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Fifth Annual Report of the RIGHT TO KNOW ADVISORY COMMITTEE

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EXECUTIVE SUMMARY

This is the fifth 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 2010, the Advisory Committee met four times: May 25, September 23, October 21 and November 18; and scheduled a meeting for November 30 for which a quorum was not available. This year, the Advisory Committee reorganized its Subcommittee structure and appointed three Subcommittees: Legislative, Public Records Exceptions and Bulk Records. All three Subcommittees held meetings and made recommendations to the Advisory Committee.

The Advisory Committee was very fortunate to have the services of two Legal Externs of the Maine School of Law. Mariya Burnell, who received her *Juris Doctor* from the Law School in May 2010, provided research and reports to the Advisory Committee during the Second Regular Session of the 124th Legislature. Sean O'Mara, currently a third year student at the Law School, worked with the Advisory Committee during the first semester of the 2010-2011 school year.

The report also includes a brief summary of the legislative actions taken since January 2010 in response to the Advisory Committee's recommendations in its fourth annual report.

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

- ❑ **Continue without modification, amend or repeal specific existing public records exceptions in Titles 22 to 25;**

- ❑ **Amend the freedom of access statute to clearly state that all forms of communications, including electronic mail, not be used to defeat the purposes of the freedom of access laws;**

- ❑ **Retain the existing penalty provisions of the freedom of access laws;**

- ❑ **Take no action concerning the application of the freedom of access laws to partisan caucuses;**

- ❑ **Include a simple but noticeable statement on all State webpages that all aspects of communications with the State, including an individual's e-mail address, may be considered public records;**

- ❑ **Retain the Central Voter Registry System's confidentiality provisions as enacted by Public Law 2009, chapter 564;**

- ❑ **Amend the freedom of access laws to clarify that Social Security Numbers are not public records;**

- ❑ **Enact legislation to require records of public proceedings of decision-making bodies;**

- ❑ **Enact legislation to expand the scope of the review of proposed public records exceptions to include access issues;**

- ❑ **Make improvements to the State's freedom of access website www.maine.gov/foaa; and**

- ❑ **Support establishment of a project to provide freedom of access services to the public.**

In 2011, 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 the public records exceptions in Titles 22 through 25. It will continue the process of reviewing the existing public records exceptions contained in Titles 22 through 25; will receive and make recommendations on draft legislation from the Criminal Law Advisory Commission regarding the Criminal History Record Information Act; will continue the development of uniform standard drafting templates for statutes that protect information filed in seeking technical or financial assistance from the State; will continue to seek a balance in setting standards for participation in public proceedings via use of technology; and will revisit the application of the freedom of access laws as they relate to bulk records requests. If concerns about protecting personal information included in communications with elected officials are not resolved by the Legislature, the Advisory Committee will also reopen consideration of that issue and try to establish a policy that appropriately balances privacy concerns and expectations with the public's interest in communications with elected officials. The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fifth annual report.

A special note of thanks to Christopher Spruce for his dedication to the Right to Know Advisory Committee during his tenure. It was Chris's enthusiasm and perseverance that gave structure to the process to review existing public records exceptions, and his sense of humor that carried us through. The Advisory Committee wishes him well in his next endeavors.

I. INTRODUCTION

This is the fifth 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. Barry Hobbins Chair	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Rep. Dawn Hill	*House member of Judiciary Committee, appointed by the Speaker of the House*
Shenna Bellows	*Representing the public, appointed by the President of the Senate*
Karla Black	*Representing State Government interests, appointed by the Governor*
Robert Devlin	*Representing county or regional interests, appointed by the President of the Senate*
Sheriff Mark Dion	*Representing law enforcement interests, appointed by the President of the Senate*
Richard Flewelling	*Representing municipal interests, appointed by the Governor*
James T. Glessner	*Member of the Judicial Branch*
Suzanne Goucher	*Representing broadcasting interests, appointed by the Speaker of the House*
A.J. Higgins	*Representing broadcasting 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*
Judy Meyer	*Representing newspaper publishers, appointed by the Speaker of the House*

Kelly Morgan	*Representing newspapers and other press interests, appointed by the President of the Senate*
Linda Pistner	*Attorney General's designee*
Harry Pringle	*Representing school interests, appointed by the Governor*
Chris Spruce[1]	*Representing the public, appointed by the Speaker of the House*

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

By law, the Advisory Committee must meet at least four times per year. During 2010, the Advisory Committee met four times: May 25, September 23, October 21 and November 18; and scheduled a meeting for November 30 for which a quorum was not available. Subcommittee meetings were held on June 28, July 12, 21 and 19, August 30, September 23 and 27, October 18 and 27, and November 18 and 24. All of the meetings were held in the Judiciary Committee Room or the Legal and Veterans' Affairs Room of the State House 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 also established a webpage that can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas, summaries of the meetings and other information are included on the webpage.

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;

[1] Chris Spruce resigned from the Advisory Committee effective November 4, 2010.

- 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.

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. During 2010, the Advisory Committee identified only one decision (Superior Court) and one pending case (Superior Court) on freedom of access issues.

2010 Maine Court Opinions involving Maine's freedom of access laws

- MacImage of Maine LLC. v. Androscoggin County et al. (Me. Super. Crt., Cumb. Cty., December 22, 2009 and August 3, 2010) (Warren, J.) After the court's decision in MacImage of Maine, LLC. v. Hancock County et al. (2009), MacImage brought a freedom of access suit against 12 additional counties seeking access to the computer database of records maintained by each county's registry of deeds. MacImage, believing the requests were not being timely fulfilled made two motions, one for a Temporary Restraining Order ("TRO") and Preliminary Injunction and a second for an expedited trial de novo and an order specifying the future course of the proceedings. Motions to dismiss were filed by 10 counties and the two remaining counties filed a motion for summary

judgment (but the time for MacImage to oppose the summary judgment motion had not expired at the writing of the court order). The court denied the MacImage motion for a TRO; ruled that MacImage's motion for preliminary injunction should be consolidated with the trial on the merits; reserved its decision on MacImage's motion for an expedited scheduling and specification of the future course of the proceedings until all parties had an opportunity to be heard; and denied the counties' pending motions to dismiss.

In the court order dated August 3, 2010, the court denied the motion for summary judgment put forth by Franklin County and Sagadahoc County on the grounds that "in recording and indexing deeds, mortgages, and other land records, the county registries are engaged in the transaction of public or governmental business." On MacImage's motion for a partial summary judgment, the court recognized the defendants who requested a stay or continuance in order to provide further responses limited to the "public records" issue. MacImage's renewed motion for a TRO and Preliminary Injunction was denied.

The trial on the merits began Monday, October 4, 2010. At the time of the trial, six defendants remained: Androscoggin, Aroostook, Cumberland, Knox, Penobscot, and York counties. Issues reserved for trial include, but are not limited to, the following: (a) reasonableness of the fees charged by the registries; (b) cost and feasibility of MacImage's proposed method of access to electronic registry information; (c) whether any portion of MacImage's requests are exempt under Title 1, section 402, subsection 3, paragraph M; and (d) the form and availability of any relief, if MacImage prevails.

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 2010. Three Subcommittees were appointed: 1) Legislative; 2) Public Records Exceptions; and 3) Bulk Records. Senator Hobbins and Representative Hill, 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 concerning issues affecting public records and public access. Christopher Spruce served as chair of the Subcommittee and the following serve as members: Shenna Bellows, Karla Black, Robert Devlin, Richard Flewelling, Mal Leary, Judy Meyer, Kelly Morgan, Linda Pistner and Harry Pringle. Ms. Meyer chaired the Subcommittee after Mr. Spruce's resignation.

During 2010, the Legislative Subcommittee held six meetings. The Subcommittee was charged with several specific tasks.

- Examine use of communication technologies to ensure that decisions are made in proceedings that are open and accessible to the public

LD 1551, An Act To Further Regulate the Communications of Members of Public Bodies, proposed restrictions on the use of e-mail and other communication technologies by members of public boards and commissions. The Right to Know Advisory Committee grappled with the same issue throughout 2009 and came to the conclusion that the law is clear in requiring that decision-making be carried out in public. Guidance to that effect was added as part of the Frequently Asked Questions section of the State's freedom of access webpage. The Judiciary Committee amended LD 1551 to direct the Advisory Committee to take up the issue again, requiring the Advisory Committee to examine and report recommendations concerning how the freedom of access laws can appropriately address the use of communication technologies, both existing and those to be developed in the future, and to ensure that decisions are made in proceedings that are open and accessible to the public. (See Resolve 2009, chapter 171.)

The Legislative Subcommittee reviewed other states' efforts to legislate in response to similar concerns and discussed constitutional limitations on restrictions of communications, as well as the need for public servants to be well-informed and to be active participants in their communities. The Subcommittee determined that the central concern was to make it clear that any type of communication among members of a public body that occurs outside of a public meeting is prohibited if it circumvents the purposes of the freedom of access laws: Deliberations be conducted openly, and actions be taken openly. The Subcommittee recommended to the full Advisory Committee that the freedom of access policy section be amended to clearly state that outside communications may not be used to defeat the purposes of the chapter.

See discussion of Advisory Committee recommendations in Section VII.

- Consideration of revision of penalties for violations of the freedom of access laws

The Legislature charged the Right to Know Advisory Committee with examining whether penalties for violations of the freedom of access laws should be revised, including consideration of criminalizing violations and making the individual who violates the laws responsible for the penalty, rather than the governmental entity. (See Resolve 2009, c. 171.) There was discussion within the Legislative Subcommittee that some public officials are aware that actions must be taken in public meetings, but continue to try to carry out business in secret meetings or via e-mail or telephone calls. The argument the Subcommittee considered was that a public official who knowingly violates the freedom of access laws in these types of situations should be held personally liable for the penalty, whether it be a civil or criminal fine or other penalty. After much discussion, the Subcommittee decided to continue to support education as the most effective method to ensure compliance with the laws and not amend the existing penalty provision; two Subcommittee members continue to support establishing more significant sanctions and having the option of penalizing individuals who knowingly violate the law, instead of just governmental entities, in order to emphasize the importance of the public's right to records and public proceedings.

- Whether partisan party caucuses should be specifically excluded from the definition of "public proceedings"

The question of whether partisan caucuses, of the State Legislature as well as of local government, are public has been discussed on many occasions. The Judiciary Committee thought it might be appropriate to state definitively in the law whether partisan caucuses fell within the definition of "public proceedings," and asked the Right to Know Advisory Committee to look at the issue. (See Resolve 2009, chapter 171.)

The Legislative Subcommittee reviewed materials prepared by the National Conference of State Legislatures on how caucuses are treated across the country. Although there was interest in stating that caucuses must be open, at least on the legislative level, the Subcommittee members were fully cognizant of the inherent authority of the Legislature to govern its own proceedings, and chose not to recommend including or excluding partisan caucuses from the definition of "public proceedings."

- Protection of private information contained in e-mail and other forms of communication that are sent and received by public officials, particularly communications between elected public officials and their constituents

LD 1802, An Act To Exempt Personal Constituent Information from the Freedom of Access Laws proposed to exempt from the definition of "public records" any communication between a constituent and an elected official if the constituent expects it to be confidential or if it contains certain personal information. Instead of enacting the proposal, the Legislature directed the Right to Know Advisory Committee to examine issues relating to the protection of private information contained in electronic and other communications that are sent and received by public officials, particularly communications between elected public officials and their constituents. The Advisory Committee was also directed to consider confidentiality requirements related to Legislators' oversight responsibilities, as well as appropriate warnings for public officials to provide with regard to communications that are or may be public records. (See Resolve 2009, chapter 184.)

The Legislative Subcommittee reviewed statutes from other states that protect the e-mail and other communications of legislators. After much discussion and several drafts, the Subcommittee submitted to the Advisory Committee draft language that protected as confidential information contained in communications by or to public officials if the information: 1) was already designated as exempt from the definition of public records; 2) was designated as confidential by statute; or 3) would be confidential in the hands of another public agency. The Advisory Committee did not reach consensus on the draft and recommitted it to the Legislative Subcommittee. At the same time, the Advisory Committee supported the Legislative Subcommittee's recommendation that a simple but noticeable statement be included on all State webpages indicating that all aspects of communications with the State may be considered public records.

At the Advisory Committee's request, the Legislative Subcommittee met a second time in November to try to come to agreement on language to address the concerns about private information shared with elected officials by constituents. The members debated the merits of a version narrower than the last draft, limiting the exception to information in communications between elected officials and constituents that meets certain criteria. The existing laws governing the confidentiality of public employees' personnel records influenced the selection of the criteria, with a general inclusion of personal information that would be confidential in the possession of another agency or official. The Subcommittee members voted 4-2 to send the proposal to the full Advisory Committee for discussion.

The Advisory Committee was scheduled to meet on Tuesday, November 30, 2010, to consider the recommendation. The Advisory Committee was unable to convene because a quorum was not present. The draft legislation supported by a majority of the Legislative Subcommittee is included as Appendix D.

- Policy on whether e-mail addresses are public records

During the Second Regular Session of the 124th Legislature, the Judiciary Committee was asked pursuant to Title 1, section 434 to review language that proposed to designate as confidential the e-mail addresses of customers and licensees of the Department of Inland Fisheries and Wildlife who engaged in online transactions with the Department. The Legislature did not enact an exemption, but the Judiciary Committee asked the Right to Know Advisory Committee to discuss the issue in depth and report back with any recommendations.

The Legislative Subcommittee discussed whether the e-mail addresses of persons engaging in transactions with the government should remain public records as they exist under current law. The Subcommittee looked at other states' laws that protect such information from public access, collected comments from state and local government officials and debated the issue at length. The Subcommittee recommended no change in the current law; however, at least one member, concerned that such a conclusion is not consistent with the public's expectations when they transact business with the State or otherwise communicate with public officials online, would recommend protecting e-mail addresses from release to the public. The issue was raised as to whether a person's e-mail address is really part of the government's process of conducting business, which is what the freedom of access laws are intended to make transparent and accessible. The Subcommittee's recommendation for a notice on websites about the public nature of communications applies to e-mail addresses as well. The Subcommittee recommended that each State agency post a disclaimer on its website that indicates that a person's e-mail address may be a public record.

See discussion of Advisory Committee recommendations in Section VII.

- Examine Central Voter Registry System confidentiality provisions

The Legal and Veterans' Affairs Committee considered *LD 1627, An Act To Improve Access to Data in the Central Voter Registration System*, which rewrote the provisions governing the protection of information in the Central Voter Registration System (CVR). The Judiciary Committee and the Advisory Committee have been involved in reviewing the statutory confidentiality provisions for several years because the entire database is designated confidential, with limited, carefully crafted exceptions to that confidentiality. Upon the enactment of LD 1627 as Public Law 2009, chapter 564, the Judiciary Committee asked the Advisory Committee to review the CVR System revision to ensure that it embodies an appropriate departure from the usual declaration that all governmental records are public, with few, if any, specified exceptions.

The Legislative Subcommittee reviewed the information provided by the Legal and Veterans' Affairs Committee staff as well as the Secretary of State's Office and found that the law is meticulous in identifying which information is available to specified requestors. The Subcommittee concluded that the law strikes an appropriate balance between providing information to ensure the integrity of the voting process and the need to protect privacy and not create a disincentive to register and vote. The Subcommittee recommended no change to the current law.

- Examine protection of Social Security Numbers

The Advisory Committee has been studying the treatment of Social Security Numbers (SSNs) in public records from almost the inception of the Advisory Committee. In 2009, the Advisory Committee developed legislation that would phase in prohibition of collection of SSNs except when required by law, along with specified processes for ensuring that those SSNs appropriately collected are protected from public access. The Advisory Committee chose not to recommend the draft, based mostly on the comments received from various State agencies that believed the proposal was unworkable with present systems.

The Legislative Subcommittee, after much discussion, recommended that the law be amended to simply state that SSNs are not public records. This allows records custodians to redact SSNs when they appear in otherwise public records. The Subcommittee recognized that the draft may not affect the responsibilities of Registers of Deeds with regard to protecting SSNs that are part of records filed with the Registries.

The Bulk Records Subcommittee also considered the proposed recommendation concerning SSNs and was not comfortable recommending the change without further input from agencies. (See *Bulk Records Subcommittee* discussion.)

See discussion of Advisory Committee recommendations in Section VII.

- Examine the use of technology in attending meetings

The Advisory Committee developed draft legislation in 2009 to specifically address public bodies holding meetings using conference call or other communications technology. There is concern that current law does not allow members who are not physically present to be counted as part of the quorum or to vote. Four entities have special language in their statutes enabling meetings among members that are located in different places at the time of the meeting:

- Finance Authority of Maine (FAME), 10 MRSA section 971;
- Commission on Governmental Ethics and Election Practices, 21-A MRSA section 1002;
- Emergency Medical Services Board, 32 MRSA section 88, subsection 1, ¶D; and
- Workers' Compensation Board, 39-A MRSA section 151, subsection 5.

The Legislative Subcommittee revised the draft developed in 2009 and proposed amendments to the statutes of the four entities to make the proposed language apply to them in most situations. Comments from three of the four entities were received, raising legitimate concerns about the draft language. Because of these concerns, the Advisory Committee voted to postpone making recommendations, allowing more time to work with the public bodies who believe the proposed draft would be detrimental to their ability to carry out their functions.

- Revisit the recommendation to require records of public proceedings

In 2009, the Right to Know Advisory Committee recommended, although not unanimously, that records be kept of all public proceedings. *LD 1791, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Records of Public Proceedings* was heard and discussed by the Judiciary Committee. Citing a few significant concerns, the Judiciary Committee instead reported out a resolve directing the Advisory Committee to revisit the issue. (See Resolve 2009, chapter 186.)

The Legislative Subcommittee reviewed the prior materials on requirements for records of public proceedings and developed a draft that addressed the Judiciary Committee's concerns about the contents of the record and the consequences for failure to make and maintain a record. On the advice of the Legislative Policy Committee of the Maine Municipal Association, the full Advisory Committee considered draft language that included imposing the requirement on only those public bodies that have actual decision-making authority, as opposed to committees that function in only an advisory capacity.

See discussion of Advisory Committee recommendations in Section VII.

- Examine the scope of process to review proposed public records exceptions

During the Second Regular Session of the 124th Legislature, the Judiciary Committee reviewed, ostensibly under Title 1, section 434, a proposed change in the fee structure for copies of specific

public records. The Judiciary Committee reluctantly came to the conclusion that the statute requiring the review did not include criteria for proposals that may deleteriously affect public access to public records without designating anything as confidential. The Judiciary Committee requested the Advisory Committee to consider the review criteria and make any recommendations appropriate to ensure public access to public records.

The Legislative Subcommittee discussed the concerns and noted that both the Advisory Committee, in its review of existing public records exceptions, and the Judiciary Committee, in its review of proposed public records exceptions, follow the specific questions listed in the statutes in reviewing and evaluating exceptions. See 1 MRSA §432 and §434. The Subcommittee developed language to include the consideration of any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

See discussion of Advisory Committee recommendations in Section VII.

- Explore expansion of mandatory freedom of access training

The Legislative Subcommittee discussed the need for expanding the training required under Title 1, section 412. One suggestion was to require training for municipal and county clerks who are appointed but have the same responsibilities as elected clerks. The Advisory Committee agreed that all employees who have to respond to public inquiries should have freedom of access training, as should their supervisors. There was no consensus to mandate training for a broader class at this point in time. The Advisory Committee did agree that there is the expectation that training is to be completed each time a public official is elected or re-elected to office.

Public Records Exceptions Subcommittee. The Public Records Exceptions 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. Shenna Bellows is the chair of the Subcommittee and the following serve as members: Karla Black, Ted Glessner, Suzanne Goucher, AJ Higgins, Linda Pistner and Christopher Spruce.

During 2010, the Public Records Exceptions Subcommittee held three meetings. The Subcommittee began its review and evaluation of all 123 public records exceptions in Titles 22 through 25 that were initially identified as requiring review. By request, the Subcommittee also reconsidered the development of appropriate standard statutory language for protected information provided in applications for government funding or technical assistance.

The Subcommittee's process of review and evaluation began by sending a questionnaire to each agency that acts as a custodian of the records listed in Titles 22 through 25. Records custodians were generous with their time in responding to the questions (the Bureau of Insurance provided 56 responses, and the Department of Health and Human Services was able to provide responses

to 28 questionnaires). The information collected provided guidance to the Subcommittee concerning the types of records and information subject to the public record exception at issue, whether the public record exception has been cited as a means for denying a request, whether the public records exception should be continued or modified, and any other persons with whom the Subcommittee should consult in its review and evaluation. Thomas Record, Senior Staff Attorney of the Bureau of Insurance, not only prepared the responses for the Bureau and met with staff, but also spent an afternoon with the Subcommittee explaining current law and how the statutes operate. Charles Soltan, an attorney representing insurance interests affected by the statutes, participated in two Subcommittee meetings as well. The Subcommittee appreciates the assistance of all the participants and the records custodians and interested persons who provided information.

The Subcommittee made recommendations on the majority of the provisions slated for review this biennium and tabled the rest, as well as the Criminal History Record Information Act and a revision of the standard drafting templates, until the Subcommittee can reconvene in 2011.

In its discussion of the Title 24-A (the Insurance Code) exceptions, the Subcommittee talked about the issue of records that are both confidential and not subject to subpoena. It was not clear whether changing the subpoena language would impact state law accreditation. States must adopt the same or substantially similar language to that in model laws to retain accreditation status. One member noted concerns about under-regulation of some of the insurance businesses and that she was uncomfortable with exceptions that are so broad and except records from subpoenas in court proceedings. Other members expressed their discomfort in amending the language, since it is not known how a change would impact accreditation, the Bureau of Insurance and consumers. Although the other members present felt comfortable with the reasons for the exception from subpoena, the dissenting member expressed that in principle she would vote against the motion to leave those exceptions with no change. The Subcommittee recommended that the Advisory Committee ask the Judiciary Committee to look at the general question of information not being subject to subpoena.

One member also recommended that all rate filings be public from the date they are filed and dissented from majority decisions to retain confidentiality until the filings are approved.

The Subcommittee discussed the issue of examinations of viatical or life settlement companies and why these reports are not made public when filed. Because the issue of life settlements has been discussed in the Legislature five years in a row, the Subcommittee voted not to recommend changes at this time, but to flag it for future review by the Insurance and Financial Services Committee. One member, again as a matter of principle, voted against the Subcommittee's recommendation for no change.

See discussion of Advisory Committee recommendations in Section VII.

Bulk Records Subcommittee. The Bulk Records Subcommittee's focus is to respond to the questions raised by the Legislature in Public Law 2009, chapter 567, section 11. Bob Devlin is

the chair of the Subcommittee and the following serve as members: Karla Black, Richard Flewelling and Judy Meyer.

During 2010, the Bulk Records Subcommittee held three meetings. The Subcommittee considered the following issues:

- Public access to databases;
- Protection of personal information that is not designated as confidential but is contained in databases that include public records;
- Reasonable costs for copies when public records are requested in bulk;
- Whether access or costs should be based on the intended or subsequent use of the information requested in bulk;
- The acceptable formats for responses to requests, including electronic and paper; and
- The appropriate role for InforME in responding to requests for public records in bulk.

The complexity of these issues related to bulk records, coupled with the pending litigation, MacImage of Maine LLC. v. Androscoggin County et al. (Me. Super. Crt., Cumb. Cty., December 22, 2009 and August 3, 2010), resulted in the Subcommittee identifying a number of questions and conclusions but no specific recommendations for policy or legislative changes at this time. Also of note is that because of the pending litigation, another working group, the Bulk Data Stakeholders Group, which was staffed by the Office of Information Technology (OIT) and was created at the request of the State and Local Government Committee, met once in June, tabled its work and then disbanded. The State and Local Government (SLG) Committee requested that OIT in the Department of Administrative and Financial Services convene the stakeholder group and include: a representative from the Maine County Commissioners Association, the Register of Deeds Association, the Maine Association of Realtors; a person representing the interests of title attorneys; a member from the Right to Know Advisory Committee; a representative from MacImage; and any other parties that were relevant and interested. The group was tasked with defining bulk data transfers, evaluating the best way to handle such requests and developing a web portal for the 18 county registry offices. Upon advice of the SLG Chairs, the group was initially suspended in July until the court case was settled. However, the court case has not yet been resolved, and the counties have been advised by their counsel not to participate in the group with John Simpson, who is the principal of MacImage. On further advice from the SLG Chairs, the Bulk Data Stakeholder Group was disbanded and all members of the SLG Committee were notified of this on November 4, 2010.

- Public access to databases
- The acceptable formats for responses to requests, including electronic and paper

The Subcommittee reviewed and discussed definitions of "bulk data" and "bulk records" and whether the public has a right to access record(s) within a database or access the entire database. The Subcommittee found that, although there are some examples of these definitions in other states' statutes and judicial rules, the provisions are scattered in individual departments and agencies and are not universally applied across any state system. Because departments and

agencies differ in how they maintain and how they disseminate public records, the idea of defining a "one size fits all" approach, again coupled with the issue being part of pending litigation, led to no specific recommendation regarding adopting definitions for "bulk records" and "bulk data" and therefore, no specific parameters for defining and responding to requests for records of a bulk nature. The Subcommittee discussed the format of public records, access to those records and what the obligations of agencies are to provide access to those records. Although agencies do not have to create documents that do not exist, they do have to provide what the requester seeks and provide it in a manner that is useable. Formats for data may be fairly standard; records are provided on disk, thumb drives, by e-mail and in paper form; however the Subcommittee learned that some county registries do not have the capacity to respond to a requester in a certain format.

Looking at public access also raised questions of security and proprietary matters, especially when data is to be provided in its original form. Also, a requester may be unable to do anything with the records - so what is an agency's obligation to decipher codes and fields and provide documentation? Who should bear the costs of translating information if it is otherwise unusable when received? These questions were raised by state and county officials. Counties contract with vendors to maintain their records from the registry of deeds, and vendors will not simply transfer documents to requesters from the vendors' programs. A separate account would have to be established, so that the transfer would not endanger the safety or integrity of the original records. Some have questioned this process as well because the documents that are released are not original or "official" registry documents, which may not satisfy the purposes for which they were requested. Furthermore, the meaning of data may be lost in the transfer, and the only one that can make sense of it is the custodial agency. Although an agency has no obligation to create new documents, again there is an expectation that a requester receive the data in the format requested if reasonable.

OIT and others are constantly looking at bulk data management and formatting changes to meet the needs of agencies. They are also constantly working on retention policies and ways to access and manipulate documents whose formats change over time. One of OIT's jobs is to ensure that its operational system is responsive to requests. There already exists an enterprise data catalog created by InforME that is free and searchable by category and key word. This service may provide a solution for simple requests for straightforward data sets. See www.maine.gov/data.

There was Subcommittee consensus that public records, bulk or otherwise, are public and should be provided to the requester in a useable form and that public records are not free – there are costs involved, which should also be reasonable.

- Protection of personal information that is not designated as confidential but is contained in databases that include public records

In the context of discussions about bulk records, the Subcommittee discussed SSNs that may be buried in public documents. The Subcommittee reviewed the recommended language of the Legislative Subcommittee that establishes that SSNs are not a public record without providing

any confidentiality protection. Although the legislative proposal appears not to impose a duty to redact on the part of departments and agencies, some members expressed an interest in hearing the potential concerns of those departments, agencies and municipalities that would be affected. Although the Legislative Subcommittee supported this change, the Bulk Records Subcommittee felt that it was premature to send a legislative recommendation to the Advisory Committee with unresolved questions. The Subcommittee discussed having a public hearing to discuss the SSN issue and hear from interested parties (public and government), but was unable to do so this interim.

- Reasonable costs for copies when public records are requested in bulk
- Whether access or costs should be based on the intended or subsequent use of the information requested in bulk

One of the first issues that the Subcommittee discussed was that of "reasonable fees" for public records, including bulk records. The Subcommittee reviewed draft language that outlined the same process for determining reasonable fees for copies as was enacted into the Register of Deeds statutes in Title 33, section 751, subsection 14 pursuant to Public Law 2009, chapter 575. The draft incorporated language like that in Title 33 into Title 1, section 408, subsection 3 dealing with payment of costs for records under the freedom of access laws. The Subcommittee solicited and received useful feedback from interested parties regarding the draft. Although some members wanted to proceed with amending Title 1, the Subcommittee ultimately decided that because the litigation involving MacImage and the counties includes the court looking specifically at the issue of what are "reasonable fees," it made sense to postpone making a recommendation. Members of the Subcommittee, as well as some interested parties, expressed concern that the current law is confusing, and amending it now with litigation pending might only add to the confusion. It makes sense to wait before recommending another statutory change, since the court's decision might undo the law and require that the Advisory Committee revisit the issue all over again.

The Subcommittee agreed to provisionally approve the proposed language as drafted but to wait to move forward pending the outcome of the court case, and suggested that the Advisory Committee's recommendations include informing the Legislature of this and suggesting that the Judiciary Committee revisit the issue of reasonable fees, if the litigation is resolved during the First Regular Session of the 125th Legislature.

The Subcommittee looked at other states' practices regarding restrictions on the use of bulk records and heard from county and state officials on this point. Some felt that public records, including bulk records, are public and once disseminated the requester should be able to use the record(s) for any purpose. Others felt that it may be appropriate to draw distinctions. A number of states do impose restrictions on use and require that the requester sign a contract or otherwise agree to certain terms of use or face penalties. Others take the approach of not restricting use of a public record. Currently, some bulk records are collected and distributed for purposes such as public safety (i.e., the sale of Secretary of State motor vehicle records to insurers), and others are collected for different purposes. The consensus of the Subcommittee appeared to be that bulk

records are to be treated like any other public records, without restrictions on use, but again with the caveat that they are not free, and that it is reasonable for custodial agencies to charge for the costs of providing the records.

- The appropriate role for InforME in responding to requests for public records in bulk

Kelly Hokkanen, who administers InforME educated the Subcommittee about InforME's Bulk Data Services. (See Appendix E.) She explained that there are different kinds of requests ranging from individual records to batches of records, whole databases and regular records updates to subscribers. Ms. Hokkanen also discussed the issue of persons who request a record under the freedom of access laws when the record is currently available for a fee under InforME. This led to further talks about what is subject to freedom of access and what is a bulk sale, and whether there should be any distinction or restrictions. The Subcommittee was not in agreement on the issues and recommends carrying this forward.

Beverly Bustin Hatheway, Register of Deeds for Kennebec County, noted that she has been looking at other states' work in the area of creating and implementing bulk data policies and concluded that it takes years to create and implement such policies.

Ms. Black, who has overseen the establishment of the State's freedom of access webpage, also recognized and thanked Ms. Hokkanen for all of her help creating the existing Maine freedom of access website at http://www.maine.gov/foaa/.

V. EXTERN PROJECTS

The Advisory Committee was very fortunate to have the services of Legal Extern, Sean O'Mara, who is a third year student at the University of Maine School of Law, during the fall semester. (General information about the externship program in is available online at: http://mainelaw.maine.edu/academics/clinical-programs/externships.html.)

Mr. O'Mara attended a number of Advisory Committee meetings and was involved in a number of projects, including the following.

- Making improvements to the State's Freedom of Access Website

Mr. O'Mara analyzed the existing website and made a number of suggestions for clarifying and simplifying the information. He met with staff and Karla Black, as well as presented his recommendations to the full Advisory Committee. Mr. O'Mara will forward his work to the Office of the Governor for changes to be updated on the existing website. (See Appendix F.)

- Revising public records exceptions templates relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities

After hearing the Advisory Committee's discussion regarding the existing public records exceptions templates and the concerns of FAME, Mr. O'Mara took both FAME's existing statute and the templates created and recommended by the Advisory Committee in 2009 and combined elements to make the templates more complete and applicable for all users. Although complete revisions of the templates were not ready to go forward at the time of this report, Mr. O'Mara will finish the work for the next Advisory Committee to consider.

- Establishing a program to support the provision of freedom of access services to the public

At the request of the Advisory Committee, Mr. O'Mara researched what other states are doing in the area of providing freedom of access services to the public. Mr. O'Mara looked specifically at how law schools have become involved in providing services, and he took that information and met with representatives from the University of Maine School of Law, including the administration and the staff of the Cumberland Legal Aid Clinic, to determine if there is a place for the school to support a law student providing freedom of access services. Because of limited resources, the clinic cannot support a new program at this time. Mr. O'Mara continued to search for alternatives and discovered that the Volunteer Lawyers Project (VLP), which provides help to low-income people with civil legal problems, was willing to take on the project. Mr. O'Mara will continue to work with the VLP regarding implementing a freedom of access help-line and providing freedom of access training. Taking this approach will allow for better understanding of what the demand for these services is; if the demand exceeds five calls per month, the VLP will require additional funding. Mr. O'Mara is looking into grant money for this purpose also. The Advisory Committee looks forward to an update on the progress of this exciting project. (See Appendix G.)

VI. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN FOURTH ANNUAL REPORT (January 2010)

The Right to Know Advisory Committee made several recommendations in its fourth annual report. The actions taken in 2010 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Continue without change, amend or repeal the specified existing public records exceptions in Titles 10 to 21-A	The Judiciary Committee accepted all recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in LD 1792, enacted as Public Law 2009, chapter 567, except those relating to the Finance Authority of Maine.
Recommendation:	**Action:**
Recommend again that the teacher confidentiality	The Judiciary Committee accepted the recommendation concerning release of information about disciplinary acts by the Commissioner of Education. It is included as Section 10

provisions in Title 20-A be amended with regard to the public disclosure of actions taken by the Department of Education on credentials of public school personnel, including the grounds for actions taken	of Public Law 2009, chapter 567.
Recommendation: Amend Title 1, chapter 13 to require that a minimum record be kept of all public proceedings	**Action:** The Advisory Committee's recommendations were introduced as LD 1791. Concerns were raised about the proposal, and the issue was sent back to the Advisory Committee as Resolve 2009, chapter 186.
Recommendation: Add guidance for public officials on the use of e-mail communications outside of public proceedings to the Frequently Asked Questions section of the Freedom of Access Website	**Action:** The Frequently Asked Questions on the State's Freedom of Access webpage www.maine.gov/foaa were revised to provide more guidance about avoiding inappropriate action outside of public meetings. But see LD 1551, An Act To Further Regulate the Communications of Members of Public Bodies, which was finally passed as Resolve 2009, chapter 171, directing the Advisory Committee to take up the issue in 2010.
Recommendation: To the Health and Human Services Committee that the freedom of access laws not be amended to require hospital board meetings to be open to the public as proposed in LD 757, An Act to Improve the Transparency of Certain Hospitals	**Action:** The Health and Human Services Committee reported out LD 757 as Ought Not To Pass on January 20, 2010.
Recommendation: To the Judiciary Committee that no statutory changes be	**Action:** The Judiciary Committee did not consider any statutory changes on this issue (LD 1353 was voted Ought Not To Pass in 2009, but the issue was sent to the Right to Know Advisory

made relating to the public's access to salary information for public employees as proposed in LD 1353, An Act Concerning Salary Information of Public Employees	Committee to review and make recommendations).
Recommendation: Propose standard statutory language for use by the Judiciary Committee in reviewing proposed exceptions relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities	**Action:** The Judiciary Committee accepted the drafting templates, but chose not to support the templates as applied to the confidentiality provisions of the FAME. LD 1792 was enacted as Public Law 2009, chapter 567 without the Title 10 amendments and cross-references.
Recommendation: That the Advisory Committee continue discussion of the following issues: the use of SSNs, the use of technology in public proceedings and requests for bulk electronic data	**Action:** The Advisory Committee assigned these issues to Subcommittees in 2010 and recommendations are included in this report.

VII. RECOMMENDATIONS

During 2010, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

❑ Continue without modification, amend or repeal the following existing public records exceptions in Titles 22 through 25

As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 22 through Title 25. The Advisory Committee's recommendations are summarized below.

The Advisory Committee recommends that the following exceptions in Titles 22 through 25 be continued without change.

- Title 22, section 17, subsection 7, relating to records of child support obligors
- Title 22, section 42, subsection 5, relating to DHHS records containing personally identifying medical information
- Title 22, section 261, subsection 7, relating to records created or maintained by the Maternal and Infant Death Review Panel
- Title 22, section 664, subsection 1, relating to State Nuclear Safety Program facility licensee books and records
- Title 22, section 666, subsection 3, relating to the State Nuclear Safety Program concerning the identity of a person providing information about unsafe activities, conduct or operation or license violation
- Title 22, section 811, subsection 6, relating to hearings regarding testing or admission concerning communicable diseases
- Title 22, section 815, subsection 1, relating to communicable disease information
- Title 22, section 824, relating to persons having or suspected of having communicable diseases
- Title 22, section 832, subsection 3, relating to hearings for consent to test for the source of exposure for a blood-borne pathogen
- Title 22, section 1064, relating to immunization information system
- Title 22, section 1233, relating to syphilis reports based on blood tests of pregnant women
- Title 22, section 1317-C, subsection 3, relating to information regarding the screening of children for lead poisoning or the source of lead exposure
- Title 22, section 1494, relating to occupational disease reporting
- Title 22, section 1596, relating to abortion and miscarriage reporting
- Title 22, section 1597-A, subsection 6, relating to a petition for a court order consenting to an abortion for a minor
- Title 22, section 2153-A, subsection 1, relating to information provided to the Department of Agriculture by the US Department of Agriculture, Food Safety and Inspection Service

- Title 22, section 2153-A, subsection 2, relating to information provided to the Department of Agriculture by the US Food and Drug Administration
- Title 22, section 2425, subsection 8, paragraph A, relating to information submitted by qualifying and registered patients under the Maine Medical Use of Marijuana Act
- Title 22, section 2425, subsection 8, paragraph B, relating to information submitted by primary caregivers and physicians under the Maine Medical Use of Marijuana Act
- Title 22, section 2425, subsection 8, paragraph C, relating to list of holders of registry identification cards under the Maine Medical Use of Marijuana Act
- Title 22, section 2425, subsection 8, paragraph F, relating to information contained in dispensary information that identifies a registered patient, the patient's physician and the patient's registered primary caregiver under the Maine Medical Use of Marijuana Act
- Title 22, section 2425, subsection 8, paragraph G, relating to information that identifies applicants for registry identification card, registered patients, registered primary caregivers and registered patients' physicians under the Maine Medical Use of Marijuana Act
- Title 22, section 2425, subsection 8, paragraph J, relating to a hearing on revocation of a registry identification card under the Maine Medical Use of Marijuana Act unless card is revoked
- Title 22, section 2698-A, subsection 7, relating to prescription drug marketing costs submitted to the Department of Health and Human Services
- Title 22, section 2698-B, subsection 5, relating to prescription drug information provided by the manufacturer to the Department of Health and Human Services concerning price
- Title 22, section 3474, subsection 1, relating to adult protective records
- Title 22, section 3762, subsection 3, relating to TANF recipients
- Title 22, section 4007, subsection 1-A, relating to a protected person's current or intended address or location in the context of child protection proceeding
- Title 22, section 4008, subsection 3-A, relating to the child death and serious injury review panel
- Title 22, section 4018, subsection 4, relating to information about a person delivering a child to a safe haven
- Title 22, section 4021, subsection 3, relating to information about interviewing a child without prior notification in a child protection case
- Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman
- Title 22, section 4306, relating to general assistance
- Title 22, section 5328, subsection 1, relating to community action agencies' records about applicants and providers of services
- Title 22, section 7250, subsection 1, relating to the Controlled Substances Prescription Monitoring Program
- Title 22, section 7703, subsection 2, relating to facilities for children and adults
- Title 24, section 2302-A, subsection 3, relating to utilization review data provided by a nonprofit hospital or medical service organization
- Title 24, section 2307, subsection 3, relating to an accountant's work papers concerning a nonprofit hospital or medical service organizations

- Title 24, section 2986, subsection 2, relating to billing for forensic examinations for alleged victims of gross sexual assault
- Title 24, section 2986, subsection 3, relating to District Court hearings on storing or processing a forensic examination kit of gross sexual assault
- Title 24-A, section 414, subsections 4 and 5, relating to insurance certificate of authority audit work papers
- Title 24-A, section 796-A, relating to the proprietary business information of special purpose insurance vehicle filed with the Superintendent of Insurance
- Title 24-A, section 994, subsection 2, paragraph A, and subsection 4 relating to property and casualty actuarial report, work papers or actuarial opinion summary in possession or control of Bureau of Insurance
- Title 24-A, section 1905, subsection 1, relating to credit and investigative reports concerning insurance administrator applicants
- Title 24-A, section 1911, relating to insurance audits and examinations
- Title 24-A, section 2187, subsection 6, relating to insurance fraud reporting
- Title 24-A, section 2204, subsection 4, relating to insurance investigative information (definition)
- Title 24-A, section 2384-B, subsection 8, relating to workers' compensation insurance rating concerning claims and self-insurance
- Title 24-A, section 2384-C, subsection 7, relating to workers' compensation insurance concerning claims and self-insurance
- Title 24-A, section 2483, subsection 6, relating to the Interstate Insurance Product Regulation Commission work papers and individuals privacy and proprietary information of insurers
- Title 24-A, section 2736, subsection 2, relating to rate filings on individual health insurance policies
- Title 24-A, section 2749, subsection 3, relating to utilization review data for health insurance contracts
- Title 24-A, section 2808-B, subsection 2-A, relating to rate filings for small group health plans
- Title 24-a, section 2847, subsection 3, relating to utilization review data for group and blanket health insurance
- Title 24-A, section 4224, subsections 1 and 2, relating to quality assurance committees of health maintenance organizations
- Title 24-A, section 4228, subsection 3, relating to utilization review data for health maintenance organizations
- Title 24-A, section 4233, subsection 2, relating to health maintenance organizations work papers filed with the Superintendent of Insurance
- Title 24-A, section 4406, subsection 3, relating to delinquent insurers
- Title 24-A, section 4612-A, subsection 1, relating to information reported by the Superintendent of Insurance to the National Association of Insurance Commissioners Insurance Regulatory Information System Board
- Title 24-A, section 6715, relating to captive insurance companies information submitted to the Superintendent of Insurance

- Title 24-A, section 6907, subsection 2, relating to health information obtained by Dirigo Health covered by the federal Health Insurance Portability and Accountability Act of 1996, or c. 24, or T.22 section 1711-C
- Title 24-A, section 6907, subsection 3, relating to practitioner-specific quality data collected, used, produced or maintained for measuring the professional performance of a health care practitioner by the Maine Quality Forum
- Title 24-A, section 6907, subsection 1, relating to personally identifiable financial information obtained by Dirigo Health
- Title 25, section 1577, subsection 1, relating to the state DNA data base and the state DNA data bank
- Title 25, section 2006, relating to concealed firearms permit applications
- Title 25, section 2413, subsection 1, relating to information received under the Arson Reporting Immunity Act
- Title 25, section 2806, subsection 8, relating to proceedings of the board of trustees of the Maine Criminal Justice Academy concerning complaints of misconduct of law enforcement officers
- Title 25, section 2957, relating to Maine Drug Enforcement Agency investigative records

The Advisory Committee recommends, with one dissenting vote, that the following exceptions in Titles 22 through 25 be continued without change.

- Title 24-A, section 222, subsection 13, relating to insurance information filed with the Superintendent of Insurance concerning registration statements, tender offers, requests or invitations for tender offers, options to purchase, agreements
- Title 24-A, section 423-C, subsection 4, relating to insurance reports of material transactions
- Title 24-A, section 1420-N, subsection 6, relating to insurers and producers
- Title 24-A, section 2169-B, subsection 6, relating to insurance scoring model
- Title 24-A, section 2304-A, subsection 7, relating to insurance rate filings
- Title 24-A, section 2304-C, subsection 3, relating to physicians and surgeons liability insurance rate filings
- Title 24-A, section 2412, subsection 8, relating to insurance contracts and forms
- Title 24-A, section 4245, subsections 1 and 3, relating to health maintenance organizations accreditation survey report
- Title 24-A, section 6458, subsection 1, relating to risk-based capital standards for insurers
- Title 24-A, section 6708, subsection 2, relating to examination of captive insurance companies documents
- Title 24-A, section 6807, subsection 7, paragraph A, relating to individual identification data of viators (suggested review by Insurance and Financial Affairs Committee)
- Title 24-A, section 6818, subsections 6 and 8, relating to fraudulent viatical or life insurance settlements information provided for enforcement
- Title 25, section 2929, subsections 1, 2, 3 and 4, relating to emergency services communications

The Advisory Committee recommends a substantive statutory change to the following public records exception. (See draft legislation in Appendix C.)

- Title 24-A, section 2325-B, subsection 9, relating to mandatory property and casualty insurance market assistance program policy form and rate filings

The Advisory Committee recommends a statutory change, not intended to effect a substantive change, to the following public records exceptions in order to make confidentiality language as consistent as possible throughout the statutes. (See draft legislation in Appendix C.)

- Title 24, section 2329, subsection 8, relating to alcoholism and drug treatment patient records of nonprofit hospitals and medical service organizations
- Title 24-A, section 225, subsection 3, relating to insurance examination reports
- Title 24-A, section 226, subsection 2, relating to insurance examination reports furnished to the Governor, the Attorney General and the Treasurer of State pending final decision
- Title 24-A, section 227, relating to information pertaining to individuals in insurance examination reports
- Title 24-A, section 2323, subsection 4, relating to reports of insurers concerning loss and expense experience
- Title 24-A, section 2842, subsection 8, relating to alcoholism and drug treatment patient records for group and blanket health insurance

The Advisory Committee recommends, with one dissenting vote, a statutory change, not intended to effect a substantive change, to the following public records exceptions in order to make confidentiality language as consistent as possible throughout the statutes. (See draft legislation in Appendix C.)

- Title 24-A, section 952-A, subsection 4, relating to actuarial opinion of reserves

The Advisory Committee recommends that the following statutory sections be repealed as the entire sections are no longer necessary. (See draft legislation in Appendix C.)

- Title 22, section 1065, subsection 3, relating to manufacturer and distributor reports on distribution of influenza immunizing agents
- Title 24-A, section 2315, relating to information submitted to fire insurance advisory organizations

The Advisory Committee tabled consideration of the following exceptions.

- Title 16, chapter 3, subchapter 8, Criminal History Record Information Act

- Title 22, section 1555-D, subsection 1, relating to lists maintained by the Attorney General of known unlicensed tobacco retailers
- Title 22, section 1696-D, relating to the identity of chemical substances in use or present at a specific location if the substance is a trade secret
- Title 22, section 1696-F, relating to the identity of a specific toxic or hazardous substance if the substance is a trade secret
- Title 22, section 1711-C, subsection 2, relating to hospital records concerning health care information pertaining to an individual
- Title 22, section 1828, relating to Medicaid and licensing of hospitals, nursing homes and other medical facilities and entities
- Title 22, 1848, subsection 1, relating to documents and testimony given to Attorney General under Hospital and Health Care Provider Cooperation Act
- Title 22, section 2706, relating to prohibition on release of vital records in violation of section; recipient must have "direct and legitimate interest" or meet other criteria
- Title 22, section 2706-A, subsection 6, relating to adoption contact files
- Title 22, section 2769, subsection 4, relating to adoption contact preference form and medical history form
- Title 22, section 3022, subsections 8, 12 and 13, relating to medical examiner information
- Title 22, section 3034, subsection 2, relating to the Chief Medical Examiner missing persons files
- Title 22, section 3188, subsection 4, relating to the Maine Managed Care Insurance Plan Demonstration for uninsured individuals
- Title 22, section 3192, subsection 13, relating to Community Health Access Program medical data
- Title 22, section 4008, subsection 1, relating to child protective records
- Title 22, section 8707, relating to the Maine Health Data Organization
- Title 22, section 8754, relating to medical sentinel events and reporting
- Title 22, section 8824, subsection 2, relating to the newborn hearing program
- Title 22, section 8943, relating to the registry for birth defects
- Title 23, section 63, relating to records of the right-of-way divisions of the Department of Transportation and the Maine Turnpike Authority
- Title 23, section 1980, subsection 2-B, relating to recorded images used to enforce tolls on the Maine Turnpike
- Title 23, section 1982, relating to patrons of the Maine Turnpike
- Title 23, section 4251, subsection 10, relating to records in connection with public-private transportation project proposals of at least $25,000,000 or imposing new tolls
- Title 23, section 8115, relating to the Northern New England Passenger Rail Authority
- Title 24, section 2510, subsection 1, relating to professional competence reports under the Maine Health Security Act
- Title 24, section 2510-A, relating to professional competence review records under the Maine Health Security Act
- Title 24, section 2604, relating to liability claims under the Maine Health Security Act
- Title 24, section 2853, subsection 1-A, relating to action for professional negligence under the Maine Health Security Act

- Title 24, section 2857, subsections 1 and 2, relating to mandatory prelitigation screening and mediation panels
- Title 24-A, section 216, subsections 2 and 5, relating to records of the Bureau of Insurance
- Title 24-A, section 2393, subsection 2, relating to worker's compensation pool self-insurance and surcharges

The Advisory Committee also recommends that the Judiciary Committee consider a comprehensive review of the statutes that protect information not only from public access but also from access through subpoena. The Advisory Committee raises the question of whether there should be a consistent policy with regard to when information is neither publicly accessible nor available in court proceedings.

The Advisory Committee recommends that the Insurance and Financial Services Committee keep in mind that the examination reports of viatical or life settlement companies are not public records, and are therefore treated differently than all other insurance examination reports prepared by the Bureau of Insurance. Because the laws are recently amended, a review of the issue by the Insurance and Financial Services Committee in a year or two may be appropriate.

❑ **Amend the freedom of access statute to clearly state that all forms of communications, including electronic mail, not be used to defeat the purposes of the freedom of access laws**

The Advisory Committee finds that it is important to make clear that any type of communication among members of a public body that occurs outside of a public meeting is prohibited if it circumvents the purposes of the freedom of access laws. Deliberations must be conducted openly, and actions must be taken openly. The Advisory Committee recommends that the policy section be amended to clearly state that outside communications may not be used to defeat the purposes of the chapter. (See draft legislation in Appendix C.)

❑ **Retain the existing penalty provisions of the freedom of access laws**

All but two members of the Advisory Committee do not recommend any statutory change to the existing penalties provisions at this time, preferring to continue to rely on education about the rights and responsibilities under the freedom of access laws. Both members expressed strong support for more significant sanctions to emphasize the importance of the public's right to records and public proceedings.

❑ **Take no action concerning the application of the freedom of access laws to partisan caucuses**

Although some members felt in principle that caucuses should be open to the public, the Advisory Committee does not recommend any statutory change addressing whether partisan caucuses should be considered "public proceedings."

❑ Include a simple but noticeable statement on all State webpages that all aspects of communications with the State, including an individual's e-mail address, may be considered public records

The Advisory Committee recommends that all State webpages include a notice that is easily seen and understood indicating that all aspects of communications with the State, including e-mail addresses, may be considered public information. One member of the Advisory Committee believes that e-mail addresses should not be considered public records. Local governments should consider the same precautions to make their constituents aware of the possibility that information provided via the Internet may be accessible as public records. Both OIT and InforME may have important roles in implementation. The Advisory Committee will encourage State and local officials to take appropriate steps to inform the public about the nature of such communications.

❑ Retain the Central Voter Registry System's confidentiality provisions as enacted by Public Law 2009, chapter 564

The Advisory Committee is satisfied with the balance of confidentiality and public access to information contained in the CVR System and does not recommend statutory changes.

❑ Amend the freedom of access laws to clarify the Social Security Numbers are not public records

The Advisory Committee recommends that the freedom of access laws be amended to clarify that SSNs are not public records. (See draft legislation in Appendix C.)

❑ Enact legislation to require records of public proceedings

The Advisory Committee recommends enactment of a statutory requirement that a record be kept of all public proceedings for which notice is required to be given. The record can be in writing or any other medium, and is subject to the existing record retention requirements for that type of records. The information to be recorded is limited to: the date, time and place of the public proceeding; the members of the body holding the public proceeding, recorded as either present or absent; and all motions and votes taken by individual members if there is a roll call vote. Failure to make or retain the record as required does not affect the validity of any actions taken. The requirements do not apply to public bodies whose purpose is advisory only and who have no decision-making authority. (See draft legislation in Appendix C.)

❑ **Enact legislation to expand the scope of the process of reviewing proposed public records exceptions to include access issues**

The Advisory Committee recommends that the review and evaluation process for proposed public records exceptions and existing public records exceptions be expanded to include consideration of other possible limitation of access factors. These limiting factors may include costs, request procedures and timeliness of responses. (See draft legislation in Appendix C.)

❑ **Make improvements to the State's Freedom of Access Website www.maine.gov/foaa**

The Advisory Committee recommends that the State's freedom of access website be improved, based on the suggestions made by Sean O'Mara, a third-year student at the Maine School of Law, who served as an extern with the Right to Know Advisory Committee for the Fall Semester of 2010. (See Appendix F.)

❑ **Support establishment of a project to provide freedom of access services to the public**

The Advisory Committee recommends continued support of the effort to provide services concerning the freedom of access laws to the public in addition to maintaining the currently unfunded Public Access Ombudsman position within the Office of the Attorney General. Mr. O'Mara developed several options for providing these reference services. (See Appendix G.)

VIII. FUTURE PLANS

The Advisory Committee will continue with the development of revised standard drafting templates for statutes that protect information filed in seeking technical or financial assistance from the State. The redraft of the Criminal History Record Information Act prepared by the Criminal Law Advisory Commission, and the changes recommended by the Judicial Branch's Task Force on Electronic Court Records Access (TECRA) Implementation Group, should be available for review by the Advisory Committee by the beginning of 2011. Once the courts have resolved the legal questions in the MacImage case, the Advisory Committee will be better able to address the increasingly complex questions about the application of the freedom of access laws to requests for bulk records. The Advisory Committee will also continue to review issues around expanding training and education for appointed officials, as well as others who administer the freedom of access laws. The Advisory Committee will revisit the issue of enacting uniform legislation to govern the use of technology for the purpose of remote participation by members of public bodies. If concerns about protecting personal information included in communications with elected officials are not resolved by the Legislature, the Advisory Committee will reopen consideration of that issue and try to establish a policy that appropriately balances privacy concerns and expectations with the public's interest in elected officials' communications.

In 2011, the Right to Know Advisory Committee will also 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 22 through 25. The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fifth annual report.

APPENDIX A

Authorizing Legislation, 1 MRSA §411

CURRENT LAW GOVERNING RIGHT TO KNOW ADVISORY COMMITTEE

§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

Karla Black 161 Pleasant Street Richmond, ME 04357	Representing State Government Interests
Richard Flewelling P.O. Box 244 Freeport, ME 04102	Representing Municipal Interests
Harry Pringle 44 Neal Street Portland, ME 04102	Representing School Interests

Appointments by the President

Sen. Barry J. Hobbins 110 Main Street Suite 1508 Saco, ME 04072	Senate Member of the Judiciary Committee
Shenna Bellows Maine Civil Liberties Union 401 Cumberland Ave. Portland, ME 04101	Representing the Public
Robert Devlin Kennebec County Administrator 125 State Street Augusta, ME 04330	Representing County or Regional Interests
Mark Dion Cumberland County Sheriff's Department 36 County Way Portland, ME 04102	Representing Law Enforcement Interests
Kelly Morgan 90 Loggin Road Cape Neddick, ME 04072	Representing Newspapers and Press Interests
A.J. Higgins 18 West Street Manchester, ME 04351	Representing Broadcasting Interests

Appointments by the Speaker of the House

Rep. Dawn Hill P.O. Box Cape Neddick, ME 03902	House Member of the Judiciary Committee
Judy Meyer Lewiston Sun Journal 104 Park Street Lewiston, ME 04243-4400	Representing Newspaper Publishers
Suzanne Goucher Maine Association of Broadcasters 69 Sewell 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
Chris Spruce c/o Island Housing Trust P.O. Box 851 Mount Desert, ME 04660	Representing the Public

Attorney General

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

Chief Justice

James T. Glessner State Court Administrator P.O. Box 4820 Portland, ME 04112	Member of the Judicial Branch

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Staff:

Marion Hylan Barr, Margaret J. Reinsch & Carolyn Russo
Office of Policy and Legal Analysis
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APPENDIX C

Recommended Draft Legislation

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation

PART 1: Proposing Statutory Changes to Public Records Exceptions, Titles 22 - 25

Sec. 1. 22 MRSA §1065 is repealed.

Sec. 2. 24 MRSA §2329, sub-§8 is amended to read:

§2329. Equitable health care for alcoholism and drug dependency treatment

8. Confidentiality. ~~The confidentiality of all alcoholism~~ Alcoholism and drug treatment patient records ~~shall be protected~~ are confidential.

Sec. 3. 24-A MRSA §225, sub-§3 is amended to read:

§225. Examination report; contents; prima facie evidence in certain proceedings

3. All working papers, recorded information, documents and copies of any of these media produced by, obtained by or disclosed to the superintendent or any other person in the course of an examination made under this chapter ~~must be given~~ are confidential ~~treatment~~, are not subject to subpoena and may not be made public by the superintendent or any other person, except to the extent provided in sections 226 and 227. Access may be granted to the National Association of Insurance Commissioners. Any parties granted access must agree in writing prior to receiving the information to provide the information with the same confidential treatment as required by this section unless prior written consent of the insurer to which the information pertains has been obtained.

Sec. 4. 24-A MRSA §226, sub-§2 is amended to read:

§226. Examination reports; distribution, hearing; as evidence

2. If requested by the person examined, within the period allowed under subsection 1, or if determined advisable by the superintendent without such request, the superintendent shall hold a hearing relative to the report and may not file the report in the bureau until after the hearing and the superintendent's order on the report; except that the superintendent may furnish a copy of the report to the Governor, Attorney General or Treasurer of State pending final decision and, if the copies are so furnished, they are ~~deemed~~ confidential ~~information~~ until the other requirements of this section with regard to examination reports have been satisfied. In lieu of convening a hearing, the superintendent may reopen the examination or, if supported by the information obtained, may adopt some or all of the modifications proposed by the person examined.

Sec. 5. 24-A MRSA §227 is amended to read:

§227. Examination report

The report of examination of those persons, partnerships, corporations or other business associations that are subject to examination by the superintendent as provided for in sections 221 and 222 shall, upon satisfaction of the requirements of section 226 and so long as no court of competent jurisdiction has stayed its publication, be filed in the bureau as a public record, except ~~for~~ that any information relating to an individual insured or individual applicant for insurance~~, which~~ is ~~deemed~~ confidential.

Sec. 6. 24-A MRSA §952-A, sub-§4, ¶H is amended to read:

§952-A. Actuarial opinion of reserves

H. Except as provided in paragraphs K, L and M, any memorandum in support of the opinion and any other documents, materials or other information provided by the insurer to the superintendent in connection with the memorandum are confidential, must be kept confidential by the superintendent ~~and are not public records within the meaning of the freedom of access laws and~~ are not subject to subpoena or discovery, nor admissible in evidence in any private civil action. The superintendent is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the superintendent's official duties.

Sec. 7. 24-A MRSA §2315 is repealed.

Sec. 8. 24-A MRSA §2323, sub-§4 is amended to read:

§2323. Recording and reporting of loss and expense experience

4. Each insurer shall report its loss or expense experience to the lawful rating organization, advisory organization or agency of which it is a member or subscriber, but shall not be required to report its loss or expense experience to any rating organization, advisory organization or agency of which it is not a member or subscriber. Any insurer not reporting such experience to a rating organization, advisory organization or other agency may be required to report such experience to the superintendent. Any report of such experience of any insurer filed with the superintendent ~~shall be deemed~~ is

confidential and ~~shall~~ may not be revealed by the superintendent to any other insurer or other person, but the superintendent may make compilations including such experience.

Sec. 9. 24-A MRSA §2325-B, sub-§9 is amended to read:

§2325-B. Mandatory property and casualty insurance market assistance program

9. Modified policy form and rate filings. A modified policy form and modified rate developed by a member insurer must be filed with the superintendent. A modified rate to be used in connection with an existing policy form that consists solely of a permissible surcharge not in excess of the maximum allowable cap contained in rules adopted under subsection 8 may be used by a member insurer immediately upon filing that modified rate with the superintendent. For any other modified filings, a modified policy form and modified rate must be filed with the superintendent not less than 30 days in advance of the stated effective date. A modified rate filing subject to the 30-day advance filing requirement must include any supplementary rating information to be used in conjunction with a rate and, to the extent available, sufficient supporting information to support a rate. A modified rate may not be excessive, inadequate or unfairly discriminatory with respect to risks written through the program. A modified policy form may only be disapproved for the grounds specified in section 2413. All modified policy form and rate filings are confidential until ~~effective or~~ approved in accordance with applicable law.

Sec. 10. 24-A MRSA §2842, sub-§8 is amended to read:

§2842. Equitable health care for alcoholism and drug dependency treatment

8. Confidentiality. ~~The confidentiality of all alcoholism~~ Alcoholism and drug treatment patient records ~~shall be protected~~ are confidential.

PART 2: Ensuring Decisions are Made in Proceedings that are Open and Accessible to the Public

Sec. 1. 1 MRSA §401 is amended to read:

§401. Declaration of public policy; rules of construction

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be

taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.

This subchapter does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of this subchapter.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

PART 3: Keeping Records of Public Proceedings

Sec. 1. 1 MRSA §403, as amended by PL 2009, c. 240, §1, is repealed and the following enacted in its place:

§403. Meetings to be open to public; record of meetings

1. Proceedings open to public. Except as otherwise provided by statute or by section 405, all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.

2. Record of public proceedings. Unless otherwise provided by law, a record of each public proceeding for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and must be open to public inspection. At a minimum, the record must include:

A. The date, time and place of the public proceeding;

B. The members of the body holding the public proceeding recorded as either present or absent; and

C. All motions and votes taken, by individual member, if there is a roll call.

3. Audio or video recording. An audio, video or other electronic recording of a public proceeding satisfies the requirements of subsection 2.

4. Maintenance of record. Record management requirements and retention schedules adopted under Title 5, chapter 6 apply to records required under this section.

5. Validity of action. The validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required by this section.

6. Advisory bodies exempt from record requirements. Subsection 2 does not apply to advisory bodies that make recommendations but have no decision-making authority.

PART 4: Improving the Process to Review Proposed Public Records Exceptions

Sec. 1. 1 MRSA c. 13, subc.1-A first 2 lines is amended to read:

SUBCHAPTER 1-A
~~EXCEPTIONS TO~~ PUBLIC RECORDS EXCEPTIONS AND ACCESSIBILITY

Sec. 2. 1 MRSA §432, sub-§1 is amended to read:

1. Recommendations. During the second regular session of each Legislature, the review committee may report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process and the accessibility of public records. Before reporting out legislation, the review committee shall notify the appropriate committees of jurisdiction concerning public hearings and work sessions and shall allow members of the appropriate committees of jurisdiction to participate in work sessions.

Sec. 3. 1 MRSA §432, sub-§2-C is enacted to read:

2-C. Accessibility of public records. The advisory committee may include in its evaluation of public records statutes the consideration of any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

Sec. 4. 1 MRSA §434 is amended to read:

§434. Review of proposed exceptions to public records; accessibility of public records

1. Procedures before legislative committees. Whenever a legislative measure containing a new public records exception is proposed, or a change that affects the accessibility of a public record is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed exception or proposed change that affects accessibility of a public record may not be enacted into law unless review and evaluation pursuant to ~~subsection~~ subsections 2 and 2-C have been completed.

2. Review and evaluation. Upon referral of a proposed public records exception from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed exception should be enacted:

A. Whether a record protected by the proposed exception needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;

C. Whether federal law requires a record covered by the proposed exception to be confidential;

D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

H. Whether the proposed exception is as narrowly tailored as possible; and

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

2-A. Accountability review of agency or official. In evaluating each proposed public records exception, the review committee shall, in addition to applying the criteria of subsection 2, determine whether there is a publicly accountable entity that has authority to review the agency or official that collects, maintains or uses the record subject to the exception in order to ensure that information collection, maintenance and use are consistent with the purpose of the exception and that public access to public records is not hindered.

2-C. Accessibility of public records. In reviewing and evaluating whether a proposal may affect the accessibility of a public record, the review committee may consider any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

3. Report. The review committee shall report its findings and recommendations on whether the proposed exception or proposed limitation on accessibility should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

PART 5: Protecting Social Security Numbers

Sec. 1. 1 MRSA §402, sub-§3, ¶N is amended to read:

N. Social security numbers ~~in the possession of the Department of Inland Fisheries and Wildlife~~; and

APPENDIX D

Draft Legislation Concerning the Protection of Personal Information in Communications with Elected Officials (majority recommendation of the Legislative Subcommittee)

RIGHT TO KNOW ADVISORY COMMITTEE
Draft Legislation Recommended by a Majority of the Legislative Subcommittee

Sec. 1. 1 MRSA §402, sub-§3, ¶C-1 is enacted to read:

C-1. Information contained in a communication between a constituent and an elected official if the information:

(1) Is of a personal nature, consisting of:

(a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;

(b) Credit and financial information;

(c) Information pertaining to the personal history, general character or conduct of the person or any member of the person's immediate family;

(d) Complaints, charges of misconduct, replies to complaints and charges of misconduct and memoranda and other materials pertaining to disciplinary action; or

(e) An individual's Social Security number; or

(2) Would be confidential if it were in the possession of another public agency or official.

APPENDIX E

InforME Bulk Data Services

InforME Bulk Data Services Summary
July 2010

IF&W – Bulk Special Request Data:
Data available to purchase includes moose permittee data, hunting and fishing license data, boat/ATV/snowmobile registration data, and guides/trappers licensee data. These requests tend to be one-time and specific requests from folks who wish to market their business to outdoorsmen (camp owners, guides, outfitters, etc.), as well as from political candidates during election years.
Fees: $.03 - $.05 per record
Fee set by: rulemaking
Annual requests: approx 25-30
Annual records sold: approx 27,000

BMV – Bulk & Special Request Data:
Data available to purchase includes vehicle title, registration, and driver license data. In order to obtain personal information in these records (name, address, date of birth, license number), the purchaser must be eligible under the Driver Privacy Protection Act and sign an affidavit regarding their eligibility. Customers for this data vary but it is mostly national data brokers who have standing orders for monthly updates. These records are typically re-sold by those companies to insurance companies for underwriting purposes. Other customers include credit agencies and large local employers.
Fees: Entire reg, title, or license database - $.02 per record; sub-sets - $.06 per record
Fee set by: rulemaking
Annual requests: approx 300
Annual records sold: approx 7,175,000

The BMV bulk data service was part of the initial InforME SLA negotiated with the Secretary of State in 1999. SOS was unable to provide a sufficient per-record portal fee on online driver records to support the desired level of baseline portal staff, so SOS offered the bulk data service as supplementary baseline revenue to make up the difference. BMV had previously sold the bulk data themselves, at a financial loss due to staff time. When the service was moved to the portal, BMV increased the per-record fees and negotiated a flat monthly payment from InforME. This provided BMV more revenue and eliminated their staff impact. This service remains a core portion of the portal's funding.

CEC – Bulk & Special Request Corporations and UCC Data:
Data available to purchase includes corporate records, active/inactive corporations records, trademark records, trademark images, corporate/UCC images, UCC records. Standard record updates are available weekly or monthly. There are a handful of customers, primarily large national data brokers who have standing orders for updates.

Fees:
Bulk UCC and Corporate Data Full Data Monthly Data-sets

Batch Corporate & UCC Records	$600.00
Batch Active/Inactive Corporate & UCC Records	$1200.00
Batch Corporate & UCC Images	$1500.00
Batch Service/Trade Mark Records	$300.00
Batch Service/Trade Mark Images	$300.00

Bulk UCC and Corporate Data Weekly Updates Data-sets

Corporate Data	$300.00
Corporate Images	$500.00
Service/Trade Mark Data	$150.00
Service/Trade Mark Images	$150.00
UCC Data	$300.00
UCC Images	$500.00

Special Request Corporate & UCC Records $0.10 per record

Fee set by: rulemaking
Annual Requests: approx 100
Annual Records sold: n/a

State Police - Crash Reports:
Data available to purchase consists of state crash reports, including crash date, location, names, injury information, vehicle information, license status. There are just a few customers for this data, primarily large national entities that use this information for consumer protection and data broker services.
Fees: $0.50 per record
Fee set by: statute specifies that agency may set fees for crash records; fees set in rulemaking
Annual Requests: approx 25
Annual Records sold: approx 70,000

Board of Medicine – Bulk Physician Licensee Data:
Online service allows users to specific data parameters to create a downloadable file. These are typically one-time and specific requests.
Fees: $50 flat fee plus $.05 per record
Fee set by: rulemaking
Annual requests: approx 50
Annual records sold: approx 150,000

APPENDIX F

Recommendations for Improvements to the State's Freedom of Access Webpage

Website Recommendations

1. Have the questions in the Frequently Asked Questions section listed at the top and linked to the answers.
    - There are dozens of questions, some of which are rather long, so the simple process of linking the questions to the answers will make the page more accessible, as most people will probably only read a few answers.

2. Update the court opinions section.
    - Additional cases should be added to the court opinions page, including Maine Superior Court cases such as the LocatePlus.com case. Also, a sentence summarizing the main point of each case would be helpful.

3. Include a page listing what bulk information requests have been made.
    - It might be beneficial to include a listing of companies or organizations that have made bulk information requests, or include information on any inquiries made about the state of the freedom of access laws with the AG's office or the committee. This would keep the public informed about the developing status of public information and what is made available commercially.

4. Provide more detailed information about the use of social security numbers.
    - The table provided on the website listing each agency's policy towards the use and release of social security numbers is not particularly informative. It frequently lists "unwritten policies," "generally speaking," and the agency "does not make a practice of" in relation to when agencies share social security numbers. It also uses undefined acronyms such as "TIN" numbers.

5. Provide a statement of policy in regards to the use and release of social security numbers.
    - It may be helpful to develop a state default policy for the use of social security numbers and provide it on the website. The FOAA only mentions social security numbers in the Fisheries and Wildlife section of the act.

6. Provide more guidance as to which committees are not public.
    - Basically just mention that if a committee is exempted by law or executive order, that it doesn't have to be public, and give the four criteria the court established for determining if a mixed governmental/non-governmental committee should be public.

7. Clarify to whom FOA requests can be made.
    - The answers seem to indicate that they can be made only to elected officials and not appointed officials, or employees.

8. Explain the process of applying to the courts if there might be a violation.
    - Just provide a simple explanation of the process involved in filing a claim at the Superior Courts, and perhaps link to a form from the courts.

9. Correct the mention of mailing fees.
    - An answer in the FAQ section states that the statute allows the agency to charge mailing fees, but the statute doesn't mention it.

10. Provide a sample form for FOA requests.
    - The answer explains what a request should look like, but linking to a form is easy, and might eliminate confusion if someone doesn't read that part of the FAQ's.

11. Get a more visible placement for the Maine Right to Know link on Maine.gov.

- Maine Right to Know is only mentioned in the FAQ section of the Maine.gov homepage, and it isn't linked from the answer. Maybe listing it under the "How Do I" section or independently linking it on the side column would be most helpful, as most people won't know what they're looking for.

12. Add a link to the Public Meeting Calendar.

- The Public Meeting Calendar is elsewhere on the Maine.gov site and includes a listing of public meetings that people checking out Maine Right to Know would probably be interested in.

13. Provide information about InforME.

- InforME isn't mention except in the links section, despite it being the primary source of electronic public access.

APPENDIX G

Options for Delivery of Freedom of Access Services to the Public

Proposals for Freedom of Access Services

Submitted by the Maine Right to Know Extern Sean O'Mara for inclusion in the Maine Right to Know Advisory Committee Report on 12/2/2010.

Summary

This report outlines planned and potential means of supporting greater public access to government in accordance with the goals of Maine's freedom of access statutes. Increased knowledge and legal empowerment of the people of Maine would further the joined goals of greater access and accountability. The Right to Know Advisory Committee's current plan to accomplish this is to connect people to Maine attorneys through the Volunteer Lawyers Project. By providing volunteers and law students with the necessary training and supervision, the Volunteer Lawyers Project can provide freedom of access information to those who need it, legal representation from Maine lawyers when appropriate, and a measure of the need for such services in the state. The Volunteer Lawyers Project will work with the Maine Right to Know Advisory Committee, the Office of the Attorney General, and the Maine School of Law Extern to develop freedom of access services to the public that are similar to those being offered in other states.

Current Status of Freedom of Access Resources

The Maine Legislature, acting on the recommendations of the Maine Right to Know Advisory Committee, has made significant and sweeping improvements to the state's freedom of access laws. This process is on-going and includes: greater educational outreach to public officials, greater accessibility to agencies via online media, and the development of more uniform agency statutes.

These efforts are best complemented by increased awareness of the public's rights under the state statutes, particularly as these laws are amended. An educated public will better ensure the accountability of government officials. The Maine Right to Know website supports this process by providing answers to what rights are delineated in the law, but it is less effective at the point of assisting individuals with specific questions or inquiries.

The exact definition of what are "reasonable translation costs" of public records, what constitutes a "reasonable period of time" to acknowledge receipt and produce records for freedom of access requests, and questions regarding technology use in meetings are among the issues that have yet to be fully resolved. The specific situations that often form the basis of statutory interpretation are usually not easily navigated by a layperson. Moreover, an average citizen might not press his or her statutory freedom of access rights due to a lack of confidence or familiarity with the legal system.

The need for answers is illustrated by letters from constituents from around the state received by the Office of the Attorney General. While responses to these constituent letters addressing the general state of the law are helpful, the office is limited to serve only as an educational resource for these individuals.

What Other States are Doing

To address these public concerns, a few law schools in other states have stepped into the gap. For over a year, the Chicago Kent College of Law has operated the Center For Open Government. http://www.kentlaw.edu/academics/clinic/cog.html. This center responds to the calls and e-mails of citizens of Illinois. The inquiries are researched and

responded to by the three law students in the program, with all responses reviewed by the program's director.

This program was started by the efforts of two civil rights attorneys, who provided the money for the program's budget, while the school provided the overhead. These two attorneys have taken on 4-5 cases that came through the program in the year since the program started. The law students do not directly represent clients, although they are looking into that option. Currently, the law students do some of the research and help to file claims. The program's director, Terrance Norton, indicated that the steady number of inquiries and applications for representation has been increasing, and he expects them to increase more as awareness of the project grows. Journalists have made a significant number of these inquiries and applications.

In Illinois, there is also a Public Access Counselor, who writes decisions on freedom of access issues, which are binding unless appealed to the court system. Similarly, Yale Law School has created an externship where students work with media attorneys to prepare state access cases or federal freedom of information requests (FOIA) and appeals. Other schools, such as the Columbia University School of Law, have hosted open government workshops in cooperation with federal and state committees working on increased access to public information via technology.

Planned Solution for the Problem

What follows is a description of the planned solution currently being developed, as described and approved by the Maine Right to Know Advisory Committee.

In collaboration with the Volunteer Lawyers Project and the Office of the Attorney General, the Maine Right to Know Advisory Committee recommends

establishing a service to assist individuals with freedom of access issues. This service would help individuals request documents, gain access to meetings, and appeal any denial of those requests. The goal of the proposed services is to provide increased governmental accountability through educating and assisting the public with their rights under the Maine freedom of access laws.

The plan is to advertise freedom of access assistance through the Volunteer Lawyers Project. Individuals that call or send a letter, or who simply need more information about their rights under the freedom of access laws, will have information sent to them, or their questions will be forwarded to either the Attorney General's Office or to the Maine Right to Know Extern at the University of Maine School of Law. If the person calling needs legal representation in appealing a denial of access, then the Volunteer Lawyers Project will refer the person to an attorney, which necessitates the involvement of members of the state bar. Currently, participation is being sought from attorneys who are willing to consider referrals from the Volunteer Lawyers Project involving freedom of access issues. The freedom of access laws provide that attorney's fees can be awarded in certain circumstances. The Volunteer Lawyers Project has agreed to assist people up to 200% of the federal poverty guidelines in order to fit within its eligibility requirements.

The Right to Know Advisory Committee anticipates that some legal representation will be needed as this is a developing area of the law. Changes are made each year dealing with fresh challenges, such as electronic meetings and evolving privacy concerns that affect every Maine citizen. Before fundraising from government and private sources can be successful, the Advisory Committee must assess the demand for this sort

of representation. Assuming attorneys are available, the Volunteer Lawyers Project will take requests for assistance and record all inquiries, both those in which assistance was granted and those beyond 200% of the poverty level. If the number of calls exceeds five per month, the Voluntary Lawyers Project will need additional funding to support the additional resources required.

If enough attorneys respond to the request for participation, the Maine Right to Know Extern will work with the Voluntary Lawyers Project to set up the intake process and training to provide services as soon as possible. If too few attorneys respond, then additional communications to attorneys who work in related fields, including outreach at Maine Bar Association events, could be undertaken. If the need is significant, or if necessary attorney participation is not achieved, additional options can be pursued next year through applications for grant funding.

Other Potential Solutions

What follows are four potential options for programs that could take the place of or provide additional freedom of access services in the future depending on the nature of the need and available funding.

Option 1: Freedom of Access Clinic

The University of Maine School of Law could create a program similar to that of Chicago-Kent. This option would provide citizens with the possibility of representation through associated attorneys, as well as responses to their inquiries researched by the law students and reviewed by a supervisor. If money can be raised from members of the local bar, or from another source, then the clinic could have a full-time director and secretary

like Chicago-Kent's. Mr. Norton estimated the yearly budget at Chicago-Kent's clinic to be approximately $100,000.

If that level of funding is available, then the clinic could be an expansion of an existing clinic. The supervision could be provided by an attorney, a designated professor, or a supervisor in the existing clinic. Students could be authorized as student-attorneys to represent some litigants in their appeals depending on the need.

Option 2: Freedom of Access Externship

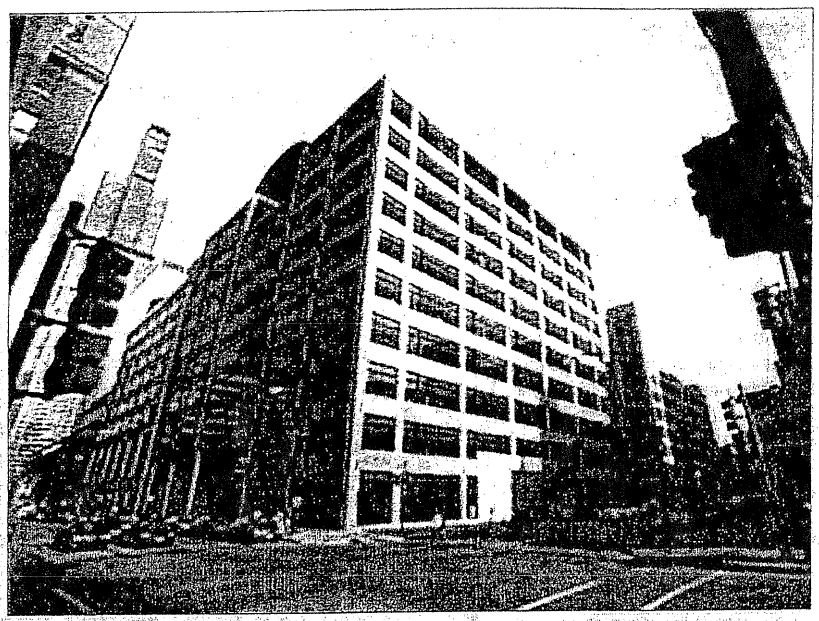
In addition to the current externship with the Right to Know Advisory Committee supervised by the Office of the Attorney General, an externship with a participating member of the local bar could be created to facilitate student representation of freedom of access requests. This option would not require additional funding, but would require a local attorney or attorneys to supervise the student-lawyer. This externship would be different than the current externship in that it would be capable of offering legal advice or assistance directly to the public.

Option 3: Freedom of Access Information Service

A member of the local bar or a law professor could supervise a law student who would conduct research and respond to requests by members of the public over a designated e-mail account. The e-mail could be listed on the Maine Right to Know website and made publicly available, with a law student drafting responses. This option would be inexpensive and would provide people with answers to their questions, but would not provide them with legal representation. This might be helpful for those who have difficulty understanding their rights under the law. Due to potential liability, this position might also be restrictive in the ability of the student to offer legal advice.

Option 4: Freedom of Access Ombudsman

The University of Maine School of Law could host a statutory freedom of access ombudsman, with student support. The position of ombudsman currently exists in a few states including Illinois and Indiana. The ombudsman would not provide legal representation but could either write binding decisions, as in Illinois, or could simply be an influential expert whose opinions do not carry legal weight but might help resolve freedom of access disputes.



Chicago-Kent College of Law runs an open government clinic.

Law schools step in to help maintain sunshine

Clinics spring up to help those who want access to government records and meetings

By Miranda Fleschert

When the District of Columbia denied WTOP Radio reporter Mark Segraves' Freedom of Information Act request for mayoral expense and travel records in February, the investigative reporter would have welcomed some assistance in appealing the denial.

"Recently it has become apparent that there is a need to litigate FOIA more now than there was before, but there just isn't the money to do that," Segraves said.

As circulations decrease and newsroom and radio station budgets dwindle, it's become increasingly difficult for news organizations to pursue what can often be protracted and expensive disputes over refused public records requests. In response, a few law schools have stepped in to guide citizens and groups through the open records process.

"Other institutions have to pick up the slack and one of the alternatives is NGOs and law schools," said Terrance A. Norton, the director of an open government clinic at Chicago-Kent College of Law.

A full-blown clinic is already up and running at Chicago-Kent College of Law. The Center for Open Government — the brainchild of Clinton Krislov, an adjunct professor and plaintiffs' class-action attorney — is a part of the school's clinical education program that helps citizens gain access to local and state government records and proceedings.

Chicago-Kent law students, with the help of supervising professors, will represent records requesters free of charge. The center will primarily handle cases dealing with violations of the state's open meetings and public records laws, which were revised earlier this year after a spate of recent state scandals that showed a lack of government transparency, according to the law school's press release.

"If laws are there for our benefit, we should be able to get all information necessary to find out what appointed and elected officials are doing with our tax dollars," Norton said.

Though the center just opened in September, students already have several cases

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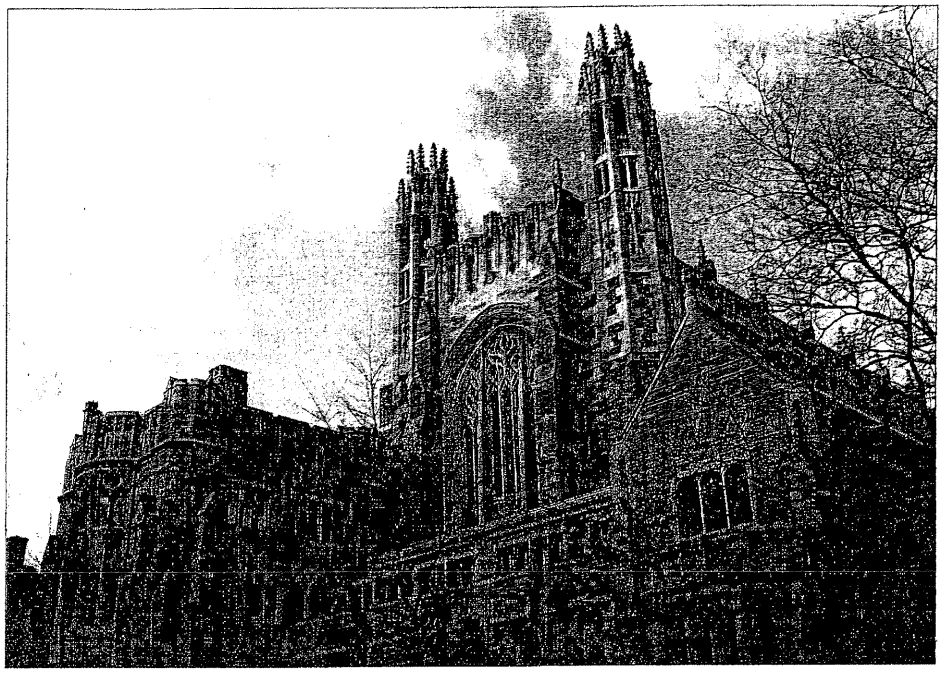
in the works. One woman from a local suburb sought help from the center after the village board of trustees, in a closed session, laid off 11 employees including her husband, a firefighter. The center will help her litigate what it argues is a violation of the state Open Meetings Act. Another client is a man seeking access to financial records from the Illinois High School Association to determine whether there are gender disparities in the funding of sports programs. IHSA, like the National Collegiate Athletic Association, has claimed it is not a public body and therefore not subject to open records laws.

Norton, a former Chicago-Kent professor who has handled open government cases for more than a decade, says that in addition to supplementing the open records lawsuits filed by media organizations, the clinic will close a gap in the nonprofit world. Eventually, it could expand to take on other issues, like whistleblower cases.



Yale Law School's program pairs students with lawyers to handle open government cases.

There are lawyers for minority groups, for those who are evicted from their homes, the developmentally disabled, victims of age discrimination, "but no lawyers to represent citizens who want to play a proper role in democracy, to move the levers of power," Norton said. "I think there is a need for citizens to have representation in whatever context."

The concept is promising, said David Tomlin, associate general counsel for the Associated Press. "Everyone is concerned now with pressure on budgets, and on personnel and staff time, that news organizations are going to do less litigating and less pursuing legal remedies in the area of First Amendment, open records and open meetings," he said. "It is clear that creative solutions are called for and this could be one of them."

Though Chicago-Kent's legal clinic is currently the only of its kind, other schools are also preparing students to litigate public records cases. At Yale Law School, students in its pracicum on media freedom, which is offered as an externship, are paired with practicing media lawyers and prepared to handle both state open government and FOIA cases at the federal level. "We are hoping it will be a really important institution for promoting media access to government information," said Jack M. Balkin, Yale's Knight Professor of Constitutional Law and the First Amendment and an adviser to the practicum.

Yale law student Nabiha Syed developed the idea for the practicum with a colleague after participating in a Yale clinic on balancing civil liberties and national security after 9/11. Balkin helped establish the program and connect students with media-law mentors.

"I care about the growing culture of secrecy in the law and this is what we need to go after. That was the push we needed to create the project," Syed said.

David Schulz, of Levine, Sullivan Koch & Schulz LLP in New York, supervises Syed's work and says that all types of journalists, from the solo blogger to the mainstream media, have shown an interest in working with the law students to resolve their disputes.

"The Yale program is very encouraging because there is a huge need for legal expertise as more and more journalists are working as independent bloggers or for online sites where they lack the resources of a larger organization," Schulz said.

As with Chicago-Kent's program, Yale's externship practicum is new this school year. Yet Syed has already been involved in four cases, including a whistleblower's appeal contesting a motion to seal exhibits in the case. She hopes other universities follow suit and get students involved in FOIA issues.

"There is a pressing need for law schools to take up this mantle," Syed said.

William G. McLain, an associate professor at the University of the District of Columbia's law school, agreed that law students can play an important role in FOIA litigation.

McLain first introduced his students to public records issues during a class on disaster and the law that dealt with the aftermath of Hurricane Katrina, including examining the issues surrounding the drowning deaths of inmates at a prison in New Orleans.

McLain's students filed a FOIA request with the District of Columbia's corrections department to find out whether Washington was any better prepared if a similar disaster occurred. The request was denied, citing homeland security concerns, and the appeal is pending in the D.C. Superior Court.

"These agencies [in the district] know that they can just stiff requesters and they'll just go away because they don't know what else to do. There is a need for representation and someone needs to step in and fill it," McLain said.

So McLain is preparing to meet the need and open a full-fledged public records clinic. Though the plan is still in its formation stage, he anticipates a strong interest from both colleagues and students — and estimates that given the district's high rate of records denials, there could be more cases than the clinic can even handle.

"It's really an idea that's time has come and if it hasn't come, it ought to immediately," McLain said. ◆