diana DeJesus, a third-year student at the Maine Law School, who is serving as the Law School Extern to the Right to Know Advisory Committee. Her graduate school research included Florida's "Sunshine Law" and she is pleased to continue working in this field. She is currently researching state-level Privacy Acts, as mentioned by the Judiciary Committee.

LD 1465, An Act To Amend the Laws Governing Freedom of Access

Ms. Meyer noted that she and Ms. Bellows and Mr. Pringle were all on a panel at the Maine Municipal Association conference that morning, and municipal officials are very interested in LD 1465, especially the timelines it proposes. She recommended that the Subcommittee invite both members of the public and government officials to provide comments about abuse of the FOA process.

Staff walked the Subcommittee through a chart that grouped provisions of LD 1465 into subject matter. The first topic covered was public notice of public proceedings. LD 1465 proposes that notice must be given at least three days prior to a proceeding; current law requires "ample time" for the public to attend. Current law appears to require a case-by-case analysis; the Law Court found that one day notice was sufficient in the facts of a particular case. Mr. Pringle asked whether there is a sense that the current notice provisions have been abused. Establishing a minimum of three days may easily end up being the practice, so the change will actually result in less notice. Mr. Flewelling noted that he usually advises municipalities to give seven days notice, although some proceedings are regularly scheduled and may be posted a year in advance. Ms. Morgan noted that the current law provides for notice for "emergency" meetings, but doesn't define what constitutes as emergency. Ms. Meyer thought the practical definition is a meeting to handle anything that can't wait until the next regularly scheduled meeting. She also noted that the Freedom of Information Coalition receives more complaints about where notice is posted than when, and agreed with Mr. Pringle and Mr. Flewelling. Ms. Bellows explained that the ACLU-Maine does not get complaints about this, and she can go either way on the proposal. The Subcommittee agreed to not recommend the changes proposed by LD 1465 concerning public notice.

The next topic discussed was the form of the requested response. Ms. Bellows agreed that the drafting could be modified, as it doesn't make sense to invest funds to change an existing document. If the public information can be provided in Excel or another electronic format, then it should be provided that way. If someone is looking for electronic data, she said, it doesn't make sense to provide it on paper. Mr. Cianchette was unable to attend the Subcommittee meeting and sent a letter to the Subcommittee with his comments. His letter noted that this topic also falls within the jurisdiction of the Bulk Records Subcommittee. Mr. Pringle said the law should be very simple: if the government has a document and it is not confidential, you are entitled to it. If it is electronic, you should be able to get it in that form, as long as copyright and similar requirements are met. He wasn't sure what the language included in LD 1465 means and whether it will be accurate as technology evolves. However, he said requiring the installation of a program on a secure system is problematic. Ms. Bellows agreed, and would like to work on a draft to require providing the record in the form in which it exists. Ms. Pistner agreed, but noted that some requesters are asking for data to be changed or massaged, and that isn't really contemplated by the FOA laws. Ms. Bellows suggested giving agencies a choice to accept software to make data exportable. Ms. Meyer added that installing new software takes up space and the training of staff to use it takes time, both of which are sometimes in short supply. The Subcommittee agreed to wait for the Bulk Records Subcommittee to discuss this issue, and then work together, if possible.

Remedies was the next topic. LD 1465 gives the Superior Court authority to issue injunctions. It was agreed that the court currently has the authority to issue injunctions. Mr. Flewelling recalled a case in which the court ordered a board to not hold another unnoticed meeting. Mr. Pringle thought it would be useful to allow public officials to bring injunctions against nuisance requesters. Ms. Bellows thought it might be helpful if it were clear that such a remedy exists for individuals. The Subcommittee agreed to not recommend the proposed changes in LD 1465 concerning remedies, although Ms. Bellows reserved judgment.

The Subcommittee then discussed public access officers (PAO). Mr. Cianchette's letter suggested an alternative, seeing this as more a management function which should be addressed differently depending on the size and level of government. He proposed either requiring the Chief Administrative Officer of a governmental unit to undergo the same training as elected

officials, or require that the elected officials who currently undergo training establish a FOAA policy for their staff. Mr. Pringle said he thinks the requirements of new §413 represent one of those issues that make sense in the abstract. He identified several concerns. Beverly Bustin-Hatheway (Register of Deeds for Kennebec County) wondered if it would require each individual county official, such as the Treasurer, to appoint a public access officer. Ms. Meyer suggested requiring a PAO for a governmental entity, and Ms. Bellows agreed such a proposal sounded more workable. Ms. Morgan liked the expansion of the training requirement, but agreed that the responsibilities listed in the new §413 are too much. Ms. Meyer suggested identifying a point of contact in all cases. Mr. Pringle didn't think that was necessary, but thought it is reasonable to provide information for the public to know how to request information. The Subcommittee asked staff to draft language providing for a public access contact.

The Subcommittee discussed the funding for the Public Access Ombudsman. LD 1465 proposed an appropriation to fund a half-time position in the Office of the Attorney General. The statutory authority and responsibilities are contained in current law. The Subcommittee agreed to recommend funding for a full-time position.

Future meetings

The next meeting was scheduled for Friday, October 21st, starting at 11:00 a.m. to take advantage of the Bulk Records Subcommittee meeting (starting at 9:00 a.m. on the 21st). The Subcommittee will invite a few people to provide comments on problems and concerns with requests/responses under the FOA laws.

Future Scheduled Meetings:

- Friday, October 14, 2011, 9:00 a.m., Bulk Records Subcommittee PUBLIC HEARING
- Friday, October 21, 2011, 9:00 a.m., Bulk Records Subcommittee
- Friday, October 21, 2011, 11:00 a.m., Legislative Subcommittee
- Thursday, October 27, 2011, 1:00 p.m., Public Records Exceptions Subcommittee
- Thursday, November 10, 2011, 1:00 p.m., Legislative Subcommittee
- Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee

The meeting was adjourned at 2:25 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee
Legislative Subcommittee
October 21, 2011
Meeting Summary

Convened 11:07 a.m., Room 438, State House, Augusta

Present:	Absent:
Judy Meyer, Chair	Ted Glessner
Shenna Bellows	Harry Pringle
Mike Cianchette	
Richard Flewelling	
Mal Leary	
Bill Logan	
Kelly Morgan	
Linda Pistner	
Bruce Smith (for Harry Pringle)	

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Judy Meyer, subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

LD 1465, An Act to Amend the Laws Governing Freedom of Access: Form and format of responses

The Subcommittee discussed whether governmental agencies should be required to provide a copy of a public record in the form requested. The members agreed that a copy of a record should always be available in the form the record is kept. There was also agreement that security, memory, compatibility and training concerns related to installing the requestor's software were significant, and that it would be inappropriate to require governmental agencies to do so. However, there should be nothing that prohibits a public records custodian from voluntarily installing or using the software requested by a requestor. The Subcommittee agreed to support a requirement that any technology purchased or developed in the future should ease public access and allow data to be easily exportable. The members reviewed statutory language from other states, and directed staff to develop language for discussion at the next meeting. The draft should include a requirement that copies should be provided in requested format if can reasonably be done, with the caveat that confidential information must be protected. The North Dakota and Connecticut statutes provide useful language for several aspects of the Subcommittee's proposal.

Problems experienced by requestors and governmental agencies under the Freedom of Access laws

The Subcommittee invited six people to provide five minutes each of comments, and as much written testimony as they wanted to provide, about the problems they have faced either in make public records requests or in responding to such requests.

Sam Adolphsen, Maine Heritage Policy Center (written testimony)

- Cape Elizabeth agreed to provide data in Excel if the MHPC paid $800 for software. The MHPC did so, and the town regularly exports the data requested
- Statute should require that when updating software, public access and redaction must be easily accommodated
- Onus should not be on the requestor to continue asking for information if agency is not responding quickly; responsibility should be on the governmental entity to get the data out
- Working with Superintendent of Schools in Biddeford and received nothing for one month while Superintendent was on vacation
- Received information on paper when data kept in electronic form: Bangor, Standish, Naples, Richmond
- Important to have a Freedom of Access person designated in each office to be responsible, trained
- Ombudsman is key - smaller problems will be resolved by Ombudsman
- Not right to have to hire an attorney to pursue a public record

Michael Doyle, resident of Falmouth (written testimony)

- Continuous overbilling by the town
- Answers included lying, and yet paid for by the requestor
- Continuous denial of the free hour for each request by inappropriately treating new requests as one continuous request
- Have to ask questions numerous times in order to get answers
- Have to guess at the name of records in order to get a copy

Dr. Dwight Hines, resident of Peru

- Sex offender information available, but information about abused women is not available
- Need oversight
- Needs to be enforcement, and the Attorney General has never enforced
- Audit report - same report, just copied from previous year
- Access to complete and accurate data is not happening
- Should reward towns and counties for doing well
- Five days is too short to file an appeal in court when public record access is denied
- Costs requested are too much
- Maine Municipal Association is giving bad advice
- We will have to do what they did in the South - go to federal court

Dana Lee, former Poland Town Manager (written testimony)

- Ironic that five days is not enough to file a complaint but okay to require a record immediately
- Providing copies of public records is not always a fast process; even takes time to come up with a cost estimate
- In Sumner, 69 years of Selectmen quit because of FOAA abuses
- Got into government to do good work for communities but would never consider serving again in today's corrosive atmosphere
- Resigned as town manager due to existing version of FOAA, much less the LD 1465 version
- No need for further "weaponizing" of FOAA
- One resident submitted 4 or 5 requests daily; on track to cost the town $14,000 in staff time (not including legal costs)

- FOAA requests filled with snide insinuation, defaming, slanderous comments - no protection for government employees
- The message is that no government employee can be trusted
- Why would a FOAA request be so important that government needs to stop what it is doing
- Which of the two ladies behind the counter in a small town should be the "Freedom of Access Officer?"
- There are people out there who will show up with this law in hand and bully their way to the front of the line for a FOAA request, just to be rude and disruptive
- If give out a government document, it should be unalterable; if they want to manipulate government data, re-enter it
- Practical implications of FOAA request in a small town
- UK term called "vexation" that sets a limit on abuses uses of FOAA, copy provided
- Should focus on limiting the damage that can be done to government by FOAA abusers
- Every system needs a check and balance: FOAA - even as it stands today - has virtually none

Peter Merrill, MaineHousing (written testimony)
- FOA requests - can be time-consuming, can be complicated, but can get to a reasonable place
- MHPC requested information for last 13 years
- Redaction a huge problem
- Tried to figure out how to get our data into the requested format
- Estimated original request at $8-9,000, not including copying costs
- Fee is a governor on the scope of request and number of requests
- Lots of practical issues that people of good will can work out

Nathan Poore, Falmouth Town Manager (written testimony)
- 10 years from now we won't have this problem because software will make happen automatically
- Just recently started keeping track of time spent
- System is working and can work, but open to abuse
- Never any opportunity to provide accurate response to disinformation
- Shouldn't allow people who act in certain ways to use FOA
- Disruption of work and workplace relationships
- Clever combination of requests and abusive language
- Law is not perfectly clear
- Actual costs would probably be five times what is charged at $10/hour

Mike Cianchette, Governor's concerns
- $10 cost too low - does not reflect actual cost; serves as a negotiating tool
- Records specifically related to Blaine House - details too intrusive
- Vexatious requests - while Governor's office working on budget, busy with legislative session
- Like working paper confidentiality in North Dakota law, apply to Governor for legislative proposals
- Ombudsman - need hard number for actual cost

<u>Discussion</u>

Bruce Smith commented that he runs into abusive and vexatious requests. Just the courts have authority to prohibit people who file frivolous suits from filing additional lawsuits, there should

be restraint on filing vexatious requests again and again. Ms. Meyer noted that the $10/hour fee was put in place partly to limit frivolous requests, and the provision that allows charging in advance addresses the problem of the same requestor not picking up prior requests responses. Shenna Bellows said she has reservations about adding "vexatious" provisions - who becomes the arbiter of what is "vexatious"? Mr. Smith noted that bad faith and malice are used in the law and judges apply the concepts all the time. There has to be a check on government officials making these decisions. Bill Logan expressed his reservations, as well; judges often lenient in dealing with a person in court who is not represented by an attorney. He is also concerned about requiring response "immediately" - different burden on a large agency than on a small town. Mr. Cianchette agreed with the concerns about requiring an immediate response, and would like to move away from hard deadlines. Mr. Cianchette is in favor of making the government provide a real estimate of how long it will take to comply so can't delay, delay, delay; but also no "gotcha" because six hours late.

Ms. Meyer asked the Subcommittee to think about all the comments and the LD 1465 proposals. She also pointed out the list of subcommittee responsibilities, and asked the members to be prepared to talk about them at the next meeting.

Future meetings

The Bulk Records Subcommittee and the Legislative Subcommittee will meet jointly on Thursday, November 10, 2011, staring at 1:00 p.m.

The meeting was adjourned at 12:50 p.m.

Future Scheduled Meetings:

- Thursday, November 10, 2011, 1:00 p.m., Joint Meeting: Bulk Records Subcommittee and Legislative Subcommittee
- Thursday, November 17, 2011, 9:00 a.m., Public Records Exceptions Subcommittee
- Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, December 8, 2011, 1:00 p.m., Right to Know Advisory Committee

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Bulk Records Subcommittee
October 21, 2011
Meeting Summary

Convened 9:06 a.m., Room 438, State House, Augusta

Present:	Absent:
Michael Cianchette, Chair	Perry Antone
Joe Brown	
Richard Flewelling	
Judy Meyer	
Mal Leary	
Shenna Bellows	

Staff:
Colleen McCarthy Reid
Peggy Reinsch

Michael Cianchette, subcommittee chair, called the meeting to order and asked the members to introduce themselves. Mr. Cianchette noted the additional participation of Shenna Bellows, an Advisory Committee member who is not a member of the Subcommittee.

What is Bulk Data? Is a definition needed?

The Subcommittee began by giving their thoughts and reaction to comments received at the public hearing. Mr.Cianchette said he was particularly struck by the suggestion made by John Simpson of MacImage and Peter Merrill of Maine State Housing Authority that requests for bulk data (or electronic data) should not be separated from the existing process for FOA requests. Mr. Cianchette asked if the Subcommittee should try to craft a specific solution for bulk data or not? Richard Flewelling remarked that perhaps the Subcommittee should take a step back and asked three questions: 1) why is the Subcommittee looking at the issue?; 2) who suggested the issue to the Subcommittee?; and 3) what are the expectations? Staff explained that issues related to requests for computerized data have been brought to the Legislature from different perspectives, including requests for public access to accident reports maintained by the Department of Public Safety, public access to the sex offender registry database and public access to the digitized records of county registers of deeds. The Legislature has enacted specific statutory solutions sought by State agencies and the counties to address concerns about personal information included within electronic databases and about the costs and scope of the requests. If possible, the Judiciary Committee is interested in developing a more comprehensive and consistent approach rather than addressing the issues on a case by case basis as they are brought forward. The Judiciary Committee has asked for input from the Advisory Committee.

Turing back to the initial question, Mr. Cianchette asked how the Subcommittee wanted to address bulk data. Is it unique? While all members agree that all records are public, no matter their form, are there differences in the scope and use of requests for bulk data? Joe Brown remarked that all of the issues could not be grouped together and that access to deeds was different than access to the sex offender registry or accident reports. Mr. Brown suggested that different treatment may be necessary. Judy Meyer responded that it would be a nightmare if every agency or government entity crafted their own definition of bulk data and cautioned that the Subcommittee should not assume requests for bulk data create an additional administrative

burden than FOA requests for other types of records. Ms. Meyer stated that the Subcommittee is obliged to try to define bulk data even if the answer is that bulk data requests are the same as requests for other records. Shenna Bellows agreed with Ms. Meyer and suggested it would be useful to make it clear in the statute that bulk data is the same as other data.

Bulk Data: What is the appropriate cost for access?

Mal Leary agreed with Ms. Meyer and Ms. Bellows that requests for bulk data should be treated the same as other requests, but stated that the real question is the cost of access. Mr. Leary noted that some agencies conduct rulemaking to set fees for access to records and suggested that the Subcommittee consider that framework and approach. Mr.Leary does not favor determining fees in statute as has been done with the registries of deeds; he believes that parameters could be put into the law and that government entities could determine reasonable fees through rulemaking. Mr. Brown liked Mr. Leary's suggestion and noted that this would provide the flexibility to government entities to change the fee over time.

However, Mr. Brown reiterated that registers of deeds do believe a definition of bulk data/records is important. Mr. Cianchette pointed out that InforME's written comments suggested that bulk data be defined as electronic data and asked if members disagreed with that characterization. Mr. Leary responded that a separate definition is not needed and that the focus should be on how a government entity can recover its reasonable cost in making records available. Mr. Cianchette wondered when a different cost structure would apply. Mr. Leary agreed there would be differences in fees for providing reasonable access and again suggested that agency rulemaking could address the differences. Ms. Bellows asked whether bulk data was the right term to be using and pointed out the North Dakota law which uses language referring to automation and electronic storage of records. Mr. Cianchette stated there must be clear parameters for certain records like email and other electronic records as the records must be reviewed and redacted, if necessary, to remove confidential information.

Mr. Brown noted the distinction in providing public access in the registry of deeds—records are available for inspection at no cost during regular business hours, but copies of the records come with a cost. Mr. Leary stated that if a requester wants a copy of a record, the government entity should determine the reasonable cost of the copy. Mr. Brown again expressed concerns about setting fees in statute, pointing out that the $10 hourly fee for search and retrieval of records is outdated and does not reflect the hourly wage of employees fulfilling records requests. Mr. Leary agreed that the $10 hourly fee is problematic for some agencies depending on the request and that his suggestion for rulemaking would provide the public with a chance to comment within the parameters set out in statute before an agency set the fees for access.

Mr. Cianchette asked whether Mr. Leary was suggesting rulemaking for only bulk data requests or all FOA requests. Mr. Leary responded that the statute should require the fee to be reasonable and set out the factors that can be considered in setting the fee. Agencies should be permitted to recover the incremental cost of providing access to the data, but should not be permitted to go way beyond that in determining the fee. The cost of paper copies may be different than the cost of access to electronic data and even access to computerized data may have different cost structures depending on the technology. Ms. Meyer stated that the law already addresses "actual cost" and that access to electronic data should be based on that standard; the fee should not be used to subsidize the creation and storage of the electronic data.

Bulk data: Commercial v. non-commercial purposes

Mr. Cianchette asked the Subcommittee to consider whether the fee for access should consider whether the request is made for commercial purposes. Ms. Bellows expressed her opinion that no distinction should be made even if the request is being made for commercial purposes. She noted that the original record remains with the government and that information is an infinite resource. Ms. Meyer agreed that no distinction should be made based on the purpose of the request and worried about who would make that decision. Ms. Meyer gave the example of the Sun Journal's request for speeding ticket records that revealed one of the common reasons cited on tickets for speeding was drivers travelling south to methadone clinics. As a result, methadone clinics were established in Lewiston, which served a commercial purpose. Ms. Meyer noted the difficulty in determining the public good or public detriment that can result from a records request and who would determine that. Mr. Cianchette played devil's advocate, raising the concern that information is not a finite resource and that taxpayers are subsidizing the inventory costs for commercial businesses seeking access to bulk data. Ms. Meyer responded that the data still must be maintained for government purposes and that the public must rely on that data, not the data of the commercial entity, for official purposes. Ms. Bellows thought the appropriate distinction is not between commercial versus noncommercial purposes, but between public and private information. She noted that what's interesting is that technology can be used to make redacting personal information easier. Mr. Flewelling stated that he also agreed with Ms. Meyer and Ms. Bellows; he would not want to put local officials in the position of deciding whether a request was being made for commercial purposes or not.

The Subcommittee returned to the discussion of the cost of access. Ms. Meyer suggested defining reasonable cost as the personnel and material costs of duplication, not overhead or costs of collecting or maintaining data and letting agencies determine the particular fees through rulemaking. Mr. Cianchette again asked whether this approach would apply to all FOA requests. Mr. Leary said that's why he used the term "incremental' because the cost should be reasonable and focused on the cost of copying the data; if redaction is necessary that would result in more cost. Mr. Brown expressed concerns about that limitation and the impact on counties if the fee wasn't permitted to recover the full cost of providing access. Mr. Leary responded that there should be a separate fee structure for recording deeds and copying deeds and that the counties should be able to recover the cost of maintaining the registry through upfront recording fees, not the copying fees. Ms. Bellows liked the parameters suggested by Ms. Meyer of personnel and material costs of duplication, but wanted to add one more factor—the costs associated with responding to the request and any necessary redaction. Ms. Meyer remarked that what the Subcommittee was discussing is already in law and suggested adding a declarative statement in the statute that records include electronic records.

With the leave of the Subcommittee chair, Rep. Terry Hayes asked whether the Subcommittee should consider whether disclosure should be made by the government at the time of collecting information from individuals that their personal information may be included when public records requests are made in the future. The Subcommittee believed the issue raised by Rep. Hayes was beyond their charge, but recommended that the issue be referred to the full Advisory Committee for discussion.

Returning to the issue of cost, Mr. Cianchette inquired if it was the Subcommittee's recommendation that bulk data not be defined, but that agencies be authorized through rulemaking to determine the reasonable cost of access with different cost structures allowed for large electronic requests. Mr. Leary wanted any recommendation to make it clear that an individual could have access to the individual's own record at little or no cost. After consideration, Ms. Meyer asked whether a rulemaking requirement was too formal and whether in practice it would make it more difficult for government entities when the Subcommittee was

trying to make the process easier. Mr. Flewelling explained that municipalities do not follow the requirements of the Administrative Procedure Act applicable to State agencies but adopt administrative rules and policies through a more informal, yet rational, process. Mr. Cianchette thought Mr. Leary was suggesting a public process among all government agencies for consistency. Mr. Leary reiterated that any fee charged by government entities must be reasonable and expressed concern that an actual cost standard may result in all requests being referred for review by lawyers to increase the cost. The Subcommittee also discussed the need to consider whether the $10 hourly fee should be revisited. The fee was originally recommended by the Advisory Committee to allow agencies the ability to recover the costs for responding to requests, which were not previously allowed under the statute. Ms. Meyer stated she was still concerned about the threshold for when rulemaking would be required; would agencies be required to adopt rules setting fees for access to each database? Ms. Meyer expressed her interest in putting the factors for determining a reasonable fee in the statute in a manner that would be applied by all government entities consistently. Mr. Cianchette noted that, after all of the discussion, the Subcommittee may have arrived back at the starting point—the current law's requirement that any fee charged must be reasonable.

Mr. Flewelling pointed out the language in the North Dakota law that defines a "reasonable" fee and suggested that the Subcommittee consider adopting similar language. The Subcommittee agreed to consider his suggestion and asked staff to prepare a draft for review at the next meeting based on comparing Maine law to North Dakota law.

Future meetings

The Subcommittee agreed to hold a joint meeting with the Legislative Subcommittee on Thursday, November 10, 2011, starting at 1:00 p.m.

The Subcommittee meeting was adjourned at 10:35 a.m.

Scheduled Meetings:
- Thursday, November 10, 2011, 1:00 p.m., Bulk Records & Legislative Subcommittees
- Thursday, November 17, 2011, 9:00 am, Public Records Exception Subcommittee
- Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, December 8, 2011, 1:00 p.m., Right to Know Advisory Committee

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Legislative and Bulk Records Subcommittees
December 8, 2011
Meeting Summary

Convened 10:20 a.m., Room 438, State House, Augusta

Present:	Absent:
Mike Cianchette, Chair, Bulk Records Subcommittee	Shenna Bellows
Judy Meyer, Chair, Legislative Subcommittee	Mal Leary
Perry Antone	Bill Logan
Joe Brown	
Richard Flewelling	
Ted Glessner	
Kelly Morgan	
Linda Pistner	
Harry Pringle	

Staff:
Peggy Reinsch and Colleen McCarthy Reid

Judy Meyer and Mike Cianchette, subcommittee chairs, called the meeting to order and asked all the members to introduce themselves.

Review of revised draft

The Subcommittees again reviewed the revised draft prepared by staff; this revision reflects the Subcommittees' decisions at the November 17th meeting.

Sec.1; New Section 400. The Subcommittees approved the language suggested by staff to provide a short title and cite to the "Freedom of Access Act" for Title 1, chapter 13, subchapter 1.

Sec. 2; Section 401-A; information technology policy. The Subcommittees reviewed the revised draft. Based on prior discussion, staff revised section 1 to make it clear that the statement of policy does not apply retroactively and revised section 2 to focus on agencies, not individual officials.

Harry Pringle expressed support for the revised section 2, but has continued concerns about putting the policy statement in section 1in the statutes. In response to a suggestion by Kelly Morgan to strike section 1, the Subcommittees unanimously approved section 2 as written.

Sec. 3; section 402, sub-§ 1-B; definition of public access officer. The Subcommittees approved the language as written.

[The Subcommittees deferred discussion of section 4 and the suggested draft language related to working papers until later in the meeting.]

Sec. 5 and Sec. 6. New Section 408-A; public records available for copying and inspection.

- *Subsections 1 to 3.* The Subcommittees unanimously approved these subsections as written.

- *Subsection 4.* The Subcommittees unanimously approved this subsection and determined that the language from current law referring to a "body" in addition to an agency or official should remain.
- *Subsection 5.* The Subcommittees approved the language as written.
- *Subsection 6.* The Subcommittees approved the language as written.
- *Subsection 7.* The Subcommittees approved the language as written.
- *Subsection 8.* The Subcommittees approved the language as written.
- *Subsection 9.* The Subcommittees approved the language as written.
- *Subsection 10.* The Subcommittees approved the language as written.
- *Subsection 11.* The Subcommittees approved the language with one change. Staff will amend the language to require that an agency or official is required to notify a requester of the estimate of the total cost of a records request when the estimate is greater than $30; under current law, the amount is $20.
- *Subsection 12.* The Subcommittees approved the language as written.
- *Subsection 13.* The Subcommittees approved the language as written.

Sec. 7; Section 409, appeals. The Subcommittees approved the language as written.

Section 8 and 9, public access officer. The Subcommittees approved section 8 as written. With respect to section 9 and new section 413, the Subcommittees agreed to amend the language to align the entities required to designate a public access officer with those entities that are included in the definition of entities that create, collect or maintain public records. The Subcommittees also agreed to clarify that a FOA request is not required to be made to a public access officer.

Section 10; Ombudsman funding. The Subcommittees approved the appropriations and allocation section to provide funding for a full-time Ombudsman position within the Attorney General's Office.

Sec. 4; section §402, sub-§3, ¶¶ C-2 and C-3; working papers exception.

Based on the Subcommittees' divided vote at the prior meeting, staff provided a revised draft to amend the definition of public records to create an exception (parallel to the exception for the Legislature) to protect working papers of the Governor and working papers of state and local agencies and officials.

Mr. Pringle again expressed his support for parallel treatment for working papers of the Governor and other public officials with working papers of the Legislature. If the Legislature has an exception, it should be available to the Governor and others. If the Legislature's exception is repealed, there is no need for an exception for the Governor and others. Judy Meyer stated that the whole idea is a bad one; the solution is to repeal the Legislature's exception, not to expand it to the Governor. Ms. Meyer felt there has not been a demonstration of harm by the Governor or others from not having the exception. Michael Cianchette responded that, without the exception, policy and budget decisions being made by the Governor will be done through meetings and oral discussions; the historical written record will be difficult to document. Richard Flewelling noted that, based on his informal poll of municipal officials, he was opposed to the exception in C-3. Municipal officials believed the proposed exception is not necessary, is excessively broad as drafted and is difficult to understand. Mr. Flewelling indicated he would support the exception for working papers of the Governor related to the legislative process. Linda Pistner agreed with the concerns raised about C-3; she stated that she too believed the exception presents legal and practical problems. Ms. Pistner said she had discussed the proposed exception for working papers

of the Governor with the Attorney General; she would support the language in paragraph C-2. Ms. Morgan is opposed to both provisions; she believes it is not the purpose of the Advisory Committee to act in this manner.

The Subcommittees proceeded to take 3 separate votes: 1) whether to repeal the Legislature's exception; 2) whether to support the exception for the Governor; and 3) whether to reject the exception for governing bodies and public officials. All 3 votes were divided.

- *Repeal the Legislature's exception.* The Subcommittees voted 3-6 to repeal the exception.
- *Support the exception for the Governor*. The Subcommittees voted 7-2 in support of the proposed exception for the Governor.
- *Reject the exception for governing bodies and public officials.* The Subcommittees voted 7-2 to reject the proposed exception for governing bodies and public officials.

Review of bulk data discussions

Bulk Records Subcommittee members briefly discussed the report to be made to the Advisory Committee. Mr. Cianchette wanted to be sure of the Subcommittee's thoughts on whether or not the law should distinguish between requests made for commercial or non-commercial purposes. Mr. Cianchette recognized that there may be some value in stratifying fees based on whether or not the information would be used commercially, but stated he didn't have strong feelings. Mr. Pringle reiterated his belief that there should be no distinction made between the uses of the information, but that government should be able to recover the costs for producing the information. Ms. Meyer and Ms. Morgan agreed with Mr. Pringle that there should be no distinction. Joe Brown disagreed; he expressed his opinion that the distinction is already made in other areas of the law, e.g. commercial fishing and motor vehicle licenses, and that government should not have to give information away to commercial competitors. Ms. Pistner said there was something wrong when a state agency invests in creating a database and is unable to recoup that investment; she would support a distinction based on whether or not the information is requested for resale to protect the agency's investment.

Other issues

Legislative Subcommittee members reviewed the list of items that were not addressed this year due to the extensive time needed for consideration of LD 1465. The Subcommittee agreed to table the following items until 2012:

- Status of Maine Public Broadcasting Network records under the Freedom of Access laws (Mike Brown)
- Use of technology for the purpose of remote participation by members of public bodies
- Drafting templates
- Storage, management and retrieval of public officials' communications, especially email

The meeting was adjourned at 12:02 p.m.

Respectfully submitted, Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
December 8, 2011
Draft Meeting Summary

Convened 9:08 a.m., Room 438, State House, Augusta

Present:	Absent:
Linda Pistner, Acting Chair	Shenna Bellows, Chair
Chief Perry Antone	
Joe Brown	
AJ Higgins	

Staff:
Peggy Reinsch, Colleen McCarthy Reid

Linda Pistner chaired the Subcommittee meeting in the absence of the chair, Shenna Bellows. Ms. Pistner convened the meeting and asked the members to introduce themselves.

Review of existing public records exceptions tabled at last meeting

54	22 MRSA §8754: sentinel events

The Subcommittee continued its discussion of Title 22, section 8754 relating to sentinel events. Staff reviewed sentinel events laws in other states and reported that, of the 27 states other than Maine that require reporting of sentinel events, 15 states make those reports confidential. Representatives from the Maine Hospital Association and the Department of Health and Human Services reiterated their prior recommendation that the Subcommittee make no changes to current law. It is their belief that the current law works well; without the confidentiality provision, health care providers and professionals would be reluctant to report sentinel events to the detriment of patients. Ms. Pistner reminded the Subcommittee that the provision does not deprive an individual patient from initiating a lawsuit or from accessing their own medical records relating to the event. Mr. Brown continued to raise his concern that, under the current law, members of the public may not have enough information about underperforming hospitals; patients should have access to the best care possible. AJ Higgins stated that the public should be made aware of these events, but recognizes the need for give and take between hospitals and the State to ensure reporting. Mr. Higgins asked whether there might be some middle ground: could hospitals be required to annually report their sentinel events? The Maine Hospital Association expressed some concern that individual hospital reporting may affect an individual's medical privacy, especially in smaller communities. Mr. Brown suggested that the Subcommittee consider tabling the exception so further discussion can take place.

The Subcommittee voted 4-0 to make no change to Title 22, section 8754 at this time and to recommend that the Advisory Committee continue its review of the provision in 2012.

57	23 MRSA §63: MTA and DOT records

The Subcommittee reviewed the draft language to amend the statute to clarify that engineering estimates are public once a contract is awarded. After consulting with DOT and MTA, staff reported that the intent of the language is that only the engineering estimates are made public after a contract is awarded. Staff

confirmed that DOT and MTA would not support amending the language further to also make any records and data relating to the engineering estimates public after a contract award.

The Subcommittee voted 4-0 to recommend that Title 23, section 63 be amended as drafted.

62	23 MRSA §8115: NNEPRA

The Subcommittee reviewed a revised draft prepared in response to the Advisory Committee's discussion of Title 23, section 8115. Staff worked with Nathaniel Rosenblatt, the attorney representing the Northern New England Passenger Rail Authority (NNEPRA), to prepare a revised draft that narrows the confidentiality of estimates for goods and services to be procured by NNEPRA. The revised draft makes it clear that only estimates prepared by or at the direction of NNEPRA are confidential; estimates for goods and services submitted by potential vendors to NNEPRA become public once a contract is awarded.

The Subcommittee voted 4-0 to recommend that Title 23, section 8115 be amended as reflected in the revised draft.

18 and 19	22 MRSA §§1696-D and 1696-F: Community Right to Know Act

The Subcommittee reviewed a draft letter to the Health and Human Services Committee and Environment and Natural Resources Committee informing them that the program has never been implemented and asking them to consider whether there are other programs in the Department of Environmental Protection or the Maine Emergency Management Agency that provide public access to information about toxic or hazardous substances.

The Subcommittee voted 4-0 to approve the draft letter.

66	24 MRSA §2510: professional competence reports

The Subcommittee reviewed redrafted language to clarify Title 24, section 2505 to clarify that the Title 10 general provisions do not apply, and to amend Title 24, section 2510 to allow the Board to share investigative information with enforcement agencies. Staff reported that the Maine Hospital Association and Maine Medical Mutual Insurance Company expressed agreement with the draft, but no response has been provided by the Board of Licensure in Medicine or Maine Medical Association.

The Subcommittee voted to amend Title 24, section 2505 and Title 24, section 2510 as drafted.

67	24 MRSA §2510-A: professional competence reports and review records

With regard to Exception #67, Randal Manning, the Executive Director of the Board of Medical Licensure, and the Attorney General's Office had been working with interested parties to develop draft language to give the Board access to certain credentialing and privilege records. To date, staff has not received any draft language from the interested parties.

Given that recommended language for changes has not been submitted, the Subcommittee voted 4-0 to make no changes to the exception.

Adjourned 10:15 a.m.
Respectfully submitted, Peggy Reinsch and Colleen McCarthy Reid