

Right to Know Advisory Committee  
Public Records Exceptions Subcommittee  
November 15, 2012  
Meeting Summary

Convened 9:18 a.m., Room 438, State House, Augusta

Present:	Absent:
Shenna Bellows, Chair	None
Rep. Joan Nass	
Perry Antone	
Joe Brown	
AJ Higgins	
Linda Pistner	

Staff:  
Peggy Reinsch  
Colleen McCarthy Reid

**Introductions**

Shenna Bellows, Subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

**Public-Private Partnerships for transportation projects**

Current law (23 MRSA §4251) designates all information that MaineDOT has about a public-private partnership project confidential until the Department determines whether the plan meets the statutory standards. Approved projects are then submitted to the Legislature for approval. The Subcommittee had before it two different drafts for changes to the existing law governing public-private partnerships records. Linda Pistner provided a rough draft (labeled Minority Report B) for the purpose of discussing options for making at least some information about public-private partnerships projects before the current law allows release. Her concern about the current law is that by the time the plan is released and it goes to the Legislature, the opportunity for changes has passed and the only options are up or down. The draft was an attempt to find a middle ground between the current law and Minority Report A, which proposes to delete the confidentiality completely.

Toni Kemmerle, General Counsel for MaineDOT provided a few comments in the place of Deputy Commission Bruce Van Note who was not available. The Department's position is that, although there is an appreciation for the issues raised, any weakening of the confidentiality will kill the chance of proposals. Ms. Kemmerle reiterated that MaineDOT has not had any proposals yet. The Legislature having the final say should provide the public ample chance to review and comment, and the Legislature can put everyone on the spot. She said that it is not that the Department opposes changes, but that the real world consequences of removing confidentiality must be part of the discussion. MaineDOT will be happy to consider anything.

Joe Brown stated that he is comfortable that MaineDOT and the Legislature can appropriately handle the process under the current law. He believes that existing law provides sufficient transparency. AJ Higgins expressed his concern that the current process allows access to information, but too late for the public. Perry Antone said he is in the middle: large projects shouldn't go forward without some information serving as a check, but supporting free enterprise means allowing the development of plans without revealing trade secrets and other information to competitors. Businesses, he says, should have the ability to develop what it wants to do until an agreement or just before an agreement is entered into with the State. But Chief Antone doesn't know where the appropriate line is to make information available to the public.

Cathy Johnson, North Woods Project Director and Senior Staff Attorney with the Natural Resources Council of Maine, expressed a concern about Minority Report B. It would allow an applicant to have full discussions and negotiations with MaineDOT and file an official "application" at the very last minute, which would then make that information public. She suggested a different approach: list specifically the documents or records that should be confidential, such as trade secrets. If you narrowly define what would be confidential, then everything else would be public once MaineDOT receives the records. Ms. Johnson again noted that one of the review criteria that MaineDOT must apply is whether the project is in the public interest, and wondered how that could be adequately assessed if the public has no opportunity for input.

Ms. Pistner described Minority Report B as needing at least some fine-tuning, and chose to withdraw it as an official proposal to the Subcommittee.

Commissioner Brown reiterated that the Subcommittee had agreed that this discussion was not about a particular project, whether it is the East-West Highway or any other specific proposal. If there is concern about the East-West Highway, he believes there will be plenty of opportunity for the public to express thoughts and concerns.

Ms. Bellows said she supports Minority Report A because it provides for transparency; it will increase competitiveness and will provide for consistency across agencies. Mr. Higgins said that although he understands the need to protect the competitive process, he would hate to see the shield manipulated to the detriment of landowners or homeowners. Ms. Pistner said she doesn't want to open up the records completely as proposed in Minority report A, but every process needs a range of views earlier in the process than the current law allows for these public-private partnership projects. Chief Antone said he completely disagrees with opening it all up, likes a middle-ground approach but without one in sight, he thinks no change to the current law is the best option. Rep. Joan Nass expressed her full confidence in MaineDOT.

The Subcommittee voted 3-2 in favor of no change, with one abstention. (Rep. Nass, Commissioner Brown and Chief Antone voting in the majority; Ms. Bellows and Mr. Higgins supporting Minority report A, Ms. Pistner abstaining.) Mr. Higgins noted that if there is support for a middle ground in the full Advisory Committee, he may support that rather than repealing the confidentiality completely.

### **Confidentiality of Sentinel Events reporting**

Katie Lybrand, the Advisory Committee's Law School Extern, presented a memo she had prepared describing other states' sentinel events reporting programs and the availability of information collected through those processes. She noted that a lot of states do include names of hospitals and information about the sentinel events that were reported. Some state reports include comparisons among hospitals, as well as proposals or actions for improvement.

Jeff Austin of the Maine Hospital Association referred to the memo provided by the Maine Hospital Association, the Maine Medical Association, the Maine Osteopathic Association and the Medical Mutual Insurance Company of Maine. They remain strongly opposed to any change in the confidentiality. Mr. Austin stressed that quality in Maine is very high. In addition, there is already lots of information about quality of care that is publicly available. Removing the confidentiality would cause significant chilling for the hospitals to ever work with any groups again because they would not be able to trust that compromises would hold. Mr. Austin said that robust sentinel event reporting is not necessarily an indication of poor care. Sentinel events reporting covers rare events; a better indicator is the quality of routine care. The purpose of the reporting statute, he said, is not to inform the public but to improve care.

Lisa Simm, Administrative Director of Quality Care Management at MaineGeneral, and Kate Dempski at Inland Hospital explained the importance of confidentiality in the sentinel event reporting process. It has taken years to develop the "no blame" culture which allows everyone involved to be completely candid and allow the discovery of the causes of unexpected outcomes. Sometimes human errors are forced by system problems: was it a system error vs. a conscious deviation from the standard of care? Competence issues can be dealt with and are reported to the board. The hospitals are transparent about quality indicators; information is readily available [www.GetBetterMaine.org](http://www.GetBetterMaine.org) and [www.HospitalCompare.hhs.gov](http://www.HospitalCompare.hhs.gov), two websites that are publicly available. Both stressed that quality data are more specific and more useful than sentinel events reports.

Joseph Katchick from DHHS explained that DHHS also greatly values the confidentiality provided in current law. If an immediate risk exists, information is turned over to the licensing personnel who can take action quickly. It is also important to have follow up plans – need to know what to do, and who will do what when specific events do occur. Of 12 states that report, Mr. Katchick said four follow up with the families. He also stated that the "no blame" philosophy is really important.

The Subcommittee members tentatively agreed that full disclosure of all information provided to DHHS through the sentinel events reporting program would probably be counter-productive. The challenge is to find what information is helpful to people in making informed health care decisions. Ms. Bellows said transparency is an important factor in increasing public trust, and Chief Antone said the hospitals must be permitted to maintain their investigative process. The members agreed to table the issue until 2013 with the understanding that more information from other states, coupled with good discussions with the hospitals and quality care professionals will identify common ground with regards to providing useful information to the public.

### **Review of Existing Exceptions in Titles 26 through 39-A**

The Subcommittee took up two public records exceptions somewhat related to sentinel events and review of medical outcomes.

32: 32 MRSA §2599 (Osteopathic Board) 34: 32 MRSA §3296 (Board of Licensure in Medicine)
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These two provisions relate to the medical staff reviews and hospital reviews concerning osteopathic physicians. Ms. Bellows expressed concern that not only is the information in reviews confidential, but it is not subject to discovery in the course of litigation. The confidentiality provision being reviewed focuses on whatever medical staff review information is provided to the Licensing Board. Title 24 requires facility credentialing decisions to be sent to the licensing board. Although the final Board action is public, the Board's investigative records remain confidential.

Dr. Chris Pezullo, speaking for the Osteopathic Board, and Randal Manning, speaking for the Medical Licensing Board, explained the process the boards go through and what information is public and when. At this point, the Boards are not interested in receiving all the records pertaining to medical staff reviews.

Mr. Manning said that if the Board's materials became discoverable, then their complaint volume would double because patients would file a complaint as an avenue to getting their medical files for free.

Ms. Pistner recognized that the underlying concept is the same as for sentinel events: confidentiality is necessary to provide for a full investigation. Some information, however, should be available to the public.

The Subcommittee agreed to table both #32 and #34 to gather more information and review the language pertaining to "discovery" and why that is important.

### **Future Meetings**

The Subcommittee agreed to start meeting again in 2013 after the First Regular Session of the 126th Legislature has adjourned.

The Advisory Committee will meet:

- Thursday, November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Bellows adjourned the meeting at 11:30 a.m.

Respectfully submitted,  
Peggy Reinsch and Colleen McCarthy Reid