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127th LEGISLATURE
SECOND REGULAR SESSION**

Right to Know Advisory Committee

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EXECUTIVE SUMMARY

This is the tenth 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 17 members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, 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 located at 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 2015, the Advisory Committee met on September 15, October 6, November 13 and December 1.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2015 recommendations and a summary of relevant Maine court decisions from 2014 and 2015 on the freedom of access laws.

For its tenth annual report, the Advisory Committee makes the following unanimous recommendations:

- Enact legislation clarifying whether and under what circumstances public bodies are authorized to use technology to allow for remote participation in public meetings**
- Continue without modification, amend or repeal the existing public records exceptions enacted after 2004 and before 2013**

In 2016, 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 enacted from 2005 through 2012.

I. INTRODUCTION

This is the tenth 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 – the Advisory Committee's authorizing legislation – 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 17 members. The chair of the Advisory Committee is elected annually by the members. Current Advisory Committee members are:

Sen. David C. Burns Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Kimberly Monaghan	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Frederick Hastings	<i>Representing newspaper and other press interests, appointed by the President of the Senate</i>
Richard LaHaye	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Mary Ann Lynch	<i>Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court</i>
Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Kelly Morgan	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>
Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Helen Rankin	<i>Representing the public, appointed by the Speaker of the House</i>

Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>
William Shorey	<i>Representing county or regional interests, appointed by the President of the Senate</i>
[Vacancy]	<i>Representing municipal interests, appointed by the Governor</i>
[Vacancy]	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
[Vacancy]	<i>With broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor</i>

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

II. 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 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 work with the 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 2015, the Advisory Committee met on September 15, October 6, November 13 and December 1. Due to building upgrades and conflicting meeting schedules, the meetings were held in the Judiciary Committee Room of the State House, the Insurance and Financial Affairs Committee Room, and the Labor, Commerce and Economic Development Committee Room in the Cross State Office Building in Augusta and were 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, which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas, meeting materials and summaries of the meetings are available 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 recent developments in case law relating to Maine's freedom of access laws. For its Ninth Annual Report, the Advisory Committee has identified and summarized the following court decisions related to freedom of access issues.

2014-2015 Maine Supreme Judicial Court Decisions

Doyle v. Town of Falmouth

In *Doyle v. Town of Falmouth*, 2014 ME 151, 106 A.3d 1145, Michael Doyle appealed a decision of the Superior Court that the Town of Falmouth and Falmouth School Department had properly redacted certain information in the work-issued cellular telephone records of the Falmouth School Department's Superintendent that were supplied to Doyle pursuant to his request under Maine's Freedom of Access Act (FOAA). The redacted information consisted of: 1) work-issued cellular telephone numbers of School District employees; 2) records of the Superintendent's personal telephone calls; and 3) the personal telephone numbers of Falmouth students' parents.

The Court looked to the legislative history of the FOAA exception at 1 M.R.S. §402(3)(O) for "personal contact information concerning public employees," which includes a "personal cellular telephone number," concluding that the provision had been enacted with the intent to protect the privacy rights of public employees. Applying this legislative intent to the language of the exception, the Court held that work-issued cellular telephone numbers of public employees fit within the exemption for "personal contact information," and therefore such information was properly redacted from the records supplied to Doyle. Regarding the Superintendent's personal calls, the Court held that these personal calls were unrelated to the transaction of public or government business and were therefore not "public records" within the gambit of the Act, despite their having been made with the work-issued cellular telephone. With respect to the redacted telephone numbers of students' parents, the Court concluded that these numbers were also outside the scope of FOAA because they were designated as confidential under the federal Family Educational Rights and Privacy Act (FERPA), which is also incorporated into Maine law by statute.

Bowler v. State

In *Bowler v. State*, 2014 ME 157, 108 A.3d 1257, the Law Court held that under an unallocated provision of law passed as part of the Intelligence and Investigative Record Information Act, Public Law 1993, ch. 719, § 11, (the "IIRIA"), an investigative file that was not confidential when it was created in 1953, but was made confidential retroactively by a later-enacted statute, remains confidential regardless of its date of creation. Although the individual requesting the document argued that the unallocated IIRIA language requires that documents be confidential "at the time of their creation" to enjoy continued confidentiality under the IIRIA, the Court instead found that 5 M.R.S. §200-D, which was enacted in 1979 and repealed as part of the enactment of the IIRIA, made documents within its scope confidential retroactive to the date of their creation.

The Court also held that the Attorney General did not waive confidentiality when it released the file to the grandniece of the investigation's subject, who had died, because the IIRIA allows confidential information to be released to an "immediate family member." The term "immediate family member" is not defined in the IIRIA, but the Court determined that it includes a grandniece "when it is likely that there are no closer surviving relatives."

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEE

In prior years the Right to Know Advisory Committee has divided its workload among various subcommittees that have reported recommendations back to the full Advisory Committee for consideration and action. This year the Advisory Committee chose to appoint one subcommittee – the Public Records Exceptions Subcommittee. The Public Records Exception Subcommittee’s focus is to participate in the review and evaluation of public records exceptions, as required of the Advisory Committee pursuant to Public Law 2015, chapter 250, now codified at 1 M.R.S. §433, sub-§2-A. The guidelines in the law require Advisory Committee review of all public records exceptions enacted after 2004 and before 2013 by no later than 2017. The Subcommittee, and turn the Advisory Committee, reviewed 25 such exceptions this year. The review process includes reaching out to State and local bodies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. All inquiries to the public bodies were coupled with an invitation for a representative of the public body to attend the Subcommittee meeting to provide any additional information or answer questions from the Subcommittee. Review is undertaken in light of the criteria codified at 1 M.R.S. §434, and, after discussion and a vote, recommendations for either keeping a provision with no modification or otherwise striking or amending the provision are passed along to the full Advisory Committee for a final vote. Representative Monaghan is the chair of the Subcommittee and Mary Ann Lynch, Linda Pistner and Luke Rossignol serve as members. As a legislator and the Advisory Committee chair, Senator Burns is an ex officio member.

During 2015, the Public Records Exception Subcommittee held three meetings. The recommendations from two of these meetings are encompassed in this report, and summarized below. The fruits of the Subcommittee’s third meeting will be passed along to next year’s full Advisory Committee for its consideration, which final recommendation will be incorporated into next year’s report.

The Subcommittee discussed the following exceptions. *(Note: Reference numbers below are based on a spreadsheet of public records exceptions to be reviewed by 2017 pursuant to 1 M.R.S. §433, sub-§2-A, paragraph A.)*

Ref# 20 - 27: 8 MRSA §1006, sub-§1, ¶¶A-H, relating to information or records required by the Gambling Control Board for licensure: trade secrets and proprietary information; would be unwarranted invasion of privacy of key executive, gaming employee or another person; key executive or gaming employee compensation; financial, statistical and surveillance information related to the applicant; creditworthiness, credit rating or financial condition of person or project; information from other jurisdictions conditioned on remaining confidential; information designated confidential under federal law; specific personal information, including Social Security Number, of any individual

Ref# 28: 8 MRSA §1006, sub-§3, relating to records and information developed as part of a suitability requirement to select an operator of a central site monitoring system, held by the Gambling Control Board and the Department of Public Safety

Ref# 29: 8 MRSA §1006, sub-§4, relating to financial, statistical and surveillance information from the central site monitoring system held by the Gambling Control Board and the Department of Public Safety

Ref# 30: 8 MRSA §1007, sub-§2, relating to information or records received by the Gambling Control Board or Department of Public Safety from another agency pursuant to agreement

Ref# 31: 8 MRSA §1008, relating to information or records used or produced by the Gambling Control Board or Department of Public Safety in connection with hearings, proceedings or appeals pursuant to Title 8, section 1052

Ref# 32: 8 M.R.S. §1052, relating to reports, information or records compiled by the Gambling Control Board and Department of Public Safety concerning noncompliance with or violation of the chapter by an applicant, licensee, owner or key executive

The Subcommittee voted 5-0 to recommend no modification to all of the above provisions concerning the Gambling Control Board. The group had initially reviewed these Gambling Control Board exceptions at its first meeting, tabling them until more information could be provided, particularly regarding the regulations and publicly accessible information around slot machine payouts. Additionally, the Subcommittee sought out stakeholder input from the state's casinos on the scope of confidentiality for information supplied by them to the State. At the subsequent Subcommittee meeting Mr. Fleming, the Executive Director of the Gambling Control Board, was not available to attend, but Advisory Committee staff reviewed the relevant statutory language and relayed information communicated by Mr. Fleming, as well as passing along input received from the Oxford and Bangor casinos. Additionally, Mike Mahoney appeared before the Subcommittee on behalf of the Bangor casino and answered Subcommittee questions regarding the industry's data privacy needs and existing regulatory oversight of slot machine payout data. He noted that these 2005 public records exceptions had been well vetted by the Judiciary Committee, balancing the public's right to know with the casinos' legitimate business needs to keep some sensitive information confidential. Ms. Pistner corroborated that the Judiciary Committee had worked hard to narrow these exceptions, noting that this is best left as a policy decision for the Legislature and that she felt confident in the current process.

Ref# 5: 1 M.R.S. §402, Sub-§3, ¶P, relating to geographic information regarding recreational trails on private land held by the Department of Inland Fisheries and Wildlife and the Department of Agriculture, Conservation and Forestry

The Subcommittee voted 5-0 to recommend no modification. The Department of Agriculture, Conservation and Forestry supports this exception – without it landowners may not be willing to permit a recreational trail system on their land.

Ref# 43: 20-A M.R.S. §13004, Sub-§2-A, relating to complaints, charges and accusations concerning certification and registration of educational personnel and administered by the Department of Education

The Subcommittee voted 4-1 to recommend changes to this public records exception, as proposed by the Department of Education. Sen. Burns casted the dissenting vote, citing his concern that parents did not have adequate access under the existing law, or the proposed amendment, to records and information concerning investigations into complaints about alleged teacher misconduct.

The Department of Education presented draft language to amend the existing exception, stating the Department's intent to clarify the exception and to eliminate redundant language in order for the exceptions to better fit with the original intent of the provision. The DOE representative noted that while records regarding the investigation are confidential, a final written decision to discipline is public.

Ref# 12: 4 M.R.S. §1806, relating to certain information and records in the possession of the Maine Commission on Indigent Legal Services

The Subcommittee voted 5-0 to recommend no modification. John Pelletier, Executive Director of the Maine Commission on Indigent Legal Services, addressed the Subcommittee, pointing out that the records covered by the exception contain highly personal information, including individuals' personal contact information (including date of birth and Social Security Number), sensitive details about case litigation, performance evaluations of individual attorneys and information privileged under the attorney-client privilege. The Commission is very supportive of keeping the exception in statute as is.

Ref# 8: 1 M.R.S. §538, Sub-§3, relating to InforME subscriber information

The Subcommittee voted 5-0 to recommend no modification. During the discussion, Ms. Lynch noted that the Judicial Branch uses this system, for example in the public's paying of fines, and that this information is indeed best kept confidential.

Ref# 14: 5 M.R.S. §17057, Sub-§3, relating to home contact information of Maine Public Employees Retirement System members, benefit recipients and staff

The Subcommittee voted 5-0 to recommend no modification.

Ref# 15: 5 M.R.S. §17057, Sub-§4, relating to Maine Public Employees Retirement System private market investment activity

The Subcommittee voted 5-0 to recommend no modification. The Maine Public Employees Retirement System (MePERS) in its written response pointed out that without this exception it could not make private market investments, and that it does post public information regarding private market investments on its website.

Ref# 16: 5 M.R.S. §17057, Sub-§5, relating to Maine Public Employees Retirement System employees personal and complaint and disciplinary information

The Subcommittee voted 5-0 to recommend no modification. MePERS noted that it has never received a public request relating to this information.

Ref# 17: 5 M.R.S. §90-B, Sub-§7, relating to the Address Confidentiality Program administered by the Secretary of State

The Subcommittee voted 5-0 to recommend no modification.

Ref# 18: 7 M.R.S. §1052, Sub-§2-A, relating to total potential acreage of genetically modified crops reported by individual manufacturers to the Department of Agriculture

The Subcommittee voted 5-0 to recommend no modification. There was some concern on the Subcommittee regarding how the public would know whether they were near a GMO crop, given the risk for cross-contamination with regular crops. The Subcommittee decided that the concerns were not necessarily germane to this exception, and that other sections of the statute seemed to meet some of these concerns.

Ref# 19: 7 M.R.S. §2231, Sub-§3, relating to criminal history records provided to the Commissioner of Agriculture, Conservation and Forestry as part of an application to grow industrial hemp for commercial purposes

This exception was repealed by Public Law 2009, chapter 320, §1, so the Subcommittee decided no review was necessary.

Ref# 33: 8 M.R.S. §270-A, relating to records and information included in application or materials required for issuance of commercial track license by the Department of Agriculture

The Subcommittee voted 5-0 to recommend no modification.

Ref# 34: 9-A M.R.S. §6-105-A, relating to information concerning uniform multistate licensing system provided to Consumer Credit Protection by other jurisdictions and administered by the Department of Professional and Financial Regulation

The Subcommittee voted 5-0 to recommend no modification.

Ref# 48: 22 M.R.S. §1494, relating to occupational disease reporting information held by the Department of Health and Human Services

The Subcommittee voted 5-0 to recommend no modification.

V. COMMITTEE PROCESS

This year, the Right to Know Advisory Committee held four full committee meetings, which are summarized below.

Summary of September 15, 2015 meeting

Rep. Monaghan called the meeting to order and the members introduced themselves. The decision to elect a chair was tabled until the next meeting and Rep. Monaghan agreed to chair the current meeting.

Summary of the FOAA legislative actions during the First Regular Session of the 127th Legislature

Staff summarized the FOAA legislative actions during the First Regular Session of the 127th Legislature by providing a summary of the following:

- Public Law 2015, chapter 248 (LD 1086), An Act To Implement the Recommendations of the Right To Know Advisory Committee To Create a Remedy for Unduly Burdensome and Oppressive Requests (*based on Appendix I, RTK-AC 2014 report);
- Public Law 2015, chapter 249 (LD 1087), An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Response Deadlines and Appeals (*based on Appendix G, RTK-AC 2014 report);
- Public Law 2015, chapter 317 (LD 1085), An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Receipt of a Request for Public Records (*based on Appendices G and H, RTK-AC 2014 report);
- Public Law 2015, chapter 250 (LD 1088), An Act To Implement Recommendations of the Right To Know Advisory Committee (*based on Appendices D,E and F, RTK-AC 2014 report).

The committee briefly discussed the status of the Judiciary Committee's carryover bill LD 1241. Ms. Pistner explained that much of the discussion on this bill involved a need for clarification on remote participation as it stands under the current law, and whether or not the law should be broadened. The committee discussed the fact that the topic of remote participation has been a longstanding unresolved issue where it has been difficult to identify a solution. The committee requested that staff provide an overview of remote participation and the challenges that are associated with meeting the public's expectations in light of advancements in technology. The committee requested that the summary also include the RTKAC's prior recommendations on this topic and the most recent Judiciary Committee's work sessions on this issue, as well as a copy of the Governor's veto letter on the bill related to remote participation.

Update from the Public Access Ombudsman

Public Access Ombudsman Brenda Kielty provided the Committee with an update on her recent activities and presented the committee with the following materials: a mid-year data summary report that summarizes the activities of the Ombudsman for the first half of calendar year 2015; a summary of the interim report to the Government Oversight Committee (GOC) regarding compliance with public records laws; and a copy of the status of recommendations from the report to the GOC on records retention and management. These documents are posted on the RTKAC's website at: <http://legislature.maine.gov/legis/opla/righttoknow.htm>.

Ms. Kielty described that FOAA provides a right to public records; however there are significant challenges to the public's right to records when public records are not created in the first place or properly retained. A brief overview was provided of the letter from the Secretary of State's Office that summarized the interim report to the GOC regarding the stakeholder group charged with reviewing the records retention and management issue. Ms. Kielty explained that she has been working with Tammy Marks, Director of the State Archives, to develop the report to the GOC and how to improve public record retention policies and practices (a list of the stakeholder group is included in this letter, which is available on the RTKAC website). Ms. Kielty stated that the FOAA depends on adequate documentation and proper record retention. The committee asked if the RTKAC would be able to provide input on any proposed legislation that the GOC considers relating to the records retention issue and management topic, and Ms. Kielty stated she would report back to the committee on this request.

Ms. Marks explained that October is Archives Month in Maine and around the country. The Maine State Archives is using the month of October to highlight the training that it offers in the area of records management, records retention, email management and the Freedom of Access Act. The State Archives website has a link to allow people to sign up for the workshops (see the Maine State Archives website at: <http://www.maine.gov/sos/arc/>). Training is being provided for any interested State employees, records officers, directors/agency heads, as well as legislators and public officials. Ms. Kielty and Ms. Marks noted that training in this area across the state has been inconsistent and not far-reaching.

The committee asked if this stakeholder group would be look at how these issues are affecting people at the municipal level. Ms. Kielty stated that the stakeholder group was primarily focused on issues at the state level and would not be able to address all issues seen at the municipal level. Ms. Kielty stated that she would recommend that the Archives Advisory Board receive input from a representative of a school or municipality to provide this perspective.

Ms. Kielty provided a review of the mid-year data summary report. Ms. Kielty explained that many members of the public have an expectation that public records should be easily or readily available and are surprised to learn of the technological challenges and costs associated with accessing public records. Ms. Kielty requested approval from the Committee to draft some FAQs regarding recent changes to the FOAA statute that could be placed on the website. The Committee approved this request. Ms. Kielty will be providing the Committee with a copy of the proposed FAQs for the website in order to allow the Committee to provide any suggested changes by October 15.

Update on public records exceptions statutory review schedule for public records exceptions enacted from 2005- 2012; establishment of the Subcommittee

The Committee agreed that the public records exception statutory review process should be led by a subcommittee. The subcommittee members are: Rep. Monaghan, Linda Pistner and Luke Rossignol.

The Committee determined that the first agency to be reviewed from 2005 should be the Gambling Control Board and requested that a representative from the board be present at the next meeting.

Topics and Projects for 2015

The Committee began exploring potential tasks to be undertaken in 2015.

Chris Parr recommended that the Advisory Committee review the topic of extremely burdensome FOAA requests that are voluminous and require considerable length of time to review for confidential information and to redact personal information. In addition, Mr. Parr mentioned that many cases involve individuals who are requesting information based on a personal interest and not for any public purpose. Mr. Parr asked if there was interest on behalf of the Committee to discuss crafting a potential remedy that would address these types of circumstances, suggesting a set number of hours that would be allowed for fulfilling the request and then the agency would be allowed to charge the actual cost associated with the request. Ms. Kielty agreed that the State Police have a high volume of requests and discussed how the federal law allows full compensation to be charged and not a flat fee. Ms. Kielty explained that Maine has chosen to try to accommodate the need for access to public records for those that do not have the funds to pay large fees for FOAA requests. Maine FOAA is not concerned as to who the requester of records is, or their purpose, unlike the federal law which categorizes the requestor based on the purpose of the request and the corresponding fee schedule (serving a commercial interest/media/ private interest). Ms. Kielty noted that another area that could be discussed was the length of time for fulfilling a public records request and that there are no uniform standards that apply in order to hold an agency to a specific standard. The Committee agreed that the topic of burdensome requests should be addressed by the full committee.

The Committee also requested a summary of the most recent actions relating to remote participation in the Judiciary Committee, as well as the previous RTKAC recommendations that were designed to address this topic, but have not yet been adopted.

Some members of the Committee also expressed an interest in discussing the legislative budget process and whether or not the FOAA applies to the Legislature and if so, how FOAA addresses the issue of small groups of legislators meeting privately to adopt language for the State budget. The Committee agreed to take up this topic at one of its meetings this fall.

Summary of October 6, 2015 meeting

Selection of Chair

Rep. Monaghan nominated Sen. Burns to serve as the Committee's chair, which motion was seconded by Mr. LaHaye. Sen. Burns was elected chair in a unanimous vote of those present.

Review of Public Records Exceptions Subcommittee meeting

Rep. Monaghan, chair of the Public Records Exceptions Subcommittee, gave the full Committee a synopsis of the Subcommittee's meeting from earlier that morning. The Subcommittee had reviewed a number of public records exceptions to Maine's Freedom of Access Act (FOAA), including relevant agency input and survey results. The group had tabled discussion regarding the confidentiality provisions concerning the Gambling Control Board in order to get more information from the Board's Executive Director prior to a final vote on the provisions.

After discussion, the full Committee decided it would like to hear from the Gambling Control Board Executive Director at its next meeting. Staff will make a formal request.

Remote participation by members of public bodies

Staff reviewed the legislative and Committee history with the topic of remote participation by members of public bodies, going back to 2012. The first bill on this topic was LD 258 (in 2013), which was voted Ought Not To Pass in the Legislature's Judiciary Committee. The subsequent letter from that Committee to this one highlighted areas of concern, including: 1) the bill did not grandfather agencies with an existing remote participation process; 2) the bill only addressed participation by telephone, which may not be sufficient to provide full public access; 3) that further input should be solicited from other public bodies. The subsequent iteration of legislation put forward, after further Advisory Committee refinement, was vetoed by the Governor. The veto letter cited concern that giving only specific entities the right to remote participation implies that others, including those already doing so, may not. The Judiciary Committee had two bills during this past session of the 127th Legislature dealing with remote participation - the first concerned only the Public Utilities Commission and was voted Ought Not To Pass, while the second, more comprehensive proposal, LD 1241, is being carried over to the 2nd Regular session of the 127th Legislature. This bill would allow for certain specific agencies to meet remotely under certain conditions (e.g., illness, dangerous travel conditions).

Staff presented a summary of research into other states' laws regarding remote participation. In general, many states do permit remote participation by members of public bodies, with the major difference in these laws being where the authorization to do so occurs. Some states allow remote participation for bodies with statewide jurisdiction, while denying it for more local bodies.

Committee members discussed the history of the topic, harkening back to 2009. Some members expressed the opinion that the former LD 258, from the First Regular Session of the 126th Legislature, along with its Judiciary Committee refinements, was about as good a job as could be done in setting guidelines designed to make sure the public is aware of what is happening at public meetings. Several members opined that the Committee should either take immediate action to recommend legislation, or decide to leave the topic and focus on other topics where the Advisory Committee can have an actual impact. The key for this Committee, a member noted, is to come to a conclusion of substance and then figure out the best technical way to bring it forward, because the law is currently unclear. Rep. Monaghan wondered how any policy recommendations/legislation would affect the related bill, LD 1241, currently in carryover status in the Judiciary Committee. Some members suggested that staff prepare a side-by-side document comparing LD 1809 with LD 258.

Staff offered to prepare something to highlight the fundamental differences between these two approaches. Mr. Pringle suggested going over LD 258 as a starting point, using a decision-tree style discussion around the premise that public proceedings can't be conducted remotely unless certain requirements were met (including a physical quorum, the public being able to hear remote participants, and removing voting power from remote participants when a quasi-judicial vote is being taken, etc.). The group also discussed including a provision for grandfathering prior statutory provisions for remote participation. There was some discussion of inviting stakeholder input, but the group ultimately abandoned this as premature.

Several members of the group discussed the need to address the concerns raised in the Governor's veto message of LD 1809. Ms. Meyer thought the main point of contention was the bill's application to only a few specified agencies and that a policy that applied statewide would be sufficient to address the Executive Branch concerns, noting that LD 258 would meet this requirement. Some members suggested soliciting input from the Governor's Office regarding its position on legislation similar to LD 258.

Mr. Parr suggested a contrary interpretation of the Governor's veto letter, positing that any bills premised on the idea that legislative authorization was needed would be objected to, that the Governor's stance seemed to be that this legislative authorization was not needed at all, and therefore legislation modeled after LD 258 stood no better chance of approval.

Sen. Burns asked Ms. Kielty, the Public Access Ombudsman, to weigh in on the remote participation issue in regards to FOAA. Ms. Kielty replied that given the underlying purpose of FOAA, that actions and deliberations are taken openly and publicly, the current FOAA mechanisms are not adequate to ensure this openness when there is remote participation by members of public bodies. FOAA needs to adapt and mature to ensure that this new situation meets the public policy aim of FOAA. She is supportive of updating FOAA to accommodate remote participation, but also likes the idea of giving local bodies the option to set their own policies in this regard, with FOAA being the baseline/default.

The group's consensus was to draft new legislation, similar to LD 258, and then seek input from the Governor's Office on that proposed legislation. After some discussion, the group members agreed to each answer a series of questions (8-10) posed over email by staff covering the various policy considerations addressed in prior legislation (e.g., whether/when elected members must be physically present, what constitutes a quorum, whether specific reasons would be required before remote participation, etc.). This feedback will be compiled by staff and used to guide the discussions around forming new legislative recommendations in this area in the Advisory Committee's next meeting.

Relief from abusive/burdensome FOAA requests

Staff related the history of actions since the Advisory Committee discussions in 2013 concerning mechanisms to provide public agencies certain relief from overly burdensome or abusive FOAA requests. Those discussions developed recommended legislation to provide a cause of action for public bodies to seek injunctive relief through the courts in cases of abusive/burdensome Freedom of Access Act (FOAA) requests. This legislation was rejected by the Judiciary

Committee in the Second Regular Session of the 126th Legislature at least in part because of concerns raised by the Judicial Branch around implementation of the new judicial standard. The Advisory Committee redrafted this recommended legislation, and it returned to the 127th Legislature as LD 1086 and was subsequently enacted into law and codified at 1 M.R.S. §408-A, sub-§ 4-A.

Staff next provided a summary of what other states are doing to address this issue, and highlighted a few notable examples. Sen. Burns remarked that states' responses to this issue were quite varied. Mr. Pringle noted that the larger issue of relief from burdensome requests has been wrestled with by the Advisory Committee in one form or another for the last 10 years. For example, the \$15 per hour fee an agency is permitted to charge for staff time beyond one hour was settled on as a reasonable balance between the competing interests of the agencies and the requesting public.

There was discussion about whether the requirements of the new law (LD 1086) may be too burdensome for an agency. Mr. Parr favorably referenced the model used in some other states that permit an agency, after a certain time threshold was breached, to charge actual labor costs for staff time, as well as other costs. He also noted that the amount of time an agency spends on certain burdensome requests leaves less time to fulfill other requests. Ms. Meyers expressed her hesitancy to go full bore on something new before there was time to see how the new injunction provision was working out in practice.

Several members agreed that the distinction between commercial and noncommercial was almost nonexistent. Mr. Rossignol expressed concern that agencies at times may be using an estimated cost to deter would-be requestors.

The group reached a consensus to not move ahead on any new action in this area.

Public Access Ombudsman's proposed new "FAQs" for website

Ms. KIELTY addressed the Advisory Committee, providing advance copies of her proposed updates to the FAQ section of the public website her office maintains. The changes are being made to accommodate FOIA amendments from the prior legislative session. Committee members voiced no issues or concerns with the new language.

Summary of November 13, 2015 meeting

[***INSERT***]

VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN NINTH ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its ninth annual report. The actions taken in 2015 as a result of those recommendations are summarized below.

<p>Recommendation: Enact legislation adding an IT professional to the Right to Know Advisory Committee</p>	<p>Action: The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee to expand the membership of the Right to Know Advisory Committee to add a member experienced in information technology issues in Part A of <i>LD 1088, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. Governor LePage vetoed LD 1088 as amended, but the veto was overridden (<i>see veto letter in Appendix F</i>).</p>
<p>Recommendation: 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</p>	<p>Action: The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee in Part B of <i>LD 1088, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. Governor LePage vetoed LD 1088 as amended, but the veto was overridden (<i>see veto letter in Appendix F</i>).</p>
<p>Recommendation: Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A, and repeal the Community Right-to-Know Act</p>	<p>Action: The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee to amend or repeal the existing public records exceptions in Title 26 through 39-A, and repeal the Community Right-to-Know Act, in Part C of <i>LD 1088, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. The Judiciary Committee amendment struck the proposed amendment to Title 29-A, section 152, sub-section 3, which affected a requirement that the Secretary of State adopt rules regarding confidential data processing information, but otherwise accepted the Advisory Committee’s recommendations. Governor LePage vetoed LD 1088 as amended, but the veto was overridden (<i>see veto letter in Appendix F</i>).</p>
<p>Recommendation: Establish a process for continuing the review of public records exceptions</p>	<p>Action: The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee to establish a process for continuing the review of public records exceptions in Part D of <i>LD 1088, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. Governor LePage vetoed LD 1088 as amended, but the veto was overridden (<i>see veto letter in Appendix F</i>).</p>
<p>Recommendation: Enact legislation to address deadlines and appeals under the Freedom of Access Act</p>	<p>Action: The Judiciary Committee voted “Ought to Pass as Amended” on the Advisory Committee’s recommendation to address deadlines and appeals under the Freedom of Access Act in Section 2 of <i>LD 1085, An Act to Implement the</i></p>

	<i>Recommendations of the Right to Know Advisory Committee Concerning Receipt of a Request for Public Records, and in Section 2 of LD 1087, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Response Deadlines and Appeals. Governor LePage allowed LD 1085 as amended to become law without his signature. Governor LePage vetoed LD 1087 as amended, but the veto was overridden (see veto letter in Appendix F).</i>
Recommendation: Enact legislation to clarify the date of receipt of a request for public records	Action: The Judiciary Committee voted “Ought to Pass as Amended” on the Advisory Committee’s recommendation to clarify the date of receipt of a request for public records in <i>LD 1085, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Receipt of a Request for Public Records</i> . Governor LePage allowed LD 1085 to become law without his signature.
Recommendation: Enact legislation to provide government relief from unduly burdensome or oppressive public records requests	Action: The Judiciary Committee voted “Ought to Pass as Amended” on the Advisory Committee’s recommendation to clarify the date of receipt of a request for public records in <i>LD 1086, An Act to Implement the Recommendations of the Right to Know Advisory Committee to Create A Remedy for Unduly Burdensome and Oppressive Requests</i> . Governor LePage vetoed LD 1086 as amended, but the veto was overridden (see veto letter in Appendix F).

VII. RECOMMENDATIONS

Arising from its activities and discussions in 2015, the Advisory Committee makes the following recommendations in this, its Tenth Annual Report.

Enact legislation authorizing the use of technology to permit remote participation in public proceedings

The Advisory Committee recommends the enactment of legislation to authorize bodies subject to the Freedom of Access Act, except bodies composed of elected members, to permit remote participation by members in those meetings. The Advisory Committee has made similar recommendations in its recent prior reports.

See draft legislation in Appendix C.

See additional materials in [Appendix E](#) for a copy of LD 258, LD 1809, the Judiciary Committee’s majority amendment to LD 1809, Governor LePage’s veto letter for LD 1809, LD 1241 and the Judiciary Committee’s majority amendment to LD 1241.

❑ Continue without modification, amend or repeal the existing public records exceptions enacted after 2004 and before 2013

As required by law, the Advisory Committee reviewed existing public records exceptions enacted after 2004 and before 2013. 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 enacted after 2004 and before 2013 be continued without modification.

- ◆ Title 1, section 402, subsection 3, relating to geographic information regarding recreational trails on private land held by the Department of Inland Fisheries and Wildlife and the Department of Agriculture, Conservation and Forestry
- ◆ Title 1, section 538, subsection 3, relating to InforME subscriber information
- ◆ Title 4, section 1806, relating to certain information and records in the possession of the Maine Commission on Indigent Legal Services
- ◆ Title 5, section 90-B, subsection 7, relating to the Address Confidentiality Program administered by the Secretary of State
- ◆ Title 5, section 17057, subsection 3, relating to home contact information of Maine Public Employees Retirement System members, benefit recipients and staff
- ◆ Title 5, section 17057, subsection 4, relating to Maine Public Employees Retirement System private market investment activity
- ◆ Title 5, section 17057, subsection 5, relating to Maine Public Employees Retirement System employees personal and complaint and disciplinary information
- ◆ Title 7, section 1052, subsection 2-A, relating to total potential acreage of genetically modified crops reported by individual manufacturers to the Department of Agriculture
- ◆ Title 8, section 1006, subsection 1, paragraph A, relating to trade secrets information or records required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 1, paragraph B, relating to information or records required by the Gambling Control Board for issuance of a gambling license that if released would constitute an unwarranted invasion of personal privacy of a key executive, gaming employee or another individual included in a gambling license application
- ◆ Title 8, section 1006, subsection 1, paragraph C, relating to key executive or gaming employee compensation information or records required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 1, paragraph D, relating to financial, statistical and surveillance information related to the applicant required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 1, paragraph E, relating to records that contain an assessment by a person who is not employed by the board or the department of the creditworthiness, credit rating or financial condition of any person or project required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 1, paragraph F, relating to information obtained from other jurisdictions designated as confidential by the jurisdiction from which it is obtained and that must remain confidential as a condition of receipt required by the Gambling Control Board for issuance of a gambling license

- ◆ Title 8, section 1006, subsection 1, paragraph G, relating to information that is designated confidential under federal law whether obtained from federal authorities or provided to the board or department by an applicant, licensee or key executive required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 1, paragraph H, relating to birth dates, social security numbers, home addresses and telephone numbers, passport numbers, driver's license numbers, fingerprints, marital status, family relationships and support information, health status, personal financial records and tax returns of any individuals required by the Gambling Control Board for issuance of a gambling license
- ◆ Title 8, section 1006, subsection 3, relating to records and information developed as part of a suitability requirement to select an operator of a central site monitoring system, held by the Gambling Control Board and the Department of Public Safety
- ◆ Title 8, section 1006, subsection 4, relating to financial, statistical and surveillance information from the central site monitoring system held by the Gambling Control Board and the Department of Public Safety
- ◆ Title 8, section 1007, subsection 2, relating to information or records received by the Gambling Control Board or Department of Public Safety from another agency pursuant to agreement
- ◆ Title 8, section 1008, relating to information or records used or produced by the Gambling Control Board or Department of Public Safety in connection with hearings, proceedings or appeals pursuant to Title 8, section 1052
- ◆ Title 8, section 1052, relating to reports, information or records compiled by the Gambling Control Board and Department of Public Safety concerning noncompliance with or violation of the chapter by an applicant, licensee, owner or key executive
- ◆ Title 8, section 270-A, relating to records and information included in application or materials required for issuance of commercial track license by the Department of Agriculture
- ◆ Title 9-A, section 6-105-A, relating to information concerning uniform multistate licensing system provided to Consumer Credit Protection by other jurisdictions and administered by the Department of Professional and Financial Regulation
- ◆ Title 22, section 1494, relating to occupational disease reporting information held by the Department of Health and Human Services

The Advisory Committee recommends that the following public records exceptions be amended.

- ◆ Title 20-A, section 13004, subsection 2-A, relating to relating to complaints, charges and accusations concerning certification and registration of educational personnel

[Explanation of amendment]

See draft legislation in Appendix D.

VIII. FUTURE PLANS

In 2016, 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 enacted after 2004 and before 2013. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

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APPENDIX A

Authorizing Legislation: 1 MRSA §411

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APPENDIX B
Membership List

APPENDIX C

Recommended Draft Legislation: Remote participation by members of public bodies

APPENDIX D

Recommended Draft Legislation: Amend Title 20-A, section 13004, subsection 2-A relating to complaints, charges and accusations concerning certification and registration of education personnel

APPENDIX E

Remote participation legislation: LD 258, LD 1809, Judiciary Committee's majority amendment to LD 1809, Governor LePage veto letter for LD 1809, LD 1241 and Judiciary Committee's majority amendment to LD 1241

APPENDIX F

Governor LePage veto letter for LD 1088, “An Act to Implement Recommendations of the Right to Know Advisory Committee”

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APPENDIX G

Additional Materials (???)