STATE OF MAINE
126TH LEGISLATURE
FIRST REGULAR SESSION

Eighth Annual Report of the RIGHT TO KNOW ADVISORY COMMITTEE

January 2014

Staff:
Henry Fouts, Legislative Analyst
Colleen McCarthy Reid, Legislative Analyst
Margaret J. Reinsch, Senior Analyst
Office of Policy & Legal Analysis
13 State House Station
Room 215 Cross State Office Building
Augusta, ME 04333-0013
Telephone (207) 287-1670
Fax (207) 287-1275
www.maine.gov/legis/opla
http://www.maine.gov/legis/opla/righttoknow.htm

Members:

Sen. Linda M. Valentino
Rep. Kimberly Monaghan-Derrig
Perry Antone Sr.
Percy Brown Jr.
Richard Flewelling
Suzanne Goucher
Frederick Hastings
Mal Leary
William Logan
Mary Ann Lynch
Judy Meyer
Christopher Parr
Linda Pistner
Harry Pringle
Luke Rossignol

Table of Contents

Page

Executive Summary i

I. Introduction 1

II. Advisory Committee Duties 2

III. Recent Court Decisions Related to Freedom of Access Issues 3

IV. Right to Know Advisory Committee Subcommittees 5

V. Actions Related to Right to Know Advisory Committee Recommendations Contained in Seventh Annual Report 22

VI. Right to Know Advisory Committee Recommendations 26

VII. Future Plans 31

Appendices

A. Authorizing legislation, 1 MRSA § 411
B. Membership list, Right to Know Advisory Committee
C. Recommended Draft Legislation for statutory changes to public records exceptions (Title 22, Sections 1696-D and 1696-F and public records exceptions in Titles 26 - 39-A)
D. Recommended Draft Legislation: Add an IT professional to membership of Right to Know Advisory Committee
E. Recommended Draft Legislation: Authorize use of technology to permit remote participation in meetings
F. Recommended Draft Legislation: Relief from overly burdensome FOAA requests
G. Recommended Draft Legislation: Amend PL 2013, c. 350 concerning deadlines and appeals
H. Recommended Draft Legislation: Align the reporting dates for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee
I. Correspondence

EXECUTIVE SUMMARY

This is the eighth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The 16 members are appointed by the Governor, the Chief Justice, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website: http://www.maine.gov/legis/opla/righttoknow.htm. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2013, the Advisory Committee met on July 24, October 3, November 12 and December 17. The Advisory Committee established the Legislative Subcommittee, the Public Policy Subcommittee and the Public Records Exceptions Subcommittee to assist it in conducting its work. All three subcommittees held meetings and made recommendations to the Advisory Committee.

The Advisory Committee was very fortunate to have the services of a Legal Extern of the Maine School of Law. Stephen Wagner, currently a second year student at the Law School, worked with the Advisory Committee during the first semester of the 2013-2014 school year.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2013 recommendations and a summary of relevant Maine court decisions from 2013 on the freedom of access laws.

For its eighth annual report, the Advisory Committee makes the following recommendations, although not all the recommendations are unanimous:

- ❑ **Enact legislation to add an IT professional to the membership of the Right to Know Advisory Committee**
- ❑ **Communicate to the Joint Standing Committee on Veterans and Legal Affairs about the public records exception in Title 28-A, Section 755 relating to business and financial records of liquor licensees**
- ❑ **Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A**
- ❑ **Make no change to the confidentiality provision in the sentinel events reporting law**
- ❑ **Repeal the Community Right-to-Know Act because the program has never been implemented and public information is available through other means**
- ❑ **Establish a future process for review of public records exceptions**

- ❑ **Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)**

- ❑ **Enact legislation to address overly burdensome FOAA requests**

- ❑ **Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (divided report)**

- ❑ **Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee**

- ❑ **Communicate to the State and Local Government Committee about issues identified by the Registers of Deeds relating to the redaction of social security numbers from filed documents**

In 2014, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.

The Advisory Committee looks forward to a full year of activities and working with the Public Access Ombudsman, the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its eighth annual report.

I. INTRODUCTION

This is the eighth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at www.maine.gov/legis/opla/righttoknowreports.htm.

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. Linda M. Valentino Chair	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Rep. Kimberly Monaghan-Derrig	*House member of Judiciary Committee, appointed by the Speaker of the House*
Perry Antone Sr.	*Representing law enforcement interests, appointed by the President of the Senate*
Percy Brown Jr.	*Representing county or regional interests, appointed by the President of the Senate*
Richard Flewelling	*Representing municipal interests, appointed by the Governor*
Suzanne Goucher	*Representing broadcasting interests, appointed by the Speaker of the House*
Frederick Hastings	*Representing newspapers and other press interests, appointed by the President of the Senate*
Mal Leary	*Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House*
William Logan	*Representing the public, appointed by the Speaker of the House*
Mary Ann Lynch	*Representing the Judicial Branch, appointed by the Chief Justice of the Supreme Judicial Court*
Judy Meyer	*Representing newspaper interests, appointed by the Speaker of the House*

Christopher Parr	*Representing state government interests, appointed by the Governor*
Linda Pistner	*Attorney General's designee*
Harry Pringle	*Representing school interests, appointed by the Governor*
Luke Rossignol	*Representing the public, appointed by the President of the Senate*
Vacant	*Representing broadcasting interests, appointed by the President of the Senate*

The complete membership list of the Advisory Committee, including contact information, is included as Appendix B.

II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's freedom of access laws;
- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;
- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- Examining inconsistencies in statutory language and proposing clarifying standard language; and

- Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to be able to work with the newly-appointed Public Access Ombudsman, former Special Assistant Attorney General Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

By law, the Advisory Committee must meet at least four times per year. During 2013, the Advisory Committee met on July 24, October 3, November 12 and December 17. The Advisory Committee established the Legislative Subcommittee, the Public Policy Subcommittee and the Public Records Exceptions Subcommittee to assist it in conducting its work. All of the full committee meetings and subcommittee meetings were held in the Judiciary Committee Room of the State House in Augusta and open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage that can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas, meeting materials and summaries of the meetings are included on the webpage.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's freedom of access laws. The Advisory Committee identified the following court decision summarized below.

2013 Maine Supreme Judicial Court Decision

MaineToday Media, Inc. v. State, 2013 ME 100. In this case, the Maine Supreme Judicial Court examined the State's denial of a newspaper's request under the Freedom of Access Act (FOAA) to inspect and copy Enhanced 9-1-1 call transcripts and held that they were public records subject to disclosure pursuant to FOAA.

At issue in the case were requests by MaineToday Media for 9-1-1 transcripts from three separate calls regarding an altercation and later homicide involving three tenants and their

landlord in Biddeford. The requests were variously addressed to the Biddeford Police Department, the Maine State Police within the Department of Public Safety, the Bureau of Consolidated Emergency Communications within the Department of Public Safety and the Attorney General's Office. The State of Maine, represented by the Attorney General's Office, took the lead in responding to the requests, and denied the requests citing the Criminal History Record Information Act (CHRIA), 16 M.R.S. §§ 611–623 (2012) *(Note: this confidentiality provision is now codified in the Intelligence and Investigative Record Information Act, 16 MRSA §§ 801-809 (2013)).* The State claimed the transcripts were confidential pursuant to CHRIA because they constituted "intelligence and investigative information" in a pending criminal matter.

Noting that this was the first case to examine the public disclosure of information from 9-1-1 calls, the Court proceeded with an analysis of the relationship between FOAA, CHRIA, and the emergency services communication statutes (ESC) at 25 MRSA §§ 2921-2935 (2012). The Court began with FOAA, reviewing the plain language of the statute and the underlying purpose of the Act. The purpose of FOAA, by its own terms, is that public actions be taken openly and that the records of public actions be open to public inspection and that public deliberations be conducted openly. The Court iterated FOAA's general requirement that a person has the right to inspect and copy any public record within a reasonable time of making the request, unless the record meets one of the nineteen public records exceptions listed in statute. The relevant exception in the case was the one for records designated as confidential by statute at 1 MRSA §402(3)(A). Determining that the 9-1-1 transcripts at issue would indeed be a public record subject to FOAA unless they constituted a record deemed "confidential" by statute, the Court then moved on to examine the ESC statutes and CHRIA.

In the ESC statutes, the Court pointed out, while 9-1-1 audio recordings are explicitly confidential, the statute also provides that "the information contained in the audio recordings is public information and must be disclosed in transcript form." 25 MRSA §2929(4). Although the transcripts are public information, they still may contain confidential information, such as names, addresses, telephone numbers and certain personal medical information, that cannot be released. 25 MRSA §2929(1). The Court concluded that pursuant to FOAA and the ESC statutes, 9-1-1 transcripts must be disclosed upon request, provided that any confidential information contained in the transcripts has been redacted.

The Court summarized the CHRIA in effect at the time, which dictated the manner of the disclosure of criminal history information and rendered a public record confidential when it (1) contains "intelligence or investigative information," (2) was prepared by or at the direction of, or is kept in the custody of, a "criminal justice agency" and (3) if disclosed, would create a reasonable possibility of one of the various harms listed in statute. The Court found that the transcripts qualified as "intelligence or investigative information" because they were "compiled" by Maine State Police, Attorney General and/or the Biddeford Police Department. Although MaineToday Media had filed one of its transcript requests with the Bureau of Consolidated Emergency Communications within the Department of Public Safety, the actual state agency responsible for managing the Enhanced 9-1-1 system is the Maine Emergency Communications Bureau, which is organized under the Public Utilities Commission and therefore does not qualify as a "criminal justice agency." However, the Court determined that the transcripts were still kept

in the custody of the Maine State Police or the Attorney General and so qualified under the second part of the test.

Looking to the third part of the test for CHRIA confidentiality, the Court determined that the State had not met its burden to establish any particularized reasonable possibility of one of the specific harms listed in statute. It was not enough to rely on a blanket claim that the 9-1-1 transcripts would interfere with law enforcement proceedings, the State's cited reason for denying the request. The Court also noted that if the Maine Legislature had intended to exempt from disclosure all 9-1-1 transcripts, or even just those involved in a criminal investigation, it could have done so, for example as it has done with juvenile fire setter records and ambulance medical reports in FOAA itself.

Since the 9-1-1 transcripts did not qualify for confidentiality status under CHRIA, the Court held that they were public records subject to a FOAA request, provided that any of the confidential information (names, etc.) they may contain was redacted. The Court remanded the case to the Superior Court, instructing it to order the State to provide the requested 9-1-1 transcripts with appropriate redaction.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities and the nature of the requests received from the Legislature, the Advisory Committee reorganized its subcommittee structure in 2013. Three subcommittees were appointed: 1) Legislative; 2) Public Policy; and 3) Public Records Exceptions. Senator Valentino and Representative Monaghan-Derrig, the legislative members of the Advisory Committee, are ex officio members of each subcommittee.

Legislative Subcommittee. The Legislative Subcommittee's focus is to serve as an advisor to the Legislature when legislation affecting public access is proposed and to respond to requests from the Legislature or others to consider issues affecting public records and public access. Judy Meyer serves as chair of the Subcommittee and the following serve as members: Perry Antone, Percy Brown, Richard Flewelling, Suzanne Goucher, Mal Leary, William Logan, Chris Parr, Harry Pringle and Luke Rossignol.

During 2013, the Legislative Subcommittee had five meetings and discussed the following issues. Because of the similarities in the issues being discussed as well as an overlap of members, the Legislative Subcommittee met jointly with the Public Policy Subcommittee on three occasions.

Encryption of emergency communications

The subject of establishing a policy concerning the encryption of emergency radio communications among law enforcement and first responders was discussed in 2012. The Right to Know Advisory Committee wrote to the Board of Trustees of the Maine Criminal Justice Academy requesting that the Board consider creating a model encryption policy for

consideration by local law enforcement agencies. The Chair of the Board of Trustees responded that the Board does not formulate model policies for law enforcement, although it does develop standards for law enforcement policies mandated by the Legislature.

After discussion, the Subcommittee agreed to explore options for pursuing the original proposal of a policy that maintains the current practice. Initially, the Subcommittee voted to table the issue while staff developed language and checked with stakeholders.

At the October 3rd meeting, the Subcommittee discussed the issue jointly with the Public Policy Subcommittee. The Maine Chiefs of Police Association expressed opposition to legislation regarding radio encryption because this would be legislation where there really is no issue. Additionally, the Maine Chiefs of Police Association position is that even though the public can hear live radio transmissions, there is no FOAA right to this information. After brief discussion, where the question was raised whether the issue was properly before the Right to Know Advisory Committee and some members expressed satisfaction that the cost barrier alone ensures that encryption will not be an immediate issue, the joint Subcommittees unanimously voted to take no action on this issue.

Appropriations Committee caucuses

The Right to Know Advisory Committee has discussed the openness of legislative party caucuses in the past; there is some interest in addressing it in the statute to make it clear whether caucuses are open to the public or closed. The Legislative Subcommittee discussed the current practices of the Appropriations and Financial Affairs Committee, in which negotiations done between the "chairs and leads" are open and anyone who knows about the meeting can attend, but general notice is not provided. The Legislature looks to its Joint Rules, adopted by each Legislature, to govern notice requirements rather than FOAA. This relies on the inherent power of the Legislature to govern its internal procedures.

The Subcommittee voted 7-2 (Mr. Brown and Mr. Parr dissenting) to ask Public Access Ombudsman Brenda Kielty to provide clarification regarding the public accessibility requirements under Maine law for party caucus meetings. Ms. Kielty agreed to try to provide guidance by the beginning of November. At the request of Ms. Kielty, the date for submission of the guidance was extended to December.

At the December meeting of the full Advisory Committee, Brenda Kielty responded to the request for guidance on FOAA applicability to party caucus meetings of the Legislature. Ms. Kielty noted that there was no case law on point. She also noted that the Advisory Committee did review this issue in 2009 and ultimately decided to not take action, and to leave it to the Legislature's discretion. Ms. Kielty provided copies of a 2010 Attorney General letter she felt was on-point in its guidance, and felt that this should suffice the Advisory Committee's request for guidance. Summarizing the letter, Ms. Pistner stated the general proposition that party caucuses should be exempt from FOAA requirements, however, adding the caveat that the particular facts and circumstances surrounding the meeting must be taken into account, and that a court could rule that a supposedly exempt party caucus meeting did in fact rise to the level where

FOAA would apply. After some discussion, the Advisory Committee was satisfied and moved on.

Protection of "personal information" within the data breach statute

The Notice of Risk to Personal Data Act (10 MRSA Chapter 210-B) requires that an entity that holds personal data to provide notice when the entity is aware that the personal information has been subjected to a risk of disclosure. The Legislative Subcommittee agreed that, because the State has the same responsibility as private entities under the statute, no change and no further discussion are necessary.

Review of statutes to determine whether records should be protected from disclosure

The Legislative Subcommittee agreed that no discussion was necessary on the topic of requiring a regular review of records that are accessible to the public.

McBurney v. Young, 569 U.S. ____ (2013)

The United States Supreme Court ruled that the Virginia Freedom of Information Act is constitutional even though it provides rights to public records to Virginia citizens and not to others from other states. The Legislative Subcommittee discussed whether it would be appropriate to limit the application of the Maine FOAA to Maine citizens, and quickly decided such a change would be setting up a barrier that would be easily crossed. Mr. Parr noted that it may be appropriate to give priority to in-state requests and therefore alleviate the stress on State agencies that are overwhelmed with public records requests. The Virginia statute was set up so Virginia citizens can find out what is going on with their Virginia government. Allowing access of records for other, such as commercial, purposes creates a resource issue. The Subcommittee voted 8-0 (Mr. Parr abstained) to take no action.

Permissive or mandatory

The Legislative Subcommittee discussed the question of whether the specific types of information listed as exceptions from the definition of "public record" (1 MRSA §403, sub-§3) must be redacted from records that are released to the public. Although there is some discomfort about the idea that a records custodian has discretion as to whether release records that are not "public records" but which have not been explicitly designated as "confidential," the Subcommittee agreed to take no action. The Public Records Exceptions Subcommittee reviews all public records exceptions and tries to use consistent language to designate as confidential records that should be kept from being disclosed.

Date of birth of public employees

The question of whether a public employee's date of birth is public information was raised this summer. Mr. Parr and Ms. Kielty concluded that the fact that "age" is confidential information in a public employee's personnel file is sufficient grounds to not release the employee's date of birth. The Legislative Subcommittee discussed whether the statutes should be amended to

include "date of birth" – either instead of "age" or in addition to "age." The Subcommittee agreed to table the discussion until the next meeting, at which point the members can review all the statutes that address the confidentiality of "age" and "date of birth" of public employees.

After reviewing state laws that address the confidentiality of "age" and "date of birth" of public employees, the Subcommittee agreed to take no action on the issue.

Formal, standardized policy governing the storage, retention, and disposition of government emails

The Legislative Subcommittee received a written update on the policy developed for State agencies. The Subcommittee agreed not to take action at this time, preferring to wait for other states to take the lead on this issue.

LD 549 as amended by the Judiciary Committee (bill carried over in Appropriations Committee): An Act To Provide for Special Restrictions on Dissemination and Use of Criminal History Record Information for Class E Crimes Committed by an Adult under 21 Years of Age

The Legislative Subcommittee discussed the proposal to "seal" the criminal history records relating to a single conviction of Class E theft when committed by a person under 21 years of age. Why just Class E theft, which covers shoplifting, when there are other Class E crimes that are even less serious? Convictions are always in the public realm, unless sealed in the SBI's records. The Subcommittee voted 9-0 to take no action.

See discussion of Advisory Committee recommendations in Section VI.

Public Policy Subcommittee. The Public Policy Subcommittee was formerly known as the Bulk Records Subcommittee. The Subcommittee changed its name to reflect the breadth of the issues under discussion. Chris Parr is the chair of the Subcommittee and the following serve as members: Percy Brown, Fred Hastings, Judy Meyer, Linda Pistner and Harry Pringle.

During 2013, the Public Policy Subcommittee held four meetings and discussed the following issues. Because of the similarities in the issues being discussed as well as an overlap of members, the Public Policy Subcommittee met jointly with the Legislative Subcommittee on three occasions.

Lowering the payment in advance threshold of 1 MRSA § 408-A(10)

The issue was raised regarding how an agency is able to collect money for costs associated with supplying public documents, once the requesting individual has the requested documents in possession. Requesting money upfront is much easier for the government, because the government does not have the resources or time to chase down individuals who have not paid.

The statute currently applies a $100 threshold – if there is no pre-payment for requests estimated to cost $100 or more then the agency is not require to start the process of gathering the documents. If the request is estimated to be under this amount, the agency must make copies of

the documents but does not need to turn over the documents until payment is made. If this interpretation of the statute is correct, the problem is a billing issue that could be solved by the government entity tweaking its operating procedures.

During the course of the discussion, Public Access Ombudsman Brenda Kielty addressed the Subcommittee, noting that FOAA sets hourly fee rates but not a flat fee cost. She posed the question whether there was a distinction between an "information request" fee and a FOAA fee. There had been some concern from the public regarding agencies charging arbitrary flat fees, for example, $125 for a fire report. Ms. Kielty also questioned what a "request for information" meant in the context of LD 1511. It was noted by the subcommittee that prior discussions of this topic became focused on deeds. The statutes do set some flat fees, and some fees have developed as an average according to the practical experience of the agencies.

After the discussion the Public Policy Subcommittee was not in favor of lowering the advance payment threshold and the issue was considered resolved.

Anonymous FOAA requests

Agencies comply with anonymous requests currently, when able. Should this practice be allowed? There was agreement that there are certain circumstances where anonymity should be allowed, but there was some concern about allowing a blanket opening to anonymous requests. It was noted that a person can always use a third party requester to maintain their anonymity. The subcommittee agreed to set this topic aside.

The Public Policy Subcommittee agreed that further discussions would be conducted jointly with the Legislative Subcommittee.

FOAA as a discovery tool

There are litigation discovery rules and procedures in place, but individuals still use FOAA as a discovery tool, for example, in traffic stop cases. If there are already ways for a defendant to seek out materials, should FOAA be available as an additional means to get information? It was noted in the discussions that this issue has been wrestled with in the past and the conclusion was that these are two separate processes – each with its own specific timelines and procedures. The "reasonable time" for a response to a FOAA request would not need to be relevant to any impending court deadlines. It was noted that over the years the committee has never recommended differentiating FOAA requests based on the purpose of the requestor – to do so in this context would be a big change to the current statute. The Public Policy Subcommittee agreed to stay with the status quo regarding this issue.

Post all FOAA requests made to State agencies to a searchable online database

The Legislative Subcommittee referred the topic of whether to post all FOAA requests to a searchable online database. The Public Policy Subcommittee briefly discussed the topic and decided that this was not currently an issue that needed to be explored.

Unintended adverse impacts of FOAA

An unintended adverse impact of FOAA results from the modern reluctance of government personnel to keep documents, and to put things in writing, because of the potential that the information will be disclosed pursuant to a FOAA request. This can have a negative impact on historical information, for example, and also takes away an important communicative tool at government's disposal. The Public Policy Subcommittee decided to put this issue aside.

FOAA for commercial purposes

The Committee has discussed the issue of treating FOAA requests differently based on whether the request is for commercial purposes a number of times and come to the ultimate conclusion that it is too difficult to differentiate between commercial and non-commercial purposes. There are some ways to set aside commercial purposes for specific information but not in the context of the larger FOAA. Sometimes commercial purposes can serve the public good. This also goes to the larger issue of personal privacy versus public right to information. Staff will bring back to the Subcommittee information about the Law Court case dealing with this (MacImage), as well as how the statute relating to commercial use of deeds was worked out.

The Public Policy Subcommittee agreed that further discussions would be conducted jointly with the Legislative Subcommittee.

See discussion of Advisory Committee's recommendations in Section VI.

Joint Meetings; Legislative and Public Policy Subcommittees. Because of the similarities in the issues being discussed as well as an overlap of members, the Legislative Subcommittee met jointly with the Public Policy Subcommittee on three occasions. The joint discussions of the two Subcommittees are summarized below.

Public body member participation from remote locations, LD 258

The Subcommittee discussed *LD 258, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies*, and the history of the Advisory Committee's work to address questions about electronic meetings. The Subcommittee had significant discussion about drawing distinctions between elected and appointed officials and on what the public body is doing. It was suggested that the issue be addressed incrementally: use LD 258 as a framework, but do not allow elected officials to meet remotely unless there is an emergency, as yet to be defined. The Subcommittee voted 6-2 in favor of the motion. The Subcommittee decided to review and discuss draft legislation for discussion and also review other state laws.

Staff prepared a summary of the statutory approaches other states have taken with regard to the remote participation in meetings by members of public bodies. Members agreed that the fact that the current statute provides no guidance is an unacceptable state of affairs. Either the State should embrace the technology and provide guidance as to at least minimum requirements or the statute should clearly prohibit such participation. Harry Pringle suggested that a couple of

adjustments be made to LD 258 and then have a discussion in the full Advisory Committee. Fred Hastings noted that the need for travel and the challenging weather in Maine are reasons to support the use of technology, and that there are excellent resources already in existence. He agreed with Mr. Pringle, and endorsed monitoring the use to see what happens. An important aspect is the requirement in the proposed legislation that any public body using the process would first have to adopt a policy that authorizes the use. Mr. Rossignol agreed, stating his belief that the problems and practicalities can be figured out through each body's particular policies.

The Subcommittees voted 8-1 (Ms. Meyer dissenting) to recommend LD 258 with two changes: require the policy to address whether remote participation can be used in executive sessions in order to ensure privacy and to exempt the quorum requirement when other statutes specifically address that limitation. Senator Valentino, Ms. Pringle and Ms. Pistner all expressed concerns with some aspects, but they all agreed the concept should move forward for discussion. Ms. Meyer supports remote participation until the point of voting; she said the Maine Press Association opposes letting members of a public body who are not in the room cast votes.

At the December 17th meeting, the Subcommittees voted 5-2 to recommend the draft legislation with two changes: require the policy to address whether remote participation can be used in executive sessions in order to provide the protection of privacy that is intended through the use of executive session, and to exempt the quorum requirement when other statutes specifically address that limitation. Joe Brown reiterated his opposition to allowing elected officials to participate remotely; Mr. Parr agreed with Mr. Brown. (In favor: Mr. Flewelling, Mr. Logan, Ms. Pistner, Mr. Pringle, Mr. Rossignol; opposed: Mr. Brown, Mr. Parr.)

Relief from overly burdensome FOAA requests

Should there be a limit on a number of requests per person that will be allowed per year? In discussions the Subcommittees acknowledged that FOAA abuse was definitely a problem, for example, people exploiting FOAA for personal gain or as a form of harassment against public agencies, but there was also concern about putting any restrictions on FOAA requests.

Public Access Ombudsman Brenda Kielty noted that it would be difficult to define "abuse" under the current FOAA scheme, but it could be done by placing restrictions on who may make requests, the frequency of those requests, the manner and the scope of the requests. However, such restrictions would change the current FOAA very much.

Jon Storer, superintendent of the Auburn Water District shared his agency's experience with a particular FOAA requestor, and how abuses have put a strain on his agency's resources. He added that if the agency were allowed to charge a fair amount for the actual time spent complying with requests, he would be happy.

It was noted that past attempts by the Advisory Committee to resolve this issue over the years have never ended with a solution that people are comfortable with. A possible solution was introduced, to create a system where a judge would have authority to place limits on requestors under a defined set of circumstances. The Subcommittee asked staff to look at other states'

statutes to find an analog to the authority of a civil judge to limit discovery, in limited circumstances, in regards to FOAA-type access to information. Additionally, staff was asked to bring back some proposed legislation that would accomplish this objective. The Subcommittee also asked for input on this proposed solution from the Judiciary representative on the Committee, Mary Ann Lynch.

Ms. Kielty noted that a FOAA requester has access to judicial intervention when an agency egregiously denies information – this solution would provide a parallel mechanism for the agency to get relief from the most extreme cases of abuse.

The question was posed: Who makes the determination of what an "abuse" is? Some members expressed the view that this decision must be made by a judge, not an agency. Staff provided draft legislation and examples of other states' statutes that address FOAA-type abuses.

A member posited that there should perhaps be an intermediary between the public agency denying the request and a judge – perhaps a system where a formal ombudsman or other official in the Attorney General's Office would review an agency's denial of records requests. The Public Access Ombudsman, Brenda Kielty, noted that under current law the ombudsman did not have this authority, and that there was currently no formal structure in place to allow this. Linda Pistner of the Attorney General's Office noted that an issue here is who needs to go to court. Or, would the agency be able to go somewhere else for relief? Mr. Brown requested more information on how the process worked in those states that allowed an agency to deny a FOAA-type request under defined "abusive" conditions – is the burden on the requestor to go to the courts?

The Subcommittees discussed whether current "harassment" law could provide an agency relief. After discussion, it seemed to most members this was not an adequate remedy. Mr. Pringle noted that judges apparently don't have the power to enjoin abusive FOAA requests currently, and that the issues facing the subcommittees were: 1) Should any additional limits on "abusive" FOAA requests be written into law; 2) If so, what is the standard?; and 3) Whether the burden should be on the agency or requesting member of the public to file for an injunction with the court. He continued that a judge should be given similar authority to a judge in legal discovery disputes; there should be a high standard for denying an "abusive" FOAA request, and it should be decided by a judge. The idea was introduced that both the agency and a denied requestor should have the ability to bring a lawsuit regarding denied records for "abusive" requests. Several members agreed that the burden to bring a lawsuit for an injunction should be on the agency wishing to stop the FOAA requests – the court could then decide how, or if, to limit the agency's duty to respond to the request.

A member noted that abusive requests can involve separate requests from the same individual, not just repeated requests for the same information – would this drafted language address that? Would this apply to individual requests, or the requestor? Several members thought the drafted language would cover both situations. It was noted that it was unlikely a judge would ever eliminate an individual's right to request documents through FOAA, but would perhaps limit the frequency of the individual's requests. It was also posited that if the subcommittees wish to go

down this road, it may be helpful to provide more specificity in the language to give a court more guidance and help ensure that the intent of the provision is being carried out.

The joint Subcommittees unanimously agreed to move forward on developing this legislation. The Subcommittees reviewed the draft legislation to give an agency or officer the opportunity to file an action in Superior Court to approve the denial of a request to inspect or copy a record with "just and proper cause." The members agreed that the burden to seek a remedy should be on the governmental agency, and that an extraordinary situation would need to exist for an agency to use the action. The Subcommittees voted 9-0 to support presenting the draft to the full Advisory Committee.

At the December 17th meeting, Garrett Corbin presented the results of the survey Maine Municipal Association conducted among its member municipalities during November. A total of 93 municipalities responded, and 20 of those indicated that they had received large-scale (in terms of frequency, scope or both) FOAA requests in the past three years. The results indicate a range of responses, including several recommendations for changes. The members thanked Mr. Corbin for the work and the information.

After the Subcommittees reviewed the slightly revised draft, Mr. Pringle moved to refer the draft legislation to the full Advisory Committee. Mr. Flewelling seconded. The members voted 7-0, with one abstention, to refer the draft to the full Advisory Committee. (In favor: Mr. Brown, Mr. Flewelling, Rep. Monaghan-Derrig, Mr. Parr, Ms. Pistner, Mr. Pringle, Mr. Rossignol; abstained: Mr. Logan.)

Should government records containing personal information about private citizens be generally protected from public disclosure (or protect just the personal information in public records)?

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

The subcommittees reviewed draft legislation prepared by staff that authorizes, but does not require, Registers of Deeds to redact Social Security numbers from documents filed with the Registry for recording. Ms. Bustin-Hatheway, Register of Deeds for Kennebec County, commented that the draft did not go far enough and that it would lead to inconsistencies. She offered a stricter concept, which would prohibit Registers of Deeds from accepting documents

that contain Social Security numbers. Ms. Meyer explained that the Advisory Committee's mission is not to tell Registers of Deeds how to do their jobs, but to focus on what are appropriate public records. The members were not comfortable recommending a prohibition on accepting documents containing SSNs, but they thought supporting the legislation as drafted would at least raise the issue for people to address during the legislative session. Mr. Hastings noted his concern that the burden on agencies may be the focus of discussions with the net result being the decimation of the full Right to Know/Freedom of Access Act premise.

The Subcommittees voted 9-0 to support presenting the draft to the full Advisory Committee.

At the December 17th meeting, the Subcommittees allowed Patricia Shearman, Register of Deeds for Oxford East and representing the Registers of Deeds Association, to address the Subcommittees about the proposed draft legislation. She said that the proposed discretion bothered the registers, and she read a statement for Susan Bulay, Register of Deeds for Penobscot County. The registers are concerned about inconsistencies from county to county, and the liability if redactions are not made. The estimated costs for eight of the counties (serviced by Xerox) total $675,693 to redact existing records. The registers would prefer a statute that prohibits the filing of documents that contain Social Security numbers. Ms. Shearman distributed copies of the Missouri and New Hampshire laws that prohibit such filings.

Mr. Pringle suggested that it may be better to leave the entire issue for the Legislature to handle by reviewing the recording statute. Ms. Pistner suggested that a letter to the State and Local Government Committee may be appropriate. Mr. Logan agreed that a letter may be the best route, but he did not think that a blanket prohibition on filings would be good.

Mr. Logan suggested that the Subcommittees reconsider its previously recommended draft legislation. He moved that the Subcommittees recommend that the Advisory Committee send a letter to the State and Local Government Committee recommending review of the two prongs (redacting existing recordings and stopping SSNs on new filings) of the concerns raised by the Registers of Deeds. Mr. Flewelling seconded. The members voted 7-1 with one abstention to recommend that the full Advisory Committee send a letter to the State and Local Government Committee. (In favor: Mr. Flewelling, Mr. Logan, Rep. Monaghan-Derrig, Mr. Parr, Ms. Pistner, Mr. Pringle, Mr. Rossignol; opposed: Mr. Brown; abstaining: Ms. Meyer.)

*Public **records** versus public **information***

The joint Subcommittees discussed whether FOAA applies to information or just records, and how to clarify the Public Access Ombudsman's task to track "information" requests directed to public agencies. One member stated that the entire FOAA scheme is set up in the context of public records, so *LD 1511, An Act Regarding Coordinated Access to Public Records of State Agencies* (Public Law 2013, chapter 229), should only be interpreted as applying to requests for records. The idea was posited that the Public Access Ombudsman should only track written requests, and that tracking oral requests would be unnecessary. Another member disagreed with this distinction between oral or written requests. The idea of amending the law passed in chapter 229 was raised, but was dismissed by Brenda Kielty, the Public Access Ombudsman, because it would still not address the issue of what the scope of a FOAA request may include.

The joint Subcommittees decided, together with Ms. Kielty, that she would create a draft tracking form to be used by the various agencies when FOAA requests are made, obtain feedback from various public access officers, and bring the form back to the Subcommittees for guidance.

Compliance with new law (LD 1216, PL 2013, c. 350)

LD 1216, An Act To Amend the Freedom of Access Act (public Law 2013, chapter 350) created a new deadline for public agencies to respond within five working days of receiving a FOAA request with an acknowledgement of having received the request, and also providing a denial of the request if appropriate. If an agency fails to make its timely response, the request is treated as if it was denied and the requesting individual may appeal the denial through the court system.

The discussion began around the idea of whether this deadline was enough time for agencies to comply with the law. Linda Pistner of the Attorney General's Office noted that her office has suggest amendments to the law: 1) allowing agencies to respond that they "expect to deny" the request; 2) limiting where an appeal to the courts may be taken to certain areas (in conformance with venue rules); and 3) allowing the public agency to respond to a legal complaint with a "statement of position" instead of a detailed legal answer. There was concern voiced about what extra useful information would be provided to the court in a "statement of position". It was also opined that this change would be helpful to the court and would also save costs to the State in responding to FOAA appeals, due to what are sometimes multiple irrelevant allegations of plaintiffs. There was discussion around limiting FOAA appeals to courts in the locality of the "principal office" of the agency involved.

The discussion went back to the new five-day deadline, and 10 days was offered as an alternative. Also, the idea of a grace period was introduced, where an agency would have to acknowledge the request within five days, but would have more time in which to issue a denial. The Subcommittees agreed there needed to be some kind of "hammer" – a deadline type mechanism for FOAA enforcement. Garrett Corbin, proxy for Richard Flewelling, representing municipal interests, noted that the statute does not define "receipt" of a FOAA request and suggested the statute be amended to clarify this.

The joint Subcommittees and Linda Pistner agreed that Ms. Pistner would come back to the subcommittees with draft legislation to amend chapter 350, specifically in regards to creating a grace period for FOAA denials, describing the responsibilities in a court action and better defining when "receipt" of a FOAA request is considered to occur.

Staff's redraft of chapter 350 was discussed. The central concern is the five-day deadline to acknowledge that a FOA request has been received; the law in effect prior to chapter 350 was an acknowledgment within "a reasonable time." The five-day deadline is hard on small offices with part-time employees (such as a water utility) as well as large offices with huge volumes of requests (such as the State Police and the Department of Public Safety). Mr. Parr and Ms. Meyer prefer the "reasonable time" requirement, but Senator Valentino identified concerns, such as "reasonable" to whom? She said sometimes there just has to be a time-certain, not just because an agency is swamped. Although some members prefer "reasonable" there was

reluctance to recommend going back to that language now that the statute has changed. Senator Valentino pointed out the inconsistent inclusion of "body" with "agency" and "officer" in the draft. Beverly Bustin-Hatheway, Register of Deeds for Kennebec County, asked that the term "abstract" be removed from the language, as "abstract" in the Registry of Deeds is the database.

The Subcommittees voted 8-1 (Mr. Parr dissenting) to send the revised draft to the full Advisory Committee.

At the December 17th meeting, Mr. Pringle again moved to refer the draft to the full Advisory Committee. Mr. Flewelling seconded. Mr. Parr reiterated his opposition to the proposal; the Department of Public Safety has never been able to comply with the strict deadlines because of the volume of requests and because of the complexity of requests and the necessary reviews. The new deadlines are unrealistic; he would prefer to have the statute focus on reasonableness.

The Subcommittees voted 6-1 to refer the draft to the full Advisory Committee. (In favor: Mr. Brown, Mr. Flewelling, Mr. Logan, Ms. Pistner, Mr. Pringle, Mr. Rossignol; opposed: Mr. Parr.)

Legislation proposed for Second Regular Session

Representative Bobbi Beavers agreed to talk to the Subcommittees about her proposed legislation concerning the confidentiality of marine resources and fish processing information. The Legislative Council approved LR 2490 for introduction to the Second Regular Session of the 126th Legislature. LR 2490 has been indexed to the Judiciary Committee (although it may be referred to a different committee once printed) because of the proposed confidentiality requirements. Representative Beavers introduced her constituent, Lori Howell, Vice President of Spinney Creek Shellfish Company, in Eliot, Maine. Spinney Creek runs a depuration facility to purify shellfish consistent with state and federal requirements. Ms. Howell indicated that there are only about five depuration facilities in the United States, and about six in Canada. There is no specific model for a depuration facility, so each is different. The Howells built their facility over the course of 30 years and through hundreds of thousands of dollars' worth of research in their own laboratory. The Department of Marine Resources has received at least five requests for information about the Spinney Creek business, some of the requests seeking propriety information. The Howells treat their operations and their operations manual as trade secrets and will not release information they consider proprietary. They need to collaborate and communicate with the DMR to ensure appropriate regulation, and some of that proprietary information will be collected by the Department; the Howells want that information protected from release to the public and competitors. Ms. Howell asserted that if the proprietary information is not protected, there will be no incentive for business to innovate, as all advances will have to be released to the public. Also, it will encourage honesty with DMR resulting in proper regulatory oversight.

The Subcommittees thanked Representative Beavers and Ms. Howell for sharing the information and giving the members an opportunity to preview a freedom of access issue that will be before the Legislature in 2014.

State Privacy Acts

Right to Know Law School Extern Stephen Wagner researched state-level privacy acts and prepared a memo on the different approaches. The memo was shared with the members via email prior to the meeting, so, although Mr. Wagner was not available to attend the meeting, the members were prepared to discuss the issues and thanked him for his work.

Ms. Meyer opened the discussing by expressing her concern that taking on a general privacy act would be beyond the appropriate jurisdiction of the Right to Know Advisory Committee; the emphasis has always been public access, rather than privacy, and privacy issues have been dealt with on an individual basis. She warned of unintended consequences resulting from passing overly-broad protections. Linda Pistner declined to comment on the jurisdiction, but thought that citizens who felt their privacy had been invaded would be the last to come to the Advisory Committee with a complaint. Her concern is that there is no real guidance, and that every statutory exception is dealt with individually. Suzanne Goucher questioned how to throw a cloak over "personal" records without causing other problems. Mr. Parr affirmed his belief in open government, but said he also believes in citizens' privacy rights, and thinks that the State has a responsibility to protect citizens' private information that is in the government's possession. Mr. Parr said he believes citizens should be – and will be – asking for greater protection of such information. He mentioned concerns with current accessibility to records relating to situations in which private citizens are at their most vulnerable, such as the 911 call recording transcripts that were the subject of recent litigation. He also noted that the big game changer that needs to be considered when discussing accessibility to government records is the Internet – this, given the fact that individuals can now use the Internet to share and access private information about other individuals instantaneously and globally. Ultimately, however, Mr. Parr concluded that, as a practical matter, the creation and implementation of a general privacy act would likely not be viable. He said he thought that the current practice of addressing privacy issues on an individual basis is perhaps the best approach presently available.

The Subcommittees voted 8-1 (Ms. Goucher dissented) to bring the general discussion of a state-level privacy act to the full Advisory Committee. The Advisory Committee has not yet discussed this issue or taken any action.

Addition of IT professional on Advisory Committee

The Subcommittees recommended proposed legislation to add an Information Technology (IT) professional (someone experienced in digital communications) to the roster of the Right to Know Advisory Committee.

Anonymous FOAA requests

Mr. Parr said that sometimes receiving and having to respond to an anonymous request can be frustrating. If the principle is transparency, why should the person asking for records be able to ask from behind the veil of anonymity? We cannot stop people from using pseudonyms and fronts, but we can prohibit anonymous request. He also said that having a request in writing can be enormously helpful for several reasons. Ms. Pistner explained that one of the concerns raised

by the Maine Freedom of Information Coalition's survey several years ago was how intimidated requestors felt when asking for records. Lots of people do not want their name in a written request, she said. She often creates a writing in response to a request.

Mr. Parr said that, once again, the question of "what is a FOAA request" is raised. A person who comes into the office to ask for a copy of the minutes of a meeting does not need to give a name or put the request in writing. Mr. Logan said that the statute presumes that a requester is known – the proposed abuse provision (see Appendix F), and the government agency must determine if the requester failed to pay for copies in the past. He reminded everyone that the request itself is public – the public should know who is asking, the frequency of requests, the scope, the time it takes to respond.

Ms. Meyer wondered how often anonymous requests create problems. She suggested that the Public Access Ombudsman be requested to collect information. Ms. Kielty addressed the Subcommittees and said she would be happy to work with MMA to assemble information. The only anonymous request that she is aware caused concerns is the one made for concealed handgun permit information.

The Subcommittees agreed to ask the Public Access Ombudsman to collect additional information.

FOAA for commercial purposes

The Subcommittees agreed to maintain the status quo and took no action. Mr. Parr suggested issues related to commercial purposes be tabled and the members agreed.

Review of standard fees and schedules adopted by agencies

The members reviewed information collected by staff about fees and fee schedules adopted by State agencies. The members agreed that no action was necessary.

Review of allocation of responsibilities between the Advisory Committee and the Ombudsman

Staff presented information about the evolution of responsibilities among the Advisory Committee and the Public Access Ombudsman. There was some discussion about moving mention of the FOAA website from the Advisory Committee to the Public Access Ombudsman statute, but the decision was to not make changes at this time. Ms. Kielty explained that she is already running the website. There are some funding questions, but for now the Office of the Attorney General is absorbing those costs. She hopes to make the website a platform for training starting in 2014.

Ms. Kielty explained that although she can currently handle the existing duties, she is reaching the limit of what is possible and will need additional staff eventually.

The Subcommittees agreed to take no action.

Question about whether "working papers" are public records

Ms. Meyer asked that the members discuss the underlying concern that was made evident in the recent revelations about "working papers" that were part of a funding decision-making process being shredded. Mr. Pringle stated that there is not much doubt that "drafts" are public records under the statute, but there is always a question about retention schedules. If a Superintendent revises a draft of a letter, are all electronic versions of the letter public records? Mr. Parr agreed, and said he was concerned that government employees would begin to feel obligated to hoard every document they ever create to make sure every version of every document is retained. His interpretation of "working papers" is not drafts but decision points. Ms. Meyer reminded the group about the discussion of the proposed exemption for the Governor's working papers: the public is interested in the whole process, from the kernel of an idea to fruition.

The Subcommittees agreed that the best way to approach the concerns is through training. Ms. Meyer complimented the training already being done by the Maine Municipal Association and the Maine School Management Association. Mr. Logan said he didn't think this is a big issue that is routinely a problem, and that he also supports more guidance in the training materials.

The Public Access Ombudsman agreed to collaborate with the records retention experts (in the State Archivist's office) and to develop guidance.

See discussion of Advisory Committee recommendations in Section VI.

Public Records Exceptions Subcommittee. The Public Records Exception Subcommittee's focus is to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; to examine inconsistencies in statutory language and to propose clarifying standard language. Suzanne Goucher is the chair of the Subcommittee and Mary Ann Lynch and Linda Pistner serve as members.

During 2013, the Public Records Exception Subcommittee held four meetings. The Subcommittee discussed the following exceptions.

Title 22, section 8754, reporting of sentinel events

The review of the sentinel events provision was tabled by the previous Public Records Exception Subcommittee in 2012.

Staff provided the current Public Records Exception Committee with a summary of previous discussions of the provision. The Subcommittee also reviewed memos presented by Stephen Wagner, the Advisory Committee's Extern, outlining the manner in which other state laws address the confidentiality of sentinel event reports.

After the reviewing the memo, the Subcommittee also heard remarks from representatives of the Maine Hospital Association and Maine Medical Mutual Insurance Company recommending that the confidentiality provision should be kept as is. Jeff Austin of the Maine Hospital Association noted that consumers would be better served reviewing comparative data among hospitals,

including data related to sentinel events, than from the release of data about sentinel events in individual hospitals. Mr. Austin also reminded the Subcommittee that the stated legislative purpose of the sentinel events law is to improve quality of care and increase patient safety, not public disclosure. The confidentiality provision is meant to encourage a culture of reporting about medical errors and changing the provision would have an impact. Charlie Soltan representing Maine Medical Mutual Insurance Company remarked that the reporting of sentinel events may involve potential liability for individual health care practitioners; the confidentiality provision is needed to ensure that reporting and discussion of errors happen freely.

MaryAnn Lynch expressed an interest in getting more information about the experience of other states, such as California, Florida and Minnesota, which publicly disclose information about specific sentinel events. Ms. Lynch noted that hospitals are private entities, but rely on significant government revenue as payment for services.

Suzanne Goucher stated that information about sentinel events and the quality of health care is important to consumers, especially with new ways of health care delivery; information should be available and accessible to the public. Mr. Austin agreed that one source of information for comparison purposes is needed; currently, there are many websites providing health care data and no single source has emerged as a leader. Ms. Goucher asked Mr. Austin to provide an analysis of the types of reports required under the sentinel event reporting law to federal reporting requirements for hospitals to determine if similar information is disclosed to the public by other measures.

Stephen Wagner presented a memo outlining the experience of California and Minnesota, which publicly disclose information about specific sentinel events. At the request of the Subcommittee, Jeff Austin of the Maine Hospital Association also provided an analysis of the types of reports required under the sentinel event reporting law compared to federal reporting requirements for hospitals and highlighted the similar information that is already disclosed to the public by other measures.

The Subcommittee agreed to table discussion of this exception so that the members could review the publicly available health care quality information on state and federal websites highlighted by Mr. Austin.

Staff provided a copy of draft legislation prepared last year that makes the reports public except for information require to be kept confidential by federal law and data developed from the reports that identify or permit identification of a patient of a health care facility.

Ms. Lynch, who participated in the final Subcommittee meeting by phone, explained that, because so much of the State's public money goes towards health care, she cannot in good conscience support complete confidentiality. If she had been present and voting, she would have voted in favor of the proposed draft. She also explained that her position with the Judicial Branch prevents her from advocating for that position before the Legislature. Linda Pistner said she had mixed feelings, but she is aware of many other sources for information that can be used to make health care decisions, and she is also cognizant of the extensive public hearing and work sessions of the Judiciary Committee the last time there was a legislative proposal about the

public release of sentinel event reports. Ms. Goucher also admitted being of two minds on the issue, but she understands that the reporting of the information is important and should not result in finger-pointing. She believes the public will push for access to more information useful in making health care decisions, but that this may not be the proper source.

The Subcommittee voted 2-0 to recommend no change. Ms. Lynch stated that she would support the proposed draft, but will not be filing a separate minority report.

Reconsideration of exceptions included in LD 420, An Act to Implement the Recommendations of the Right to Know Advisory Committee Regarding Public Records Exceptions

The Subcommittee recommended that all of the provisions addressed in LD 420 move forward as drafted, with the exception of the provisions amending the Community Right-to-Know Act. With regard to the Community Right-to-Know Act, the Subcommittee reiterated their understanding that the Community Right-to-Know Act has never been implemented so no records subject to the confidentiality provisions exist. Based on this information, the Subcommittee agreed to recommend repeal of the Act. However, because members felt a recommendation to repeal the Act in its entirety would not be within their charge, they agreed to recommend that the Advisory Committee send letters to the legislative policy committees (the Joint Standing Committees on Environment and Natural Resources and Health and Human Services) asking them to review the Act and other related statutory programs to determine whether the Community Right-to-Know Act should be repealed.

Review of Existing Exceptions –Titles 26 through 39-A

During 2013, the Public Records Exception Subcommittee reviewed 39 existing public records exceptions found in Titles 26 through 39-A. The Subcommittee completed review of 38 existing public records exceptions, and tabled one exception for continued analysis and discussion in 2014. In its review, the Subcommittee sought input from the State agencies responsible for administering the public records exceptions and a number of interested parties affected by specific exceptions, including the Department of Health and Human Services, the Bureau of Insurance within the Department of Professional and Financial Regulation, the Bureau of Alcoholic Beverages and Lottery Operations, the Department of Corrections, the Public Utilities Commission, the Maine Emergency Management Agency, the Department of Environmental Protection, the Board of Environmental Protection, the Land Use Planning Commission and the Maine Geological Survey.

Future process for review of exceptions

Now that all identified public records exceptions in all the Titles of the Maine Revised Statutes have been reviewed once, the Subcommittee discussed whether the existing public records exceptions should continue to be subject to a periodic review. The members recognized that things change over time and what may be a reasonable protection from public access one day may no longer be appropriate 10 or 20 years later. They discussed whether review by the Advisory Committee should be limited to just new provisions added by the Legislature since the review process was initiated in 2006. They agreed that no useful information is usually available

within a couple years of new enactments, so it is essentially a waste of time for the Advisory Committee to review newly enacted public records exceptions.

The Subcommittee asked staff to summarize the full extent of the Advisory Committee's review since 2006, including how many changes were recommended.

The Subcommittee voted 2-0 to recommend to continue the review, but with a change in the process. Ms. Lynch said that if she were present and voting, she would support the recommendation.

The proposed process (requires amendment of 1 MRSA §433):

1. No scheduled review in 2014.
2. In 2015 (to be reported to the Judiciary Committee in 2016 and 2017), review all public records exceptions that were enacted after the creation of the review process, so public records exceptions enacted in 2005 through 2012 would be subject to review. Allow two years for review.
3. In 2017 (to be reported to the Judiciary Committee in 2018 and 2019), start over with Title 1 as the first step in a 12-year process to cover all the Titles of the Maine Revised Statutes. (Each two-year period of the 12-year process will cover approximately 1/6 of the public records exceptions in Title 1 through 39-A.)
4. In 2019 (to be reported to the Judiciary Committee in 2020 and 2021), carry out the second step of the 12-year process, plus any public records exceptions enacted in 2013-2016.
5. Going forward, repeat this process for newly enacted exceptions along the same time frame, ignoring the prior three years in order to allow new exceptions to "ripen" with experience.
6. At the end of the 12-year review, the Advisory Committee will determine whether to continue the process or create a new approach.

See discussion of Advisory Committee's recommendations in Section VI.

V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN SEVENTH ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its seventh annual report. The actions taken in 2013 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Continue without modification, amend and repeal the specified existing public records exceptions in Titles 26	The Judiciary Committee voted "Ought Not to Pass" on the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in *LD 420, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions.*

through 39-A	The Advisory Committee referred the provisions addressed in LD 420 back to the Public Records Exceptions Subcommittee for additional action and recommendation. *See discussion of Public Records Exceptions Subcommittee actions in Section IV and discussion of Advisory Committee's recommendations in Section VI.*
Recommendation: Communicate to the Department of Health and Human Services about repealing two programs never implemented	**Action:** The Advisory Committee sent a letter on November 15, 2012 to the Commissioner of Health and Human Services. To date, the Legislature has not considered any legislative proposals to repeal these programs (the Maine Managed Care Insurance Plan and the Community Health Access Program).
Recommendation: Amend the Community Right-to- Know Act to provide for more public access to information about hazardous substances	**Action:** The Judiciary Committee voted "Ought Not to Pass" on the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in *LD 420, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions.* The Advisory Committee referred the provision amending the Community Right–to-Know Act back to the Public Records Exceptions Subcommittee for additional action and recommendation. The Subcommittee recommended repeal of the Act. *See discussion of Public Records Exceptions Subcommittee actions in Section IV and discussion of Advisory Committee's recommendations in Section VI.*
Recommendation: Continue discussion and consideration of the confidentiality provision in the sentinel events reporting law	**Action:** The Advisory Committee referred the issue to the Public Records Exceptions Subcommittee. The Subcommittee reviewed the confidentiality provision in the sentinel events reporting law. *See discussion of Public Records Exceptions Subcommittee actions in Section IV and discussion of Advisory Committee's recommendations in Section VI.*
Recommendation: Make no changes to the law regarding the encryption of radio transmissions from police and first responders	**Action:** No action was taken.
Recommendation: Request that the Board of Trustees of the Maine	**Action:** The Advisory Committee sent a letter on November 15, 2012 to the Board of Trustees of the Maine Criminal Justice

Criminal Justice Academy consider creating a model encryption policy for consideration by local law enforcement agencies that reflects the current practices, and request that the board report back to the Advisory Committee on any decisions or actions taken pursuant to the request	Academy. On December 6, 2012, the Board of Trustees responded to say that the Board does not formulate model policies for law enforcement and suggested that the Advisory Committee consider inviting the Maine Chiefs of Police Association to develop a model policy. In July 2013, the Advisory Committee referred the issue back to the Legislative Subcommittee. *See discussion of Legislative Subcommittee actions in Section IV and discussion of Advisory Committee's recommendations in Section VI.*
Recommendation: Request that the Public Access Ombudsman look at the confidentiality of email addresses collected by schools and municipalities and report back to the Advisory Committee	**Action:** The Legislature enacted Public Law 2013, chapter 339 (LD 104, An Act to Amend the Laws Governing Public Records).The law excludes email addresses obtained by political subdivisions of the State for the sole purpose of disseminating notices from the political subdivision or its elected officers from the definition of a "public record". In addition, the Public Access Ombudsman conducted a survey of school districts in the State and reported back to the Advisory Committee in October 2013. The Ombudsman reported that only one school district had received a request for email addresses of parents of students.
Recommendation: Make no changes to the application of the freedom of access laws to the Maine Public Broadcasting Corporation	**Action:** No action was taken.
Recommendation: Provide guidance through updates to the Frequently Asked Questions webpage and training for legislators with regard to the storage, management and retrieval of public officials' communications, including email	**Action:** The Frequently Asked Questions webpage was updated as recommended by the Advisory Committee. In December 2012, the training for legislators was updated to incorporate guidance on the storage, management and retrieval of public officials' communications, including email.
Recommendation: Make available to	**Action:** At the request of the Advisory Committee, the templates were

agencies and legislative drafters templates for drafting specific confidentiality statutes	distributed to agency and legislative drafters.
Recommendation: Make no additional modifications to the Freedom of Access Act concerning bulk requests or bulk transfers of public records, with the understanding that concerns about bulk requests and bulk data transfers will most likely be revisited in the future (divided report)	**Action:** No action was taken.
Recommendation: Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)	**Action:** The Judiciary Committee voted "Ought Not to Pass" on the recommendations of the Advisory Committee with regard to remote participation in meetings as proposed in *LD 258, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies.* The Judiciary Committee requested that the Advisory Committee continue its work related to LD 258, making sure to include in the discussion public bodies that meet through the use of telephone or video links even if their authorizing statutes are silent on the procedure. The Advisory Committee referred the provisions addressed in LD 258 back to the Legislative Subcommittee for additional action and recommendation. *See discussion of Legislative Subcommittee actions in Section IV and discussion of Advisory Committee's recommendations in Section VI.*
Recommendation: Enact legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a	**Action:** LD 217, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Access to Records Relating to Public-private Partnerships, was not enacted. Instead, the Legislature enacted Public Law 2013, Chapter 208 (LD 721, An To Provide Transparency in Public-private Partnerships for Transportation Projects), which was considered by the Transportation Committee and addressed the same concern.

transportation project (divided report)	

VI. RECOMMENDATIONS

During 2013, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

❑ Enact legislation to add an IT professional to the membership of the Right to Know Advisory Committee

The Advisory Committee recommends the enactment of legislation to add an Information Technology (IT) professional (someone experienced in digital communications) to the membership of the Right to Know Advisory Committee to be appointed by the Governor.

See draft legislation in Appendix D.

❑ Communicate to the Joint Standing Committee on Veterans and Legal Affairs about the public records exception in Title 28-A, Section 755 relating to business and financial records of liquor licensees

The Advisory Committee recommends sending a letter to the Veterans and Legal Affairs Committee about one exception - Title 28-A, Section 755 relating to business and financial records of liquor licensees, with the suggestion that the VLA Committee work with the Bureau of Alcoholic Beverages and Lottery Operations and other stakeholders to determine if statutory changes to the confidentiality exception are appropriate. Interest was expressed by the agency in clarifying the provision to enable the agency to collect certain information from licensees, but otherwise maintain the confidentiality of licensees' business and financial records while in the possession of the licensee.

See correspondence in Appendix I.

❑ Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A

As required by law, the Advisory Committee reviewed existing public records exceptions identified in Title 26 through Title 39-A. The Advisory Committee's recommendations are summarized below and are also posted at www.maine.gov/legis/opla/righttoknow.htm.

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification.

- Title 30-A, section 503, subsection 1-A, relating to county personnel records concerning the use of force

- Title 30-A, section 2702, subsection 1-A, relating to municipal personnel records concerning the use of force
- Title 32, section 2599, relating to medical staff reviews and hospital reviews – osteopathic physicians
- Title 32, section 3296, relating to Board of Licensure in Medicine medical review committees
- Title 32, section 13006, relating to real estate grievance and professional standards committees hearings
- Title 32, section 16607, subsection 2, relating to records obtained or filed under the Maine Securities Act
- Title 34-A, section 5210, subsection 4, relating to the State Parole Board report to the Governor
- Title 35-A, section 1311-B, subsections 1, 2 and 4, relating to public utility technical operations information
- Title 35-A, section 1316-A, relating to Public Utilities Commission communications concerning utility violations
- Title 35-A, section 9207, subsection 1, relating to information about communications service providers
- Title 36, section 575-A, subsection 2, relating to forest management and harvest plan provided to Bureau of Forestry and information collected for compliance assessment for Tree Growth Tax Law
- Title 36, section 579, relating to the Maine Tree Growth Tax Law concerning forest management plans
- Title 37-B, section 708, subsection 3, relating to documents collected or produced by the Homeland Security Advisory Council
- Title 37-B, section 797, subsection 7, relating to Department of Defense, Veterans and Emergency Management, Maine Emergency Management Agency reports of hazardous substance transportation routes
- Title 38, section 470-D, related to individual water withdrawal reports
- Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans
- Title 38, section 1610, subsection 6-A, paragraph F, relating to annual sales data on the number and type of computer monitors and televisions sold by the manufacturer in this State over the previous 5 years
- Title 38, section 1661-A, subsection 4, relating to information submitted to the DEP concerning mercury-added products
- Title 38, section 2307-A, relating to information submitted to the DEP concerning toxic use and hazardous waste reduction
- Title 39-A, section 153, subsection 9, relating to the Workers' Compensation Board audit working papers
- Title 39-A, section 355-B, subsection 11, relating to records and proceedings of the Workers' Compensation Supplemental Benefits Oversight Committee concerning individual claims
- Title 39-A, section 403, subsection 3, relating to workers' compensation self-insurers proof of solvency and financial ability to pay
- Title 39-A, section 403, subsection 15, relating to records of workers' compensation self-insurers

- Title 39-A, section 409, relating to workers' compensation information filed by insurers concerning the assessment for expenses of administering self-insurers' workers' compensation program

The Advisory Committee recommends that the following public records exceptions be amended, including provisions previously recommended for changes in LD 420, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Public Records Exceptions.

See draft legislation in Appendix C.

- Title 26, section 3, relating to information, reports and records of the Director of Labor Standards within the Department of Labor
- Title 26, section 934, relating to report of the State Board of Arbitration and Conciliation in labor dispute
- Title 29-A, section 152, subsection 3, relating to the Secretary of State's data processing information files concerning motor vehicles
- Title 29-A, section 257, relating to the Secretary of State's motor vehicle information technology system
- Title 29-A, section 517, subsection 4, relating to motor vehicle records concerning unmarked law enforcement vehicles
- Title 35-A, section 8703, subsection 5, relating to telecommunications relay service communications
- Title 38, section 585-B, subsection 6, paragraph C, relating to mercury reduction plans for air emission source emitting mercury
- Title 38, section 585-C, subsection 2, relating to the hazardous air pollutant emissions inventory

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification for now so that the Advisory Committee can continue to evaluate the exceptions in 2014.

- Title 36, section 1106-A, subsection 3, paragraph D, relating to forest management and harvest plan made available for Farm and Open Space Tax Law

❑ **Make no change to the confidentiality provision in the sentinel events reporting law**

The review of the sentinel events provision has been considered by the Advisory Committee since in 2012. After careful consideration, the Public Records Exception Subcommittee voted 2-0 to keep the confidentiality provision as is. Ms. Lynch was not physically present to vote. Although Ms. Lynch supports a change in the confidentiality of reported sentinel events, because of her position with the Judicial Branch, she will not advocate for any changes. The Advisory Committee supports the recommendation to make no change.

❑ **Repeal the Community Right-to-Know Act because the program has never been implemented and public information is available through other means**

The "Community Right-to-Know Act" was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public's right to access information collected by the Department of Health and Human Services. Trade secrets are completely protected. The Advisory Committee understands that the Community Right-to-Know Act has never been implemented by the Department of Health and Human Services so no records subject to the confidentiality provisions exist. Based on this information, the Advisory Committee recommends repeal of the Act. However, because members felt a recommendation to repeal the Act in its entirety would not be within their charge, they also will send letters to the legislative policy committees (the Joint Standing Committees on Environment and Natural Resources and Health and Human Services) asking them to review the Act and other related statutory programs and make a recommendation to the Judiciary Committee about whether the Community Right-to-Know Act should be repealed.

See draft legislation in Appendix C.

❑ **Establish a future process for review of public records exceptions**

The Advisory Committee discussed the Public Records Exceptions Subcommittee's draft legislation to require the Advisory Committee to review public records exceptions according to a certain schedule, starting in 2015. While the Advisory Committee already had a general requirement to review public records exceptions in statute, many members thought that having a particularized schedule for reviewing these exceptions embodied in statute was useful in giving that requirement more force, especially given the importance of the task. The Advisory Committee decided that given the limited legislative time in the upcoming Second Regular Session, and that the Subcommittee recommended a one year delay in the review process anyway, the Judiciary Committee could delay enacting legislation on this matter until the First Regular Session of the 127th Legislature. The Advisory Committee recommends that the Judiciary Committee pass legislation implementing the Subcommittee's new public records exceptions review, starting in 2015.

❑ **Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)**

Several Advisory Committee members expressed concern with the drafted legislation's inclusion of elected officials in the allowance for remote meeting participation. One member was concerned about allowing remote voting. However, some of those concerned members voiced support for moving the recommendation to the Judiciary Committee because of the importance of addressing the issue in a comprehensive way. The Advisory Committee voted 10-3 to send the suggested legislation to the Judiciary Committee. (In favor: Senator Valentino, Representative Monaghan-Derrig, Ms. Goucher, Mr. Logan, Ms. Pistner, Mr. Rossignol, Ms. Lynch, Mr. Leary, Mr. Flewelling and Mr. Pringle; Opposed: Commissioner Brown, Ms. Meyer and Mr. Parr). Commissioner Brown wished to append to the Advisory Committee's Final Report his statement in opposition to LD 258 that he submitted to the Judiciary Committee.

See draft legislation and Mr. Brown's statement in opposition in Appendix E.

❑ **Enact legislation to address overly burdensome FOAA requests**

The Advisory Committee discussed the draft legislation providing judicial relief for agencies from overly burdensome FOAA requests, and Mr. Pringle moved to include a provision in the legislation to ensure that these cases received the same expedited review that FOAA appeals enjoy.

See draft legislation in Appendix F.

❑ **Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (divided report)**

There was concern from some members that the 5-day deadline for a response to a FOAA request under current law was too burdensome, but most of the Advisory Committee felt that while the drafted legislation under consideration was not perfect, it was at least a good start. The Advisory Committee voted 10-3 to send the suggested legislation to the Judiciary Committee. (In favor: Senator Valentino, Representative Monaghan-Derrig, Mr. Flewelling, Ms. Goucher, Mr. Leary, Mr. Logan, Ms. Meyer, Ms. Pistner, Mr. Pringle and Mr. Rossignol; Opposed: Commissioner Brown, Ms. Lynch and Mr. Parr). Mr. Parr recommended a return to the "reasonable time" standard of the former law, citing the practical impossibility of compliance with the 5-day deadline.

See draft legislation in Appendix G.

❑ **Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee**

The Advisory Committee recommends legislation changing the date of the Public Access Ombudsman annual report to January 15 to align the date with the annual report of the Advisory Committee.

See draft legislation in Appendix H.

❑ **Communicate to the State and Local Government Committee about issues identified by the Registers of Deeds relating to the redaction of social security numbers from filed documents**

The Advisory Committee recommends sending a letter to the Legislature's Joint Standing Committee on State and Local Government, apprising them of the issues identified by the Registers of Deeds and leaving appropriate action to their discretion.

See correspondence in Appendix I.

VII. FUTURE PLANS

In 2014, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judiciary and the Legislature to implement the recommendations included in this report.

APPENDIX A

Authorizing Legislation, 1 MRSA § 411

CURRENT LAW GOVERNING RIGHT TO KNOW ADVISORY COMMITTEE

1 §411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and

M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

A. Except as provided in paragraph B, members are appointed for terms of 3 years.

B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to

support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

APPENDIX B

Membership List, Right to Know Advisory Committee

Right to Know Advisory Committee
1 MRSA §411

Appointments by the Governor

Richard P. Flewelling
Maine Municipal Association
60 Community Drive
Augusta, ME 04330

Representing Municipal Interests

Christopher Parr
Department of Public Safety
104 State House Station
Augusta, ME 04333

Representing State Government Interests

Harry R. Pringle
Drummond, Woodsum & MacMahon
245 Commercial Street
P.O. Box 9781
Portland, ME 04104-9781

Representing School Interests

Appointments by the Senate President

Senator Linda M. Valentino
P.O. Box 1049
Saco, ME 04072

Senate Member of Judiciary Committee

Perry B. Antone Sr.
Chief, Brewer Police Department
151 Parkway South
Brewer, ME 04412

Representing Law Enforcement Interests

Percy L. Brown Jr.
County Commissioner, Hancock County
97 Sunset Road
Deer Isle, ME 04627

Representing County or Regional Interests

Frederick Hasting
Downeast Coastal Press
2413 Cutler Road
Cutler, ME 04626

Representing the Press

Luke Rossignol
Bemis & Rossingol
1019 State Road
Mapleton, ME 04757

Representing the Public

Vacant

Representing Broadcasting Interests

Appointments by the Speaker of the House

Representative Kimberly Monaghan-Derrig
6 Russet Lane
Cape Elizabeth, ME 04107

House Member of the Judiciary Committee

Suzanne Goucher
Maine Association of Broadcasters
69 Sewall Street Suite 2
Augusta, ME 04330

Representing Broadcasting Interests

Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Representing a Statewide Coalition of Advocates of Freedom of Access

William P. Logan
Irwin, Tardy & Morris
6 S. Chestnut Street
Augusta, ME 04330

Representing the Public

Judy Meyer
Lewiston Sun Journal
104 Park Street
Lewiston, ME 04243-4400

Representing Newspaper Publishers

Attorney General

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333-0006

Designee

Chief Justice

Mary Ann Lynch
Government and Media Counsel
Administrative Office of the Courts
Maine Judicial Branch
P.O. Box 4820
Portland, ME 04112-4820

Designee

APPENDIX C

Recommended Draft Legislation for Statutory Changes to Public Records Exceptions (Title 22, Sections 1696-D and 1696-F and Public Records Exceptions in Titles 26 - 39-A)

Sec. 1. 22 MRSA c. 271, subc. 2 (§1696-A to §1696-F) is repealed.

Sec. 2. 26 MRSA §3 is repealed and the following enacted in its place:

§3. Confidentiality of records

1. Confidential records. Except as provided in subsections 2 and 3, all information and reports received by the director or the director's authorized agents under this Title are confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

2. Exceptions Reports of final bureau action taken under the authority of this Title are public records for the purposes of Title 1, chapter 13, subchapter 1.

3. Authorized disclosure. The director shall make or authorize any disclosure of information of the following types or under the following circumstances with the understanding that the confidentiality of the information will be maintained:

A. Information and reports to other government agencies if the director believes that the information will serve to further the protection of the public or assist in the enforcement of local, state and federal laws; and

B. Information and records pertaining to the work force, employment patterns, wage rates, poverty and low-income patterns, economically distressed communities and regions and other similar information and data to the Department of Economic and Community Development and to the Governor's Office of Policy and Management for the purposes of analysis and evaluation, measuring and monitoring poverty and economic and social conditions throughout the State and to promote economic development.

Sec. 3. 26 MRSA §934 is amended to read:

§934. Conciliation; notification of dispute; proceedings in settlement; report

Whenever it appears to the employer or employees concerned in a labor dispute, or when a strike or lockout is threatened, or actually occurs, he or they may request the services of the board.

If, when the request or notification is received, it appears that a substantial number of employees in the department, section or division of the business of the employer are involved, the board shall endeavor, by conciliation, to obtain an amicable settlement. If the board is unable to obtain an amicable settlement it shall endeavor to persuade the employer and employees to submit the matter to arbitration.

The board shall, upon notification, as soon as practicable, visit the place where the controversy exists or arrange a meeting of the interested parties at a convenient place, and shall make careful inquiry into the cause of the dispute or controversy, and the board may, with the consent of the Governor, conduct the inquiry beyond the limits of the State.

The board shall hear all interested persons who come before it, advise the respective parties what ought to be done by either or both to adjust the controversy, and shall make a confidential written report to the Governor and the Executive Director of the Maine Labor Relations Board. The Governor or executive director ~~may~~ shall make the report public if, after 15 days from the date of its receipt, the parties have not resolved the controversy and the public interest would be served by publication. In addition, either the Governor or the executive director may refer the report and recommendations of the board to the Attorney General or other department for appropriate action when it appears that any of the laws of this State may have been violated.

Sec. 4. 29-A MRSA §152, sub-§3 is amended to read:

3. Central computer system. Notwithstanding any other provisions of law, purchase and maintain a central computer system for purposes of administering this Title and conducting departmental operations. All other uses must be approved by the Secretary of State. ~~The Secretary of State shall adopt rules regarding the maintenance and use of data processing information files required to be kept confidential and shall distinguish those files from files available to the public~~;

Sec. 5. 29-A MRSA §257 is repealed.

Sec. 6. 29-A MRSA §517, sub-§4 is amended to read:

4. Unmarked law enforcement vehicles. An unmarked motor vehicle used primarily for law enforcement purposes, when authorized by the Secretary of State and upon approval from the appropriate requesting authority, is exempt from displaying a special registration plate. Records for all unmarked vehicle registrations are confidential.

~~Upon receipt of a written request by an appropriate criminal justice official showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.~~

Sec. 7. 35-A MRSA §8703, sub-§5 is amended to read:

5. Confidentiality. ~~Relay service communications must be~~ The providers of telecommunications relay services must keep relay service communications confidential.

Sec. 8. 38 MRSA §414, sub-§6 is amended to read:

6. Confidentiality of records. Any records, reports or information obtained under this subchapter is available to the public, except that upon a showing satisfactory to the department by any person that any records, reports or information, or particular part of any record, report or information, other than the names and addresses of applicants, license applications, licenses and effluent data, to which the department has access under this subchapter would, if made public, divulge methods or processes that are entitled to protection as trade secrets as defined in Title 10, section 1542, subsection 4, these records, reports or information must be confidential and not available for public inspection or examination. Any records, reports or information may be disclosed to employees or authorized representatives of the State or the United States concerned with carrying out this subchapter or any applicable federal law, and to any party to a hearing held under this section on terms the commissioner may prescribe in order to protect these confidential records, reports and information, as long as this disclosure is material and relevant to any issue under consideration by the department.

Sec. 9. 38 MRSA §585-B, sub-§6 is amended to read:

6. Mercury reduction plans. An air emission source emitting mercury in excess of 10 pounds per year after January 1, 2007 must develop a mercury reduction plan. Except as provided in subsection 7, the mercury reduction plan must be submitted to the department no later than September 1, 2008. The mercury reduction plan must contain:

A. Identification, characterization and accounting of the mercury used or released at the emission source; and

B. Identification, analysis and evaluation of any appropriate technologies, procedures, processes, equipment or production changes that may be utilized by the emission source to reduce the amount of mercury used or released by that emission source, including a financial analysis of the costs and benefits of reducing the amount of mercury used or released.

~~The department may keep information submitted to the department under this subsection confidential as provided under section 1310-B.~~

The department shall submit a report to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than March 1, 2009 summarizing the mercury emissions and mercury reduction potential from those emission sources subject to this subsection. In addition, the department shall include an evaluation of the appropriateness of the 25-pound mercury standard established in subsection 5. The evaluation must address, but is not limited to, the technological feasibility, cost and schedule of achieving the standards established in subsection 5. The department shall

submit an updated report to the committee by March 1, 2013. The joint standing committee of the Legislature having jurisdiction over natural resources matters is authorized to report out to the 126th Legislature a bill relating to the evaluation and the updated report.

Sec. 10. 38 MRSA §585-C, sub-§2, ¶D is repealed:

2. Emissions inventory. The commissioner shall carry out and maintain an inventory of the sources in the State emitting any substance that may be a hazardous air pollutant.

A. This inventory must include the following data for each of those substances:

(1) The number of sources;

(2) The location of each source or category of source;

(3) The quantity emitted by each source or category of source;

(4) The total emissions; and

(5) The percentage of total emissions generated by sources with existing air licenses.

B. In conducting this inventory, the commissioner may rely upon questionnaires or other reasonable methods, including those established by the United States Environmental Protection Agency, for the purpose of carrying out this duty as promptly and efficiently as possible. The commissioner shall clearly indicate on any requests for information the minimum amount of emissions that must be reported. The commissioner may not require reporting of this information more frequently than every other year.

C. In carrying out this inventory, the commissioner may require persons to provide information on forms supplied by the commissioner. Refusal to provide the information subjects the person of whom it is requested to a civil penalty of not more than $100 for each day's delay. Submission of false information constitutes a violation of section 349, subsection 3, in addition to being subject to remedies otherwise available by law.

~~D. Information relating to the emissions inventory submitted to the commissioner under this section may be designated by the person submitting it as being only for the confidential use of the commissioner. Designated confidential information must be handled as confidential information is handled under section 1310-B, with the exception of emissions data which is public record.~~

SUMMARY

This proposed legislation implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Title 22 and Titles 26 to 39-A. The legislation does the following.

Section 1 repeals the Community Right to Know Act, a program within the Department of Health and Human Services intended to provide disclosure of information about hazardous substances in the community that has never been implemented.

Section 2 makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

Section 3 relates to reports of the State Board of Arbitration and Conciliation in a labor dispute. The amendment makes clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

Section 4 repeals language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

Section 5 repeals a provision relating to the Secretary of State's motor vehicle information technology system because the confidentiality of the system is already addressed in another provision of law.

Section 6 removes language that is redundant with another section of law.

Section 7 clarifies that it is the responsibility of the providers of telecommunications relay services to keep relay services communications confidential.

Section 8 adds a cross-reference to the definition of "trade secret".

Section 9 repeals language making mercury reduction plans for air emission source emitting mercury confidential.

Section 10 repeals language making hazardous air pollutant emissions inventory reports confidential.

APPENDIX D

Recommended Draft Legislation: Add an IT Professional to Membership of Right to Know Advisory Committee

Sec. 1. 1 MRSA §411, sub-§2 is amended to read:

2. Membership. The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; ~~and~~

M. The Attorney General or the Attorney General's designee~~.~~; and

N. One member with broad experience and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including audio and web

conferencing; databases for records management and reporting; and information technology system, development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

SUMMARY

This bill adds one additional member to the Right to Know Advisory Committee, appointed by the Governor. The new position will bring information technology expertise to the Advisory Committee.

APPENDIX E

Recommended Draft Legislation: Authorize Use of Technology to Permit Remote Participation in Meetings

(Changes from LD 258 are in *italics*)

Sec. 1. 1 MRSA §403-A is enacted to read:

§403-A. Public proceedings through ~~*other means of*~~ communication *technology*

This section governs public proceedings, including executive sessions, during which public or governmental business is ~~*discussed or*~~ transacted through telephonic, video, electronic or other means of communication.

1. Requirements. A body subject to this subchapter may conduct a public proceeding during which ~~*a member*~~ *one or more members* of the body ~~*participates*~~ *participate* in the discussion or transaction of public or governmental business through telephonic, video, electronic or other means of communication only if the following requirements are met.

A. The body has adopted a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other means of communication in accordance with this section. The policy ~~may~~ *must* establish ~~*circumstances under*~~ *criteria* ~~which~~ *that must be met before* a member may participate when not physically present. *If the policy allows a member who is not physically present to participate in an executive session, the policy must specifically address the circumstances under which the executive session may be conducted to ensure privacy.*

B. Notice of the public proceeding has been given in accordance with section 406.

C. Except as provided in subsection 3, a quorum of the body is assembled physically at the location identified in the notice required by section 406.

D. Each member of the body participating in the public proceeding is able to hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations.

E. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication identifies the persons present in the location from which the member is participating.

F. All votes taken during the public proceeding are taken by roll call vote.

G. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public

proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.

2. Voting, quasi-judicial or judicial proceeding. A member of a body who is not physically present and who is participating in the public proceeding through telephonic, video, electronic or other means of communication may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.

3. Exception to quorum requirement. A body may convene a public proceeding by telephonic, video, electronic or other means of communication without a quorum under subsection 1, paragraph C if:

A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742, and:

(1) The public proceeding is necessary to take action to address the emergency; and

(2) The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency; or

B. The body is specifically authorized by its governing statute to convene a public proceeding by telephonic, video, electronic or other means of communication with less than a quorum assembled physically at the location identified in the notice required by section 406.

4. Annual meeting. If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other means of communication from a different location.

PART B

Sec. B-1. 10 MRSA §384, sub-§5 is enacted to read:

5. Meetings. The board shall have a physical location for each meeting. Notwithstanding Title 1, section 403-A, board members may participate in meetings by teleconference. Board members participating in the meeting by teleconference are not entitled to vote and are not considered present for the purposes of determining a quorum, except in cases in which the chair of the board determines that the counting of members participating by teleconference and the allowance of votes by those members is necessary to avoid undue hardship to an applicant for an investment.

Sec. B-2. 32 MRSA §88, sub-§1, ¶D, as amended by PL 2007, c. 274, §19, is further amended to read:

D. A majority of the members appointed and currently serving constitutes a quorum for all purposes and no decision of the board may be made without a quorum present. A majority vote of those present and voting is required for board action, except that for purposes of either granting a waiver of any of its rules or deciding to pursue the suspension or revocation of a license, the board may take action only if the proposed waiver, suspension or revocation receives a favorable vote from at least 2/3 of the members present and voting and from no less than a majority of the appointed and currently serving members. ~~The~~ Notwithstanding Title 1, section 403-A, the board may use video conferencing and other technologies to conduct its business but is not otherwise exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.

Sec. B-3. 39-A MRSA §151, sub-§5, as amended by PL 2003, c. 608, §9, is further amended to read:

5. Voting requirements; meetings. The board may take action only by majority vote of its membership. The Notwithstanding Title 1, section 403-A, the board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology. Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

SUMMARY

Part A authorizes the use of remote-access technology to conduct public proceedings. Subject to the following requirements, it authorizes a body to conduct a public proceeding during which a member of the body participates in the transaction of public or government business through telephonic, video, electronic or other similar means of communication.

1. The body must adopt a policy that authorizes such participation and establishes the criteria that must be met under which a member may participate when not physically present.

If the policy authorizes such participation in an executive session, the policy must spell out the circumstances for conducting the executive session that will ensure the required privacy.

2. Notice of any proceeding must be provided in accordance with the Freedom of Access Act.

3. A quorum of the body must be physically present, except that under certain emergency circumstances, a body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum assembled physically at one location. One such circumstance is if the public body's governing statute authorizes a meeting using remote access technology with less than a quorum physically present in the location listed in the meeting notice.

4. Members of the body must be able to hear and speak to each other during the proceeding.

5. A member who is participating remotely must identify the persons present in the location from which the member is participating.

6. All votes taken during the public proceeding must be taken by roll call vote.

7. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication must have received, prior to the proceeding, any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented.

8. A member of a body who is not physically present may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.

9. If a body conducts one or more public proceedings using remote-access technology, the body must also hold at least one public proceeding annually during which all members of the body in attendance are physically assembled at one location.

Under current law, the following state agencies are authorized to use remote-access technology to conduct meetings: the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Emergency Medical Services' Board and the Workers' Compensation Board. Part B provides a specific exemption from the new requirements for the Small Enterprise Growth Board, the Emergency Medical Services' Board and the Workers' Compensation Board.

Maine Legislature

Judicial Committee

Senator Valentino, Rep. Priest and members of the Judicial Committee thank you for allowing me to comment on LD 258 "An Act to Implement the Recommendations of Right To Know Advisory Committee Concerning Meetings of Public Bodies".

My name is Percy L. Brown, Jr., I live in Deer Isle, Maine. I have been a Hancock County Commissioner for eleven years and I am a current member of the Right to Know Committee. I have served on many State and local Boards over the past 25 years. I am requesting this committee amend LD 258 and not allow "Elected Officials" to conduct public proceeding through other means of communication. This bill will work well for appointed board and council members but most County Commissioners, Town Selectmen, elected School Board members and Town Councilors are elected by the people and access through public proceeding should always be available to the public. As you all know nothing can be more persuasive than a room full of concerned citizens. The information presented at these proceeding may sway the vote and from my experience often does. It is easier to make a decision on difficult issues when the member is not physically present. Remote technology is great but the public should always be allowed to have face time with their elected officials and question or support decisions they make as it insures greater transparency in government.

Thank You,

Percy L. Brown, Jr.

Hancock County Commissioner

Ellsworth, ME

APPENDIX F

Recommended Draft Legislation: Relief from Overly Burdensome FOAA Requests

1 MRSA §410-A is enacted to read:

§410-A. Government remedy; just and proper cause

1. Petition for determination. A body, agency or official who has custody or control of a public record may petition the Superior Court for a determination that a request by a person to inspect or copy the public record may be denied with just and proper cause. Petitions may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Order. After a trial de novo, the court shall either dismiss the petition or enter an order appropriately limiting or denying the request to inspect or copy the public record.

3. Just and proper cause. For the purposes of this section, in determining whether a request to inspect or copy a public record may be denied with "just and proper cause" a court shall include consideration of the identity of the requesting person and the historical frequency, scope and manner of the requesting person's requests for inspection or copying of records under section 408-A, and whether the probative value of the information to the public outweighs any substantial burden on the body, agency or official.

SUMMARY

This bill creates an option for a public body, agency or official to seek relief from overly-burdensome requests under the Freedom of Access Act by filing an action in Superior Court seeking a determination whether the request may be denied. The court must determine if the request to inspect or copy a record may be denied for just and proper cause. In making the determination, the court must consider the identity of the requesting person and the historical frequency, scope and manner of the requesting person's requests for inspection or copying, and whether the probative value of the information to the public outweighs any substantial burden on the government body, agency or official. After a trial de novo the court may issue an order limiting or denying the request to inspect or copy the public record, or may dismiss the petition.

APPENDIX G

Recommended Draft Legislation: Amend PL 2013, c. 350 Concerning Deadlines and Appeals

Right to Know Advisory Committee
Draft: FOAA deadlines and appeals (PL 2013, c. 350)

Sec. 1. 1 MRSA §408-A is amended to read

§ 408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

1. Inspect. A person may inspect any public record during reasonable office hours. ~~An~~ A body, agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the body, agency or official may charge a fee as provided in subsection 8.

2. Copy. A person may copy a public record in the office of the body, agency or official having custody of the public record during reasonable office hours or may request that the body, agency or official having custody of the record provide a copy. The body, agency or official may charge a fee for copies as provided in subsection 8.

A. A request need not be made in person or in writing.

B. The agency or official shall mail the copy upon request.

3. Acknowledgment; clarification; time estimate; cost estimate. The body, agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request, ~~and~~ the body, agency or official may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the body, agency or official shall provide a good faith, nonbinding estimate of the time within which the body, agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The body, agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this section, the date a request is received is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record.

4. Refusals; denials. If a body, ~~or an~~ agency or official having custody or control of any public record refuses permission to inspect or copy ~~or abstract~~ a public record, the body, ~~or~~ agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. Failure to ~~comply with~~ provide the notice required by this subsection within 10 working days of the receipt of the request is considered ~~failure~~ a denial to allow inspection or copying and is subject to appeal as provided in section 409.

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the body, agency or official having custody or control of the public record requested. If the body, agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the body's, agency's or official's records must be posted in a conspicuous public place and at the office of the body, agency or official, if an office exists.

6. No requirement to create new record. ~~An~~ A body, agency or official is not required to create a record that does not exist.

7. Electronically stored public records. ~~An~~ A body, agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the body, agency or official is not required to provide access to an electronically stored public record as a computer file if the body, agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the body, agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the body, agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require ~~an~~ a body, agency or official to provide a requester with access to a computer terminal.

8. Payment of costs. Except as otherwise specifically provided by law or court order, ~~an~~ a body, agency or official having custody of a public record may charge fees for public records as follows.

A. The body, agency or official may charge a reasonable fee to cover the cost of copying.

B. The body, agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than $15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. The body, agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.

D. ~~An~~ A body, agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.

E. The body agency or official may charge for the actual mailing costs to mail a copy of a record.

9. Estimate. The body, agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than $30, the body, agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 10 applies.

10. Payment in advance. The body, agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion

and copying of the public record if:

A. The estimated total cost exceeds $100; or

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

11. Waivers. The body, agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or

B. The body, agency or official considers release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

Sec. 2. 1 MRSA §409, sub-§1 is amended to read:

§409. Appeals

1. Records. Any person aggrieved by a ~~refusal or~~ denial to inspect or copy a record ~~or the failure to allow the inspection or copying of a record~~ under section 408-A may appeal the ~~refusal,~~ denial ~~or failure~~ within 30 calendar days of the receipt of the written notice of ~~refusal,~~ denial ~~or failure~~ or 40 days from the date of the request if no written notice is provided under section 408-A, subsection 4 to ~~any~~ the Superior Court ~~within the State as a trial de novo~~ for the county in which the person resides or in which the body or agency maintains an office to which the person made the request. The body, agency or official shall file ~~an answer~~ a statement of position within 14 calendar days of service of the appeal. If a court, after a ~~trial~~ de novo review and taking testimony and other evidence it determines necessary, determines such ~~refusal,~~ denial ~~or failure~~ was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who

appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

SUMMARY

This bill amends the Freedom of Access Act to clarify that the date of receipt of a request to copy or inspect a public record is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record.

Current law requires a body, agency or official to provide, within 5 days of the receipt of a request to inspect or copy a public record, a written notice that the request is denied. This bill clarifies that refusing to allow inspection or copying is considered a denial, as is the failure, within 10 days of the receipt of a request, to provide a written notice that the request is denied.

This bill amends the Freedom of Access Act with regard to appeals of denials of request to inspect or copy public records. Under current law, a person whose request has been denied may appeal the denial to any Superior Court within 30 calendar days of receipt of the written notice of denial. If no written notice of denial is provided, the requestor may file an appeal with 40 calendar days of the request. The bill provides that the appeal must be filed in the Superior Court for the county where the requestor resides or where the body or agency maintains an office to which the request was made. Current law requires the agency or official to file an answer within 14 calendar days. This bill requires the body, agency or official to a statement of position within 14 calendar days of service of the appeal. This bill provides that the court does not have to convene a trial, but must conduct a de novo review and shall take testimony and other evidence it determines necessary, and if it determines that the denial was not for just and proper cause, the court shall enter an order for disclosure.

This bill revises the language in sections 408-A and 409 to clarify that the provisions apply to public bodies as well as agencies and officials.

APPENDIX H

Recommended Draft Legislation: Align the Reporting Dates for the Public Access Ombudsman With the Annual Reporting Date for the Right To Know Advisory Committee

Right to Know Advisory Committee
Draft: Change reporting date for Public Access Ombudsman

Sec. 1. 5 MRSA §200-I, sub-§5 is amended to read:

§200-I. Public Access Division; Public Access Ombudsman

1. Public Access Division; Public Access Ombudsman. There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.

2. Duties. The ombudsman shall:

A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;

B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;

C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;

D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;

E. Make recommendations concerning ways to improve public access to public records and proceedings.; and

F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests.

3. Assistance. The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a

public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

5. Report. The ombudsman shall submit a report not later than ~~March~~ January 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

A. The total number of inquiries and complaints received;

B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;

C. The number of complaints received concerning respectively public records and public meetings;

D. The number of complaints received concerning respectively:

(1) State agencies;
(2) County agencies;
(3) Regional agencies;
(4) Municipal agencies;
(5) School administrative units; and
(6) Other public entities;

E. The number of inquiries and complaints that were resolved;

F. The total number of written advisory opinions issued and pending; and

G. Recommendations concerning ways to improve public access to public records and proceedings.

SUMMARY

Current law requires the Public Access Ombudsman to submit an annual report to the Right to Know Advisory Committee and the Legislature by March 15th of each year. This bill changes the reporting date to January 15th of each year, which is the same date by which the Right to Know Advisory Committee is required to submit its annual report.

APPENDIX I

Correspondence

Hon. Linda M. Valentino, Chair
Hon. Kimberly Monaghan-Derrig
Perry Antone
Percy L. Brown, Jr
Richard Flewelling
James T. Glessner
Suzanne Goucher
Frederick Hastings
Mary Ann Lynch

Mal Leary
William Logan
Judy Meyer
Kelly Morgan
Christopher Parr
Linda Pistner
Harry Pringle
Luke Rossignol

STATE OF MAINE
RIGHT TO KNOW ADVISORY COMMITTEE

December 17, 2013

Senator James A. Boyle, Senate Chair
Representative Joan W. Welsh, House Chair
Joint Standing Committee on Environment and Natural Resources
100 State House Station
Augusta, Maine 04333

Dear Sen. Boyle and Rep. Welsh:

The Right to Know Advisory Committee is tasked with reviewing existing public records exceptions in the statutes, and in the past three years has focused on the exceptions found in Titles 22 through 39-A. The Advisory Committee is expected to review and evaluate each public records exception and make a recommendation for keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation. The Advisory Committee has established the Public Records Exception Subcommittee to conduct these reviews.

As part of its review, the Public Records Exception Subcommittee considered two exceptions in Title 22 within the "Community Right-to-Know Act" to address public concerns about hazardous substances. Based on input from the Department of Health and Human Services, the Subcommittee was informed that the statutory provisions have never been implemented. We also understand that the Department of Environmental Protection has programs that parallel or overlap the purposes of the Community-Right-to-Know Act, and that the Maine Emergency Management Agency and county emergency management authorities also collect information and develop emergency plans concerning hazardous substances.

Previously the Department of Health and Human Services recommended to the Subcommittee that the "Community Right- to- Know Act" be repealed in its entirety. This recommendation was also endorsed by the 124th Legislature's Joint Standing Committee on Health and Human Services. Based on these recommendations and the Subcommittee's review of the provisions, the Advisory Committee has included language to repeal the "Community Right-to-Know Act", Title 22, chapter 271, subchapter 2, in its proposed legislation to the Judiciary Committee.

We anticipate that the Judiciary Committee will consider this legislation in the upcoming Second Regular Session. We hope that your committee will find the time to review the existing

programs and determine whether our recommendation to repeal the Community Right-to-Know Act is appropriate. If your committee has any thoughts or concerns, we encourage you to make them known to the Judiciary Committee.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Sincerely,

Sen. Linda Valentino, Chair
Right to Know Advisory Committee

cc: Members, Right to Know Advisory Committee

Hon. Linda M. Valentino, Chair
Hon. Kimberly Monaghan-Derrig
Perry Antone
Percy L. Brown, Jr
Richard Flewelling
James T. Glessner
Suzanne Goucher
Frederick Hastings
Mary Ann Lynch

Mal Leary
William Logan
Judy Meyer
Kelly Morgan
Christopher Parr
Linda Pistner
Harry Pringle
Luke Rossignol

STATE OF MAINE
RIGHT TO KNOW ADVISORY COMMITTEE

December 17, 2013

Senator Margaret M. Craven, Senate Chair
Representative Richard R. Farnsworth, House Chair
Joint Standing Committee on Health and Human Services
100 State House Station
Augusta, Maine 04333

Dear Sen. Craven and Rep. Farnsworth:

The Right to Know Advisory Committee is tasked with reviewing existing public records exceptions in the statutes, and in the past three years has focused on the exceptions found in Titles 22 through 39-A. The Advisory Committee is expected to review and evaluate each public records exception and make a recommendation for keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation. The Advisory Committee has established the Public Records Exception Subcommittee to conduct these reviews.

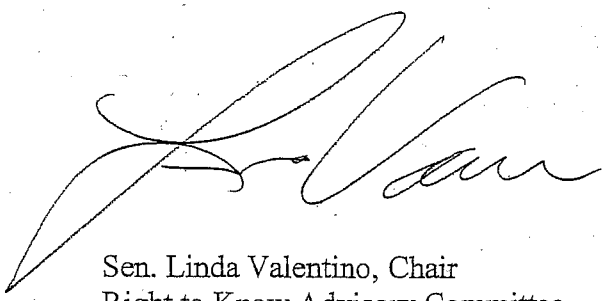
As part of its review, the Public Records Exception Subcommittee considered two exceptions in Title 22 within the "Community Right-to-Know Act" to address public concerns about hazardous substances. Based on input from the Department of Health and Human Services, the Subcommittee was informed that the statutory provisions have never been implemented. We also understand that the Department of Environmental Protection has programs that parallel or overlap the purposes of the Community-Right-to-Know Act, and that the Maine Emergency Management Agency and county emergency management authorities also collect information and develop emergency plans concerning hazardous substances.

Previously the Department of Health and Human Services recommended to the Subcommittee that the "Community Right- to- Know Act" be repealed in its entirety. This recommendation was also endorsed by the 124th Legislature's Joint Standing Committee on Health and Human Services. Based on these recommendations and the Subcommittee's review of the provisions, the Advisory Committee has included language to repeal the "Community Right-to-Know Act", Title 22, chapter 271, subchapter 2, in its proposed legislation to the Judiciary Committee.

We anticipate that the Judiciary Committee will consider this legislation in the upcoming Second Regular Session. We hope that your committee will find the time to review the existing programs and determine whether our recommendation to repeal the Community Right-to-Know Act is appropriate. If your committee has any thoughts or concerns, we encourage you to make them known to the Judiciary Committee.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Sincerely,



Sen. Linda Valentino, Chair
Right to Know Advisory Committee

cc: Members, Right to Know Advisory Committee

Hon. Linda M. Valentino, Chair
Hon. Kimberly Monaghan-Derrig
Perry Antone
Percy L. Brown, Jr
Richard Flewelling
James T. Glessner
Suzanne Goucher
Frederick Hastings
Mary Ann Lynch

Mal Leary
William Logan
Judy Meyer
Kelly Morgan
Christopher Parr
Linda Pistner
Harry Pringle
Luke Rossignol

STATE OF MAINE
RIGHT TO KNOW ADVISORY COMMITTEE

December 17, 2013

Senator John L. Tuttle, Jr., Senate Chair
Representative Louis J. Luchini, House Chair
Joint Standing Committee on Veterans and Legal Affairs
100 State House Station
Augusta, Maine 04333

Dear Sen. Tuttle and Rep. Luchini:

The Right to Know Advisory Committee is tasked with reviewing existing public records exceptions in the statutes, and in the past two years has focused on the exceptions found in Titles 26 through 39-A. The Advisory Committee is expected to review and evaluate each public records exception and make a recommendation for keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation. The Advisory Committee has established the Public Records Exception Subcommittee to conduct these reviews.

As part of its review, the Public Records Exception Subcommittee considered an exception in Title 28-A, section 755 related to the business and financial records of liquor licensees. During the 125th Legislature, we understand that the 125th Legislature transferred statutory responsibility for collecting data from on-premise liquor licenses from the Department of Public Safety to the Bureau of Alcoholic Beverages and Lottery Operations (BABLO). At the Subcommittee's request, BABLO completed a survey about section 755 and provided input about the application and potential impact of the confidentiality exception. We attach that information for your review.

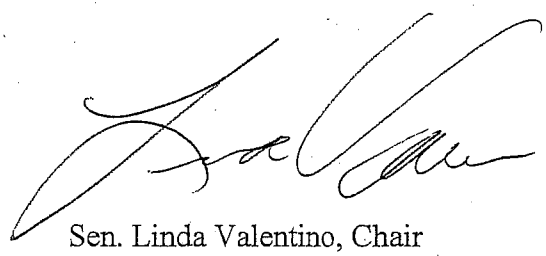
While BABLO has not yet instituted a system or process to collect data for liquor licensees, they expressed interest in gathering data from on-premise licensees for marketing purposes to help the State better manage the sale and distribution of spirits throughout the State. However, BABLO also indicated that stakeholders representing licensees raised concerns that the confidentiality provision in section 755 may impact their ability to collect that data. BABLO suggested that the Subcommittee consider making statutory changes to clarify section 755 to enable the agency to collect certain information from licensees, but otherwise maintain the confidentiality of licensees' business and financial records while in the possession of the licensee.

Because the suggestion raised other policy and legal issues that go beyond the confidentiality exception, the Subcommittee is reluctant to move ahead without legislative input.

We understand that your committee may be considering legislation in the Second Regular Session to further clarify BABLO's statutory responsibilities for liquor enforcement. As part of that review, we hope that your committee will consider the confidentiality exception and consult with BABLO and other interested parties to determine whether statutory changes should be recommended to Title 28-A, section 755.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Sincerely,



Sen. Linda Valentino, Chair
Right to Know Advisory Committee

cc: Members, Right to Know Advisory Committee
Tim Poulin, Bureau of Alcoholic Beverages and Lottery Operations

Hon. Linda M. Valentino, Chair
Hon. Kimberly Monaghan-Derrig
Perry Antone
Percy L. Brown, Jr
Richard Flewelling
James T. Glessner
Suzanne Goucher
Frederick Hastings
Mary Ann Lynch

Mal Leary
William Logan
Judy Meyer
Kelly Morgan
Christopher Parr
Linda Pistner
Harry Pringle
Luke Rossignol

STATE OF MAINE
RIGHT TO KNOW ADVISORY COMMITTEE

January 9, 2014

Senator Colleen M. Lachowicz, Senate Chair
Representative Anne P. Graham, House Chair
Joint Standing Committee on State and Local Government
100 State House Station
Augusta, Maine 04333

Dear Senator Lachowicz and Representative Graham:

As you may know, the Right to Know Advisory Committee was created by the Legislature as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Recently, representatives of registries of deeds informed the Advisory Committee's Legislative and Public Policy Subcommittees of their interest in redacting personal information in public records they supply to the public, which is currently not permitted by statute, and the desire of some of the public (e.g., banks) to have continued access to this personal information. In their discussion with the Subcommittees, two registers of deeds noted that this is a huge issue, especially with regard to bulk sales, with people in the public requesting entire databases of records. The Registers of Deeds have serious concerns with providing official records with personal information to the public.

Although the joint Subcommittees considered a draft legislative proposal that would authorize, but not require, Registers of Deeds to redact Social Security numbers from documents filed with the Registry for recording, the registers of deeds raised concerns about inconsistencies in the application of such a law between counties. They asked that the Subcommittees propose stricter legislation which would prohibit Registers of Deeds from accepting documents that contain Social Security numbers and noted two states, Missouri and New Hampshire, have similar laws.

After discussing the issue at two meetings, the joint Subcommittees determined that the issue raised by the registers of deeds would be best left to the consideration of the Legislature. A majority of the joint Subcommittees members recommended that the Advisory Committee send a letter to the State and Local Government Committee. The Advisory Committee adopted this recommendation and we are writing to inform you of this request so that you may review the recording statutes and consider whether to take statutory action as requested by the registers of deeds.

Thank you for consideration of this request.

Sincerely,

Sen. Linda Valentino, Chair
Right to Know Advisory Committee