Right to Know Advisory Committee
Ongoing FOA Issues Subcommittee
Meeting Summary
Tuesday, July 28, 2009

Convened 1:10 p.m. in Room 438, State House, Augusta

Present:
Mal Leary, chair
Karla Black
Ted Glessner
Judy Meyer
Linda Pistner

Staff:
Heidi Pushard, former extern
Peggy Reinsch

Ongoing Issues Subcommittee Chair Mal Leary convened the meeting and members introduced themselves. Upon the Chair's invitation, the members discussed their priorities of the four issues referred to the subcommittee by the Advisory Committee: Social Security numbers, use of technology in public proceedings, taking and keeping minutes/records of public proceedings and classification of records of advisory panels conducting reviews of internal activities of public agencies or officials. The members agreed that all four topics should be discussed, but that addressing issues concerning Social Security numbers is the most import task.

Social Security Numbers

Chair Leary welcomed Heidi Pushard, a third-year law student at the University of Maine School of Law, who recently completed her externship with the Right to Know Advisory Committee. Ms. Pushard presented one of her work products from the externship: a memo on Social Security Number Confidentiality. The memo outlines findings in the GAO reports: that State freedom of information laws are cited as the primary reason for making available records that that may contain Social Security numbers; and that there is concern about the practice of companies sending public records data for processing to at least two countries (India and the Philippines).

Ms. Pushard's memo described solutions adopted by other states:

- some states will truncate Social Security numbers starting now and going forward
- some states will truncate or delete Social security numbers going forward, but also a few years back in time
- California charges a new fee for each record filed to pay for redaction back 20 years
- In some states, an individual can request redaction - burden is on the individual

- Indiana prohibits disclosure of SSNs for most reasons

Ms. Beverly Bustin Hathaway, Register of Deeds for Kennebec County, was in attendance and provided additional information to the Subcommittee about Freddie Mac and Fannie Mae requiring that Social Security numbers be truncated. The Kennebec County Registry of Deeds is now digitized. Original documents filed are kept on the system, but what is available on the website has Social Security numbers redacted. Other states have faced significant costs: Florida was mandated to review all documents in the deed registries and redact Social Security numbers; only 2% included SSNs, but the cost was great because all documents were reviewed.

Mr. Leary related his experience at a conference a couple of years ago during which bankers and lenders were adamant about the need to have Social Security numbers available to track financial transaction. The Subcommittee recognized that a public discussion about Social Security numbers must include bankers and other lenders.

Mr. Leary mentioned that birthdates are also an important piece of information. Ms. Pushard agreed, citing information that to a thief, although a Social Security number alone may be worth $1, the date-of-birth and the SSN together are worth $5, and the name, date-of-birth and SSN together are very valuable. Ms. Pushard was not aware of any cost-benefit analysis of truncating Social Security numbers currently in the possession of public entities. More input from the Probate Courts would be helpful, also.

Ted Glessner indicated that the issue has two prongs. First, the policy question of whether Social Security numbers <u>should</u> be confidential? If the answer is yes – and the Federal Privacy Act amendments of 1990 direct the adoption of regulations to carry out such confidential treatment (although no regulations have been adopted) – then the next question is how do we make that happen? It can be dealt with incrementally; restrictions can be applied going forward; for past records, documents can be reviewed as requested and SSNs redacted as necessary. Do we need a policy to make it more difficult for someone to collect Social Security numbers from State and other public records?

There is no official Maine policy on Social Security numbers, and Ms. Pushard explained that provisions addressing the collection and treatment of SSNs are interspersed throughout the statutes. Mr. Glessner asked whether statutory construction rules provide that if some statutes designate Social Security numbers confidential, but other statutes are silent as to confidentiality, then the SSN are not confidential where the statute is silent. Linda Pistner asserted that there will never be one policy for collecting Social Security numbers, but that the State can have a single policy on disclosure.

Information requests for next meeting:

- What limitations do the 1990 Privacy Act amendments impose on the State? (Request to Attorney General)
- Identify statutes in which collection of Social Security numbers is authorized; treatment once collected?
- Ask State FOA contacts about collection of Social Security numbers

Use of technology for public proceedings

Both Karla Black and Ms. Pistner noted that agencies and boards and commissions bodies ask their respective offices for advice on whether meetings can be conducted online, as teleconferences or through other use of technology. It is important that the spirit of the law be maintained. Ms. Pistner noted that if the body is not required to be in one place, the synergy of meeting together, as well as public interaction, is lost.

Judy Meyer stated that e-mail meetings are a bigger problem. She said some town officials believe that if it is not prohibited on the books, then it is assumed to be permitted. A mayor told her that until there is an opinion that says it is illegal, they will continue to use e-mail to make decisions.

Mr. Glessner noted that technology provides great opportunities, but also creates more potential for abuse. The courts aren't cutting edge, but they do video arraignments; the court room is open to the public, and the public sees what the judge sees. The video arraignments help reduce safety concerns, and address travel when the court is not in the same place as where the person is being held. Technology can provide real opportunities to enhance the ability of the public to observe and participate.

Ms. Black related an incident in which a board member was ill, but the legal advice was that the member could not participate by telephone. In another situation, an entire board wanted to vote by telephone. Ms. Black said she had no experience with the e-mail traffic Ms. Meyer mentioned.

Mr. Leary raised the possibility of requiring a "phone bridge" or other means of allowing the public to participate in meetings in which public participation is invited. Both Ms. Black and Mr. Leary mentioned the manner in which the Board of Corrections holds public meetings and provides for public participation. There was discussion about when access must be provided to members of the public who are not in attendance. Ms. Pistner stated that there is a difference between a board member and a member of the public; a board member has responsibility to attend and vote. To extend remote access to the public is not practical, especially from a cost perspective. Although there was interest in providing more access for the public, Mr. Leary agreed that consensus was limited to requiring that a quorum be physically present, and with remote participation of members be limited to emergency situations. Ms. Meyer said it was important to define what constitutes an emergency – poor planning should not be considered an emergency.

Draft legislation for next meeting:
The Subcommittee agreed that the statute should be amended to provide limitations on holding public proceedings using different means. Staff will draft language to:

- Require that a quorum be physically present
- Allow for emergency exception (would exception used in public health emergencies work?)

Ms. Meyer proposed that the statute be amended to prohibit serial e-mails taking the place of public proceedings. The statute must be extremely precise; look at California law. Mr. Leary suggested no votes by e-mail or phone, with emergency exceptions. Ms. Meyer noted that there was such concern in Falmouth that they adopted a town policy (see below); it may be a good model. Mr. Leary noted that restrictions may approach First Amendment ground – when does communication between and among members become communication of the body? And how are restrictions enforced?

Ms. Black suggested looking at other state statutes and opinions about restrictions on e-mail.

Information requests for next meeting:

- Other state statutes restricting e-mail use
- Court and AG opinions on restricting e-mail use

Falmouth
Policy One: Use of Electronic Mail (E-mail)

A. Three or more Councilors or three or more members of any Volunteer Board or Committee shall avoid the use of e-mail for deliberation, discussion, or for voting on matters properly confined to public meetings; email should be used for non-substantive matters such as scheduling meetings, dissemination of information and reports, and developing agendas for future meetings.

B. In the event this policy is not followed, or if there is a question whether substantive matters properly confined to public meetings were discussed or deliberated on via e-mail by three or more members of any Town body, those emails in question should be printed and disclosed to the public at the next public meeting of the Town body.

C. Under Maine's Freedom of Access ("Right to Know") law, all e-mail and email attachments received or prepared for use in matters concerning Town business or containing information relating to Town business are likely to be regarded as public records which may be inspected by any person upon request, unless otherwise made confidential by law.

D. The Town Council Chair shall acknowledge email messages that come to all Council members at once. While the Chair is not empowered to discuss substantive matters on behalf of the Council in these acknowledgements, he or she may supply pertinent information regarding how the Council will proceed with the issue, if applicable (for example, upcoming public hearings, information available through the Town of Falmouth website, and so on). The Chair and individual Councilors remain free to reply to such messages as individuals, but shall refrain from engaging more than one other Councilor in the electronic discussion.

Minutes

Mr. Leary noted that it is clear that minutes of public proceedings are public records. The question is whether all public bodies should be required to keep minutes or records of their public proceedings.

Ms. Pistner noted that Ms. Pushard had pulled together laws from other states concerning minutes. Ms. Pistner also asked what is the problem we are trying to fix. Ms. Meyer voiced her concern about some entities recording good parts of meetings, but turning off the video camera when things get tense. Ms. Meyer recommended that any entity subject to the FOA laws must keep minutes/records of their public proceedings, but that the law should not dictate formats.

Mr. Glessner voiced his reluctance to impose requirements. What is the definition of "minutes"? There needs to be a mechanism to report what happens at public proceedings, and any record must be accessible. Ms. Pistner noted that state boards and commissions (listed in Title 5, chapter 379) are already required to make a record of their meetings. Richard Flewelling's summary of municipal public proceedings indicates that generally minutes are not required, but that many board meetings and decisions must be recorded. If not already required, though, directing that municipal entities take and keep minutes will be a local mandate, requiring a super majority vote of the Legislature.

Many towns already have recording equipment. Ms. Meyer noted that the statute would not tell municipalities how to record the meeting, but would require that it be done. She did not see a cost to pen and paper.

Mr. Leary recommended that minutes be required, but there is no information about whether this would be a hardship for towns. Ms. Black recommended that the Subcommittee seek input from towns, via the Maine Municipal Association, about what such a requirement would entail. Are there things we aren't thinking about?

Information requests for next meeting:

- Summary of minutes requirements in other states
- Comments from MMA on requiring minutes – what impact on towns?

"Abbott issues"

The last topic discussed was the issues raised by the Abbot v. Moore, 2008 ME 100: Accessibility of records of a group appointed to review internal conduct of an agency or its employees. The FOA laws make public the proceedings and records of advisory organizations that are established by executive order, law or resolve, but the law is silent as to ad hoc groups established by a public official. It is recognized that there is great public interest in such groups' activities. In the past, the Advisory Committee has discussed codifying the Abbott factors in the law, but that would not change the treatment of these groups.

Ms. Pistner noted that the problem is coming up with language that does what we want, but is not overbroad. Should it apply to agency heads unless the agency head says otherwise? The question is how to define. Ms. Meyer agreed it is a complicated area, and especially difficult if motives are considered. Mr. Glessner believes that the Supreme Judicial Court got it exactly right.

Mr. Leary asserted that anyone who is providing advice to a public body or official should be public. He has seen some major issues decided by advisory groups outside of the public eye.

The Subcommittee discussed the three main categories of records that such an ad hoc advisory group may use. First, whatever records the official appointing the group provides for the group to review. Second, the notes and working papers of the group. Third, the final report, assuming it is in writing, back to the appointing official. Ms. Meyer mentioned Mr. Pringle's earlier remarks that if all working papers are made public, you will never get qualified persons to participate; their personal and professional work may be implicated, which may include the participant's law firm, etc.

Draft legislation for next meeting:

- Use Ms. Pistner's earlier draft as starting point
- Specific records public, but not proceedings
- Report should be public, including
  - Conclusions
  - Description of people talked to and records reviewed
  - Narrative about how that conclusion was reached

Next Meeting

Thursday, August 27, 2009, 1:00 p.m.
Room 438, State House

Adjourned, 3:30 p.m.

Respectfully submitted

Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Legislative Subcommittee
July 29, 2009
Meeting Summary

Convened 12:35 pm in Room 438, State House, Augusta.

Present:
Chris Spruce, Chair
Karla Black
Robert Devlin
Suzanne Goucher
Rep. Dawn Hill
Linda Pistner
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee and explained that the focus of the meeting was to begin the subcommittee's review of LD 757 and LD 1353. Discussion of the other issues before the Legislative subcommittee will be continued at future subcommittee meetings. Mr. Spruce explained his intent for the subcommittee to meet one more time in early September so that the subcommittee has the opportunity to make recommendations to the full Advisory Committee at its meeting on September 23rd.

Review of LD 757, An Act to Improve the Transparency of Certain Hospitals

LD 757, as drafted, would make public any meetings, including board meetings and subcommittee meetings, of organizations that receive more than $250,000 annually in public funds for medical services or that provide medical services as its primary function. The bill has been carried over by the Health and Human Services Committee and that committee has asked the Advisory Committee for its opinion on the bill, including an opinion on any unintended consequences of expanding the FOA laws to non-governmental entities.

At the invitation of the subcommittee, Rep. Adam Goode, the sponsor of LD 757, and other stakeholders who testified on LD 757 before the Health and Human Services Committee provided comments to the subcommittee on the bill. Rep. Goode explained that the bill was suggested by a constituent and is intended to apply to hospitals so that hospital board meetings would be required to have board meetings open to the public. He also noted that he understands the need to protect the confidentiality of individually-identifying health information and for hospital boards to have the ability to meet in executive session for discussions of appropriate issues. He expressed his willingness to work with the subcommittee and stakeholders to clarify the bill's language.

Mr. Nick Bearce, the constituent who suggested the legislation, spoke about his rationale. He explained that Eastern Maine Medical Center and Eastern Maine Health System are the providers of health care in his area and the public has an interest in the operations of the hospital. He noted EMMC does not pay property taxes to the City of Bangor because of its nonprofit status. Rep. Hill inquired about the definition of "public funds" as used in the bill asking whether the intent

was to mean funds for health care services provided by hospitals and other medical organizations and paid for with public funds. Rep, Goode and Mr. Bearce answered that that particular issue did not get much focus in the HHS Committee, but that they understood "public funds" to include funds paid for health care services, program funding or even the amount saved in property taxes.

Harry Pringle noted that LD 757 does not apply to records of hospitals, but asked Mr. Bearce if there were certain records or specific information about EMMC that he is seeking and unable to obtain. Mr.Bearce noted the public availability of the hospital's annual report and Form 990 filed with the Internal Revenue Service, but stated the information does not include audited financial statements or auditor's notes and the Form 990 is 9 months old when the information is made available to the public. Mr. Pringle asked Mr. Bearce if access to meetings would be adequate for him since the bill does not address records in any way. Mr. Bearce commented that he wasn't sure.

Charles Soltan and Sandra Parker offered comments on LD 757 on behalf of the Maine Hospital Association. Mr. Soltan stressed the intent of the FOA laws to make the operations of public entities transparent and cautioned about the unintended consequences of extending the law to private entities. Mr. Soltan stated that hospitals and other private entities have an expectation of privacy. Mr. Soltan mentioned that other private entities who contract with the state and federal government like Bath Iron Works or Pike Industries receive substantial public funds and questioned why hospitals are the only focus of the bill. Mr. Soltan also explained that the Law Court decision, Town of Burlington v. HAD No. 1, can be distinguished and that in response to the decision hospitals have taken steps to protect the privacy of records and meetings. Mr. Soltan also noted the enactment of federal and state laws since the decision to protect the privacy of personal health information.

Ms. Parker focused on the broad language of LD 757 as drafted and noted that bill would apply to physician groups, medical supply companies, nursing homes and other entities. Ms. Parker also noted that hospitals would be put at a competitive disadvantage if strategic and business planning discussions were required to be conducted in public meetings. Ms. Parker also explained that there are many areas where hospital records are transparent, including annual financial reports, Form 990 filings and cost and quality data. Chris Spruce agreed that many hospital records are accessible to the public, but he asked how hospitals provide access to the community to its board proceedings. Ms. Parker explained Cary Medical Center in Caribou is municipally-owned and the Dover-Foxcroft hospital is operated under a hospital administrative district. Although those hospitals do not have public board meeting, hospital leadership in Caribou has regular quarterly meetings with municipal leaders and that each town in the hospital administrative district has a member on the Dover-Foxcroft hospital board.

Mr.Pringle asked Ms. Parker about her position on the bill if it were limited to board meetings and amended to permit executive sessions as appropriate since arguably the provision of medical services is a matter of public interest. Ms. Parker answered that the entire statute would have to be rewritten since the current language relating to executive sessions was written for public entities, not private entities like a hospital. Mr. Pringle inquired about the types of issues that would need confidentiality and suggested that the language could be drafted to address those issues. Mr. Soltan and Ms. Parker explained that the issues might be hard to distinguish as hospital boards have regular discussions related to contractual arrangements with insurers, reimbursement of doctors and staff, long-range planning and purchase of property, etc. Ms. Parker also noted the volunteer nature of board membership and stated that the willingness to serve on boards might be diminished if meetings were made public.

Lisa Harvey-McPherson representing Eastern Maine Medical Center distributed written materials. Ms. Harvey-McPherson highlighted the many records and data made available to the public and noted that EMMC voluntarily provides patient satisfaction and other quality data on its website. EMMC also responds to the community it serves through the use of regular meetings with community advisory councils. Finally, Ms. Harvey-McPherson explained that, to her knowledge, independent nonprofit hospitals in other states are not subject to FOA laws.

Staff also distributed written comments on LD 757 provided by Phil Saucier of the Governor's Office of Health Policy and Finance.

Review of LD 1353, An Act Regarding Salary Information for Public Employees

LD 1353, as drafted, provides that salary information as it relates to an individual state, county, municipal, school, university or community college employee is confidential; salary information related to positions is public information. The impetus for the bill was the posting of public employee names, positions and salaries on a private organization's website. The bill has been carried over by the Judiciary Committee and that committee has asked the Advisory Committee for its opinion on the bill, including any recommended changes that may be needed to balance the public interest with privacy interest of public employees.

Tarren Bragdon of the Maine Heritage Policy Center, the organization that created the website, provided comments to the subcommittee. Mr. Bragdon noted that salary information regarding public employees is already public record and expressed his opposition to the bill as drafted. Mr. Bragdon stated that he is willing to work with the Secretary of State to determine if any individual participating in the Address Confidentiality Program is a public employee or otherwise included on the website and to remove that information. Linda Pistner asked if Mr. Bragdon felt it was necessary to include the individual's name on the website along with the salary information. Mr. Bragdon responded that the public will not be able to determine if patronage or other unfair treatment of individuals is occurring if an individual's name is not included. Ms. Pistner also inquired about information related to employee benefits, specifically amounts attributed to the unfunded liability of the retirement system that are not benefits received by the employee, and whether the website has a responsibility to explain how employee benefits are attributed to individual employees. Mr. Bragdon explained that the information posted on the website reflects how it has been received by them from the Department of Administrative and Financial Services and other sources.

Bruce Hodsdon, president of the Maine State Employees-SEIU, provided comments as well. Mr. Hodsdon stated that state employees are concerned about the posting of the information on the website, but understand that the information is a matter of public record. Mr. Hodsdon proposed a compromise to the bill and suggested amending the bill to protect information of those individuals in the Address Confidentiality Program or others concerned about the release of information about the geographic location of their work. Mr. Hodsdon also suggested law enforcement and corrections employees may also have a legitimate interest in privacy. Harry Pringle reminded the subcommittee that personal contact information of state employees is already confidential by law. Mr. Bragdon noted his willingness to address participants in the Address Confidentiality Program, but stated that information related to law enforcement personnel should not be protected as that information is already public information.
The subcommittee directed staff to draft proposed language for review at the next meeting to reflect the interest in protecting information about participants in the Address Confidentiality

Program. The subcommittee will also invite the Secretary of State to provide more information about the program and how it is administered.

Matt Dunlap, Secretary of State, joined the meeting and offered comments on the Address Confidentiality Program. Mr. Dunlap explained that possibly 3 employees of a school SAD unit are participants in the program; 59 adults and 26 children are currently participating. Mr. Dunlap also briefly explained the application process and the determination of eligibility for the program, which is currently focused on personal safety. Mr. Dunlap noted the willingness of the Maine Heritage Policy Center to remove information from the website if an individual is in the program. Mr. Pringle asked how the program related to the issues in the bill since the program is not limited to public employees. Mr. Spruce noted again that the information is public and that the only difference is the publication of the information on the website. Rep. Hill asked what notice public employees may have received about the website and that salary information is public record. Mr. Dunlap explained that employees did get email communications when the website was first online, but that employees do not receive general notice at the time of hiring. Mr. Dunlap also noted that he has not received any phone calls related to Secretary of State employees since the website went online and suggested it has had little impact on the general public.

Next Meeting

The subcommittee decided to meet again on Wednesday, September 16th at 12:30 pm in Room 438, State House. The agenda will include the continuation of the discussion of LD 757 and LD 1353 along with the initial review of the public notice requirements related to LD 1271 (PL 2009, c. 256) and the transparency issues associated with the American Recovery and Reinvestment Act website.

The subcommittee meeting adjourned at 2:35 pm.

Prepared by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Right to Know Advisory Committee
Ongoing FOA Issues Subcommittee
DRAFT Meeting Summary
Thursday, August 27, 2009

Convened 1:05 p.m. in Room 438, State House, Augusta

Present:
Mal Leary, chair
Karla Black
Ted Glessner
Judy Meyer
Linda Pistner

Staff:
Colleen McCarthy Reid
Peggy Reinsch

Ongoing Issues Subcommittee Chair Mal Leary convened the meeting and members introduced themselves.

Use of technology in public proceedings

Chief Information Officer Richard Thompson and Paul Sandlin, Manager of eGov Services, Policy, Planning and Oversight of the Office of Information Technology within the Department of Administrative and Financial Services, accepted the Subcommittee's invitation and spoke about the tools that have been developed and are being used by different agencies. Mr. Thompson explained that the Office believes strongly in the use of technology. He described how the Internet port was originally used to provide information, but that there has been an increase in interest in interactive capabilities in the last five years or so. He explained that some agencies are making use of the various social networking tools. Linda Pistner mentioned the Subcommittee's interest in focusing on how technology can infringe on the public access laws through the use of Facebook, Twitter, chat rooms, which may be useful in collecting information, but not for providing access to proceedings. In addition, the Subcommittee is concerned about the temporal nature of the communications, which disappear over time in these formats. Mr. Thompson agreed, and noted that his office is asking three questions: How do we capture a record? How do we display the record in the way the agency wants it displayed? How is the record preserved? Mr. Sandlin noted that some of the social networking tools have access restrictions, such as Facebook's requirement that a user sign up to access the information. He also mentioned that the temporal nature of the information is part of the design of these tools.

Mr. Thompson told the Subcommittee that there is a cost to keeping records, especially when they are kept in multiple formats. OIT has tried to always make records available

in the traditional paper format. If information is posted on the Internet, the record that the information was posted must also be maintained.

Mr. Leary explained that the Subcommittee is most interested in two issues. First, that the public has access to a board, commission, council, etc., when it is making a decision. For example, the Legislature streams many of its proceedings. Second, how can public participation be enabled? Mr. Thompson responded that there are a number of tool sets to reach those goals. Conferencing tools are currently available, although the number of participants may be limited. Documents can be shared over the Internet. Mr. Sandlin noted the availability of "webinars" although the limiting factor is the size of the audience. They offer two-way interaction, although there is some delay.

Mr. Thompson encouraged the Subcommittee to provide details of what would be needed for public access and participation, and the technology will catch up to the need.. Ted Glessner contrasted the technology available to those in Independence Hall (which he recently visited) in 1776 with what is possible today. The question is how to make things more accessible and more open using technology? People can listen now, but participation is more difficult at this point. What will the technology and funding support: participation by members, public at specified sites, anyone anywhere? We need to look at what is practical in today's world. Mr. Thompson agreed that technology is available now to make those things possible, but the cost can be a problem, especially for public agencies other than the State government. Technology needs to be used appropriately, and the inappropriate use of technology should be discouraged. Mr. Leary recognized that the use of some technologies can save money, such as the video arraignments used by the Maine Courts. Mr. Leary also noted that although conference calls for a board are doable now, expanding the acceptance of public testimony to remote locations can lead to more questions.

The Subcommittee reviewed the draft legislation prepared by staff to address limitations on public proceedings using technology. The draft will be revised to carry out the Subcommittee's recommendations. The draft incorporates the basic requirement that a quorum of the public entity must be present in the meeting location specified in the meeting notice, although other members can participate via conference call or other audio or audio and video communication.

For next meeting:

- Revision of draft legislation

<u>Social Security Numbers</u>

Linda Pistner discussed the provision in the federal law: "social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record." (42 USC §405(c)(2)(C)(viii)) The date of enactment is key. Also,

§405(c)(2)(C)(i) exempts State and local governments from the prohibition if the SSN is used for a list of purposes. Ms. Pistner noted that many federal programs that require the collection of SSN, including by the States in administering federal programs, include confidentiality restrictions. In addition, enforcement is based on a willful disclosure, and the violation is considered a crime. She wondered whether a US Attorney would follow up and prosecute violations.

Mr. Leary suggested recommendations along the lines of protecting what is already in the hands of public records custodians, and not collecting SSNs if not necessary. Ms. Pistner recommended asking agencies how a prohibition on disclosure would affect them. Mr. Thompson noted that there are 102 locations where information is maintained. Where the SSNs already exist today, it would take a great deal of effort to not disclose in many situations. The State is getting more and more requests for bulk data. The custodian can redact as required, but it isn't always the case of simply protecting a field on a spreadsheet; it depends on the type of information that is requested. Mr. Thompson stated that he would like to have a clear statement that SSNs are confidential.

Beverly Bustin Hathaway, Register of Deeds for Kennebec County, added that her office has the ability to redact SSNs, and will do so when requested. But their database is made up of optical scans of paper records to make the information available on the web. Ms. Pistner noted that the Registry of Deeds could put the cost of redaction on the requestor.

Mr. Glessner suggested that changes should be made incrementally; a broad brush will go nowhere. He outline a four-step process:

1. First recognize that there is a problem with not protecting Social Security numbers. What is the basis of the concern? Identity theft is the biggest concern.
2. Second, require a decision in each case whether the Social Security number should be collected.
3. Third, if the decision is to collect the SSN, what are the practical methods to collect and protect the SSN? For example, the Courts are collecting SSNs in a separate file.
4. Fourth, as we make records available, exercise some due diligence. For example, on some forms there is a specific field for SSN.

Mr. Leary stated that he would like the Policy of the State to be to not collect SSNs unless there is a good reason. Ms. Pistner suggested a strong prospective prohibition against collection and disclosure. Ms. Hathaway reminded the Subcommittee that the Registers of Deeds do not now have blanket authority to redact, so the data is being distributed world-wide with all the data intact. Public disclosure can be protected, and the original can be kept as a back up copy.

For next meeting:

- Draft legislation to make SSNs confidential prospectively

Minutes

The Subcommittee reviewed the issue of requiring public bodies to keep and maintain minutes of public proceedings. LD 786, An Act to Require that Minutes Be Kept of Municipal Meetings, was considered by the State and Local Government Committee during the First Regular Session. It received one vote in favor from the Committee, and the House and Senate accepted the majority Ought Not To Pass report. The Maine Municipal Association (MMA) opposed the bill and submitted written testimony. That testimony was shared with the Subcommittee. Judy Meyer mentioned that she doesn't think there can be much cost to pen and paper and writing down the basics of what happens at a meeting. She does not believe that citizens have the power to require the selectmen to make a record. She is most concerned about dysfunctional boards and how they do business. Mr. Leary suggested requiring municipal boards to keep a record of decisions and actions, not full verbatim minutes. The Legislature has to keep a record, why not a municipal body? Ms. Pistner suggested obtaining MMA's reaction to a requirement that meetings be recorded, and maintained only until the next meeting. Karla Black agreed that MMA's reaction would be of interest, and voiced her doubt that proposing the requirement again would be a good idea; Mr. Glessner agreed.

For next meeting:

- Draft legislation on recording decisions and actions

Ad hoc internal review

The Subcommittee reviewed draft legislation prepared by staff to require certain records associated with an ad hoc internal review be designated as public records. All agreed that the report itself should be public; after that, there was concern about records reviewed and people interviewed. Ms. Meyer noted that it is an extraordinary thing for an ad hoc group to take over an internal review, so it is okay to put extraordinary restrictions on the group. She was comfortable with protecting the notes of the members, however. Ms. Black expressed her concern that this is a departure from the Freedom of Access laws - putting a burden on someone who is not a public employee, and the burden is greater than that shared by public employees.

For next meeting:

- Revise draft legislation

Issues referred to Advisory Committee

Two items brought to the attention of staff will be added to the Advisory Committee's agenda for September 23rd:

- E-mail from Pamela Lovely, Cumberland County Register of Deeds, about businesses packaging and reselling information and data kept by counties and balking at the copying fees

- E-mail from James Moore about the release of information in the Kenneth McDonald murder investigation and prosecution

Next Meeting

Wednesday, September 23, 2009, 11:30 a.m.
Room 438, State House

Adjourned, 3:05 p.m.

Respectfully submitted
Peggy Reinsch and Colleen McCarthy Reid

Other upcoming meetings scheduled so far:

- Public Records Exceptions Subcommittee
  Wednesday, September 9, 2009, 12:30 p.m.

- Legislative Subcommittee
  Wednesday, September 16, 2009, 12:30 p.m.

- Advisory Committee
  Wednesday, September 23, 2009, 12:30 p.m.

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
September 9, 2009
(Draft) Meeting Summary

Present:
Shenna Bellows, Chair
Linda Pistner
Chris Spruce

Absent:
Suzanne Goucher
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Shenna Bellows convened the Subcommittee and provided an overview of the planned agenda.

Existing Public Records Exceptions – Title 12/Marine Resources

The subcommittee reviewed three exceptions in the marine resources area: Title 12, section 6173, subsection 1 relating to marine resources statistics; Title 12, section 6445 relating to logbooks for lobster harvesters; and Title 12, section 6749-S, subsection 1 relating to logbooks for sea urchin buyers and processors. Under the provisions, statistical aggregate information related to landings is publicly disclosed if the information does not identify any person or vessel. David Etnier, Deputy Commission of the Department of Marine Resources, explained the rationale for keeping the identity of specific persons for business and proprietary reasons. Mr. Etnier also noted that while some information may be kept confidential for a certain area because information cannot be aggregated without identifying a person, the department routinely works with requesters for information to combine fisheries or geographic areas for the purposes of releasing aggregate data and marine resources statistics. Further, Mr. Etnier explained the confidentiality provision was important in securing agreement from the industry to requirements to report data and other business information to the department.

The subcommittee voted 2-1 to accept the exceptions without change (Chart #19; #21.1 and #22.1); Ms. Bellows was opposed to the motion because, in her opinion, the exceptions are overbroad in protecting the release of information to the public about a certain fishery or landings.

The subcommittee also reviewed the exception in Title 12, section 6455, subsection 1-A related to market studies and promotional plans for the Lobster Promotion Council. The exception permits the information to be kept confidential by a majority vote of the council members; information related to the market studies and promotional plans is disclosed to the Legislature. Mr. Spruce noted that the provision as drafted is not consistent with other exceptions as the subcommittee's position has been that the presumption is that records are public, but for certain specified exceptions. Mr. Etnier told the subcommittee that proposed legislation may be coming forward next session addressing the statute governing the Lobster Promotion Council. The subcommittee voted unanimously to amend the exception language to be consistent with previously approved exceptions (chart #22); staff will prepare a draft proposal for subcommittee review.

Existing Public Records Exceptions-Title 10 provisions

The subcommittee reviewed 2 provisions in Title 10: Title 10, section 945-J relating to the Maine International Trade Center and Title 10, section 975-A relating to the Finance Authority of Maine.

Last year, the subcommittee has discussed amending the Title 10, section 945-J exception but did not approve draft language. The subcommittee reviewed draft language prepared by staff that makes clear the policy that records are public but for certain records designated confidential. The draft allows proprietary information submitted to the Trade Center to be designated as confidential and protects that information if the Trade Center determines the information is proprietary and, if disclosed, would impair the competitive position of the trade center or the person submitting the information. Mr. Spruce stated that the draft reflects the standard being developed by the subcommittee which makes clear that records are public but that, if appropriate, certain information is designated confidential. Ms. Bellows and Ms. Pistner agreed. The subcommittee voted unanimously to amend the exception as reflected in the draft (Chart #2).

The subcommittee tabled its review of Title 10, section 975-A (Chart # 3) because it relates to the overall issue of the development of standard language to address information provided to state agencies in applications for government funding and technical assistance. See discussion later in summary.

Existing Public Records Exceptions-Title 12 provisions/Conservation and Forestry

The subcommittee reviewed 4 exceptions in Title 12 relating to conservation and forestry laws: Title 12, section 549-B, subsection 5 relating to water well information; Title 12, section 550-B, subsection 6 relating to mining permits on state lands; Title 12, section 8669, subsection B relating to forest policy experimental areas; and Title 12, section 8884, subsection 3 relating to volume information reports from landowners and wood processors.

Title 12, section 549-B, subsection 5 relating to water well information. The subcommittee received an email from Bob Marvinney, State Geologist, explaining the State's experience with this exception and requests for information. Ms. Bellows stated her belief that water is a resource for the public good and information about the resource should not be protected from disclosure even if the information is specific to a certain well or a well drilling business. As drafted, the provision exempts water well records from public disclosure although the records may be provided to federal and state agencies and municipalities. Mr. Spruce wondered whether the information could be provided without identifying the well driller or otherwise provided in the aggregate to the public. Ms. Bellows reiterated her belief that even individually identifying information should be disclosed given the nature of the resource. Ms. Pistner suggested asking for input from the Department of Conservation, Maine Geological Survey, on their position on the disclosure of aggregate statistical information to the public. The subcommittee voted unanimously to table the exception pending additional information from the agency. (Chart # 12.2)

Title 12, section 550-B, subsection 6 relating to mining permits on state lands. The subcommittee also had information from Bob Marvinney on this exception by email. Mr. Spruce noted that the exception keeps information related to mining permits confidential during the lease period. Ms. Bellows stated her belief that this information should be made public as a matter of principle since it involves mining on State-owned lands, but noted that such a proposal would likely cause

controversy. Given Ms. Bellow's comment, Mr. Spruce wondered whether the issue might be appropriate to refer to the Legislative policy committee. Staff noted that policy committees most often need a specific proposal to consider rather than referral of a general issue. Mr. Spruce then suggested that the subcommittee get more information about the process for granting mining permits at the next meeting. The subcommittee voted unanimously to table the exception pending additional information from the agency. (Chart # 12)

Title 12, section 8669, subsection B relating to forest policy experimental areas. Mr. Spruce noted that the language of the exception is not consistent with other provisions and stated that he would approve the exception if the language were amended. Staff noted that the law as currently drafted would limit the number of experimental areas for cutting to 6 and that information provided in 2008 indicated there were no agreements in place at that time. The subcommittee voted 2-1 to amend the exception; staff will prepare draft language for review. Ms. Bellows was opposed because of her concern that information related to public lands should not be protected from public disclosure; she would remove the exception. (Chart # 25)

Title 12, section 8884, subsection 3 relating to volume information reports from landowners and wood processors. Ms. Pistner explained that she was okay with this exception as the law as currently drafted provides for the release of aggregate data. Mr. Spruce agreed. The subcommittee voted 2-1 to accept the provision without change; Ms. Bellows was opposed. (Chart # 27)

Existing Public Records Exceptions-Judicial Branch related to jurors

The subcommittee reviewed 3 exceptions in Title 14: Title 14, section 1254-A, subsection 7 relating to the names of prospective jurors and contents of juror questionnaire forms; Title 14, section 1254-A, subsection 8 relating to names of jury pool; and Title 14, section 1254-B relating to juror selection records and information. Ms. Bellows stated her belief that this information should be confidential given the privacy and safety concerns and noted the court has some discretion to release certain information as the law is currently drafted. Mr. Spruce agreed that release of the names of jurors could jeopardize their safety. Ms. Pistner suggested that the statute itself might raise constitutional issues given the separation of powers between the Judicial and Legislative branches. The subcommittee voted unanimously to accept the provisions (Chart # 32, Chart # 33 and Chart # 34) without change (Chart # 32, Chart # 33 and Chart # 34), but also will invite comments from the full Advisory Committee and the Judicial branch on whether juror names after trial is concluded should continue to be protected from disclosure.

Existing Public Records Exceptions- Title 19-A

The subcommittee reviewed the exception in Title 19-A, section 4013, subsection 4 (Chart # 69) relating to the Domestic Homicide Review Panel. The provision keeps confidential the proceedings and records of the review panel although the conclusions of the panel are public information. Ms. Bellows raised her concern that the language is too broad and suggested that the exception be narrowed in some manner. Ms. Pistner explained that this is a standing panel that reviews deaths of persons killed by family or household members and makes systemic recommendations. The proceedings and files are confidential and often there are specific confidentiality provisions in other statutes that protect the release of the information. Mr. Spruce wondered how the exception could be narrowed and what other information beside the panel's conclusions could be made public. Mr. Spruce also noted that some individuals may not be willing to provide information to the panel without confidentiality protection. Ms. Bellows thought it would be useful to have other perspectives on this issue, perhaps from other members

of the Advisory Committee. Ms. Bellows stated her intention to protect personally identifying information but that otherwise the presumption should be that information is made public. Mr. Spruce reminded the subcommittee that there are other similar panels that review maternal and child deaths and elder abuse deaths and that the provisions should be consistent in their treatment of confidential information. Ms. Bellows agreed. The subcommittee deferred further consideration of this exception; staff will provide examples of reports from the panel and information on similar statutory provisions.

Review of Criminal History Record Information Act

The subcommittee tabled review of Title 16, chapter 3, subchapter 8: Criminal History Record Information Act and Title 16, section 614, subsection 1-A. Staff is working on a redraft of the provisions with the assistance of Charles Leadbetter, Special Assistant Attorney General. Ms. Bellows raised an additional issue on behalf of the Maine Civil Liberties Union who has had previous discussions with the Department of Public Safety about amending the law to require notice to an individual if criminal history record information is used as a basis for the denial of employment or credit. Staff suggested that this issue could be incorporated into the draft for discussion purposes. Ms. Bellows will provide follow up information.

Review of Statutory Exceptions Related to Applicants for Governmental Assistance and Funding

The subcommittee has been asked by the Advisory Committee to review the issue of appropriate statutory standard language for protected information provided to state agencies by applicants for State funding or technical assistance. The subcommittee reviewed the statutory examples provided by staff, including the most recently provision included in Public Law 2009, chapter 372. The subcommittee agreed that they preferred the language used in Public Law 2009, chapter 372 and asked staff to compare that provision to others in existing law and bring back draft language for review at the next meeting that would make all of the provisions consistent with Public Law 2009, chapter 372.

Teacher confidentiality

The subcommittee reviewed Public Law 2009, chapter 331. The enacted law does not reflect the recommended changes made last year by the full Advisory Committee to the Judiciary Committee which proposed to make public certain information related to disciplinary action against school personnel. Staff explained that the Judiciary Committee (and the Education Committee) did not fully consider the Advisory Committee's recommendation. In addition, the Judiciary Committee did not review the Education's Committee's legislation before it was enacted for a few reasons, including timing at the end of the session and because the bill technically did not create a new exception. Linda Pistner agreed that the policy issue put forward by the Advisory Committee was not discussed by the Education Committee or the Legislature and noted that the OPLA staff study of other state laws on teacher confidentiality put Maine among 25% of states that keep this type of information confidential; 50% of states make the disciplinary decision public and 25% of states make the decision and the reasons for the disciplinary action public. Ms. Pistner suggested that the full Advisory Committee consider the issue again. Chris Spruce echoed Ms. Pistner suggestion that the Advisory Committee put the proposal forward again in the next session so the policy of whether certain information related to disciplinary action against school personnel should be made public can be considered. The subcommittee recommended that the draft proposal again be referred to the full Advisory Committee; staff will redraft the language to

reflect the technical changes needed on account of the enactment of Public Law 2009, chapter 331.

Next Meeting

The subcommittee tentatively scheduled the next meeting for October 13, 2009 at 12:30 pm.

The meeting adjourned at 2:40 p.m.

Prepared by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

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Right to Know Advisory Committee
Legislative Subcommittee
September 16, 2009
Meeting Summary

Convened 12:37 pm in Room 438, State House, Augusta.

Present:
Chris Spruce, Chair
Shenna Bellows
Karla Black
Robert Devlin
Suzanne Goucher
Linda Pistner
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee.

LD 1353, An Act Regarding Salary Information for Public Employees

At the previous meeting, the Subcommittee directed staff to prepare draft legislation that would protect the names of public employees who participate in the Address Confidentiality Program administered by the Secretary of State, from release in connection with salary information. A draft was circulated before the meeting.

Before discussing the draft, the Subcommittee heard from Nicole Ladner, Special Project Director, in the Office of the Secretary of State. She explained that the purpose of the Address Confidentiality Program is to protect victims of domestic violence, stalking or sexual assault, and that participants are recommended to the program by domestic violence programs as part of the safety planning for victims.

Linda Pistner noted that the proposed legislation is different than the ACP program - if an abuser knows where the victim works, then a blank in the name field for data for a particular agency would be almost the same as including the name. Mr. Spruce agreed that the ACP and the purpose of the proposed legislation is not an exact match.

Harry Pringle questioned language that was in the original bill and was carried into this draft, which creates confusion. He recommended that the law allow the withholding of names and other information if the situation meets a high standard, such as serious personal safety issues. Karla Black agreed, although she noted that the draft does not address the law enforcement officer safety issues originally raised in the Judiciary Committee. Bob Devlin agreed with Mr. Pringle's approach. Ms. Pistner noted that the ACP already has a high standard. Mr. Spruce supported the notion of not piggybacking on the ACP, but developing a separate standard appropriate for this situation.

Suzanne Goucher expressed concerns about moving to a subjective standard for determining whose information would be protected. She likes connecting the protection to an existing program with a

similar but unrelated purpose. Ms. Goucher agreed that the position title may provide too much information to track someone in the ACP, so recommended keeping that confidential as well as the name. Shenna Bellows agreed, and reiterated that this discussion is about public employees and there is a public interest in knowing who they are and their jobs. Ms. Goucher recommended using the current draft, but cover any information that identifies the participant.

Mr. Devlin voiced his concerns about the ACP being too narrow to protect some people that have legitimate safety needs but don't fall into the ACP categories. Mr. Spruce liked the idea of leaving the decision to the employer, but raised the concern that a commissioner could claim that all law enforcement personnel deserved the name protection. He suggested that the draft start with the ACP, and then be expanded over time as it is determined where gaps lie. Ms. Pistner recommended that the representatives of the domestic violence programs should work with the Judiciary Committee on this issue, but she did not have a problem with linking the protection with the safety planning as currently required in the ACP.

Chris Parr, staff attorney for the Maine State Police, questioned whether the term "salary information" as used in the draft is clearly defined. It is not clear if that term includes benefits as part of an employee's "salary." Staff also noted that the placement of the draft, as originally proposed by LD 1353, is within the State Civil Service law which may be difficult to apply to public employees other than State employees.

Ms. Bellows noted that the ACP protects name and location, while there is a public interest in knowing the salary. Mr. Parr, as a public employee, agrees that pay for an individual position is appropriately public information, but tying it to the employee's name is not necessary.

Mr. Pringle suggested that the protection of public employees' names in specific circumstances could be appropriately located in the Freedom of Access laws as an exception to public records. Ms. Goucher noted two benefits in doing so: first, it shows there is a presumption that the information is public; second, it protects the information that appropriately deserves nondisclosure. Maybe include a statement that the intent of the State is that this information is public, with these exceptions? Ms. Bellows requested an alternative draft that is based on the ACP.

Staff will draft and circulate two proposals - one narrowly tailored to the ACP and one based on Mr. Pringle's suggestion. The Subcommittee will present these recommendations to the full Advisory Committee on September 23rd.

LD 757, An Act to Improve the Transparency of Certain Hospitals

LD 757 would require public access to meetings of an organization if the organization receives over $250,000 annually in public funds for medical services and provides medical services as its primary function. Staff provided a summary of state laws that have addressed the issue of open meetings laws as they apply to public and private hospitals. A copy of the letter from the Maine Association of Nonprofits was provided, as well. Mr. Pringle recommended that the Subcommittee not recommend a change in the law as proposed by the bill. He mentioned Maine's history of noprofits and their invaluable contributions to the welfare of the State. Ms. Goucher agreed. Mr. Spruce voiced his concerns about the proposal, including his belief that there is no compelling reason for making the meetings open. He noted that the $250,000 threshold is arbitrary, and the requirement would be a challenge for many nonprofits. This would be a first step, and the demands for access would creep into other types of organizations and services.

Ms. Bellows agreed that $250,000 is probably too low, but she pointed out that many nonprofit organizations serve a public purpose, and many public employees serve on their boards. She would like to make this apply to the nonprofits that are really public-private partnerships, although she had not developed a specific proposal at this time. Ms. Bellows also noted that the Health and Human Services Committee was looking for the Advisory Committee's recommendations with regard to unintended consequences of making the Freedom of Access laws apply to private organizations. She would like to see the letter to HHS expanded to state that there may be an opportunity to explore the application to public-private partnerships; Mr. Pringle did not support that idea, and Ms. Goucher would not without a specific proposal.

Ms. Pistner suggested that the response should be that the Freedom of Access laws are meant to apply to public entities. Although hospitals serve the public, they are not really appropriate entities to be subject to the requirements. Mr. Bearce, who requested that Rep. Adam Goode submit the legislation initially, was given the opportunity to say that the original intent was to make the big, huge entities that control health care in a wide area subject to the open meeting laws.

Mr. Spruce recommended that the proponents of the legislation indicate the information that they believe should be released by hospitals, and use that as a basis for establishing specific reporting requirements.

Staff will draft a letter that reflects the majority and minority recommendations of the Subcommittee.

Public notice requirements for rule-making (LD 1271 (SLG), PL 2009, c. 256)

The Subcommittee reviewed the letter Dan Walker had written to the Advisory Committee on behalf of the Maine Press Association. The Subcommittee recognized that the fiscal issues often color the ability of governmental entities to ensure full public access. Mr. Spruce identified the issue as representing a long-term concern that will evolve over time as technology changes and spreads. He believes the final enactment is a reasonable compromise to provide appropriate information to the public in the rule-making process.

Mr. Devlin agreed, and pointed out the difficulty in going back to local governments and telling them they have to do more than they are currently required to now that chapter 256 has gone into effect. Mr. Pringle agreed that there does not have to be further changes, and noted that those under age 27 do not use printed newspapers as their sources of information, but access and read newspapers online. Ms. Goucher agreed, pointing out that the statute (Title 1, §551) designates the Kennebec Journal as the "state paper" and yet you cannot find a hard copy of the paper in every library, although it can be accessed online.

The Subcommittee will report to the full Advisory Committee that no action should be taken.

Government Transparency website

Advisory Committee member Mal Leary had recommended that the State's website for the American Recovery and Reinvestment Act stimulus funds be used as a model to provide public access to public funding and contracts. Mr. Spruce suggested drafting a letter to the Governor encouraging him to start all State agencies along the same path. Ms. Black mentioned that it might be appropriate to hear from

Chief Information Officer Richard Thompson about the website and the resources necessary to create and maintain it. Mr. Pringle supported an expression of the Subcommittee's admiration of the website.

Staff will invite Mr. Thompson to the Advisory Committee meeting on the 23rd.

Emerging issue: Hancock County Registry of Deeds litigation

Mr. Devlin updated the Subcommittee on a Freedom of Access case, filed in Cumberland County, MacImage of Maine, LLC v. Hancock County, et al. The Cumberland County Superior Court ruled on September 1, 2009, that Hancock County must provide to MacImage electronic copies of documents without charging $1.50 per page. The court found that the $1.50 per page fee, set by the Hancock County Commissioners, was not a reasonable fee as authorized under Title 33, section 741, subsection 14. Mr. Devlin told the Subcommittee that a motion has been filed to clarify the application of the order, and that the several counties are deciding upon their next steps.

The Subcommittee asked Mr. Devlin to update the full Advisory Committee on the 23rd.

Next Meeting

The full Advisory Committee is meeting on Wednesday, September 23rd at 12:30 p.m. The Subcommittee will decide then whether to schedule another subcommittee meeting before the next Advisory Committee meeting on October 21st.

The Subcommittee meeting adjourned at 1:57 p.m.

Prepared by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Scheduled meetings

Ongoing Issues Subcommittee
Wednesday, September 23, 2009
11:30 a.m., Room 438, State House

Full Advisory Committee
Wednesday, September 23, 2009
12:30 p.m., Room 438, State House

Public Records Exception Subcommittee
Tuesday, October 13, 2009
12:30 p.m., Room 438, State House

Right to Know Advisory Committee
Ongoing FOA Issues Subcommittee
DRAFT Meeting Summary
Wednesday, September 23, 2009

Convened 11:35 a.m. in Room 438, State House, Augusta

Present:	Absent:
Mal Leary, chair	Ted Glessner
Karla Black	
Judy Meyer	
Linda Pistner	
Harry Pringle	

Staff:
Colleen McCarthy Reid
Peggy Reinsch

Ongoing Issues Subcommittee Chair Mal Leary convened the meeting and members introduced themselves.

Use of technology in public proceedings

The Subcommittee reviewed the revised draft legislation prepared by staff to address limitations on public proceedings using technology.

Although he is not an "official" subcommittee member, Harry Pringle asked about the intent of the language in subsection 2, paragraph C. Mal Leary explained that the subcommittee's intent was not to require that all remote locations from which members participate be open to the public, but only to state that if the remote location is open to the public, i.e. in a public building, then that public remote location must be open to members of the public who want to attend the meeting as well as the member of the body holding the proceeding.

Mr. Pringle also asked about who decides whether a member of a body may participate in a meeting through telephonic, video, electronic or other communication means. Is it the body holding the meeting? Is it the individual member? Mr. Leary responded that the language is intended to make the use of technology permissible. Mr. Pringle wondered if the language would be interpreted to allow flexibility or to give public officials the authority not to attend meetings. Judy Meyer agreed with Mr. Pringle and suggested that the language be clarified to require the public body to make a decision whether to permit members to participate in meetings using technological communication means.

Subcommittee Chair Leary reminded the subcommittee that staff had asked whether the exception to the requirement that all public proceedings have a quorum of the members present at one location should be limited to State governmental bodies after a declaration of an emergency pursuant to law. Using the ice storm and other natural disasters as an example, Mr. Leary noted that there could be localized emergencies affecting certain towns or counties and the language should not restrict the ability of town selectpersons or county commissioners to meet on an emergency basis to address the situation. Linda Pistner agreed.

Chair Leary stated that the subcommittee's threshold question is whether to not to refer the draft (and the other draft proposals under consideration by the subcommittee) to the full Advisory Committee; any issues related to the specific language in the draft should be reviewed by the full committee. The subcommittee agreed to forward the draft to the Advisory Committee for their consideration.

Social Security Numbers

The Subcommittee reviewed the draft legislation. The draft does the following: 1) it amends the definition of a public record to state that social security numbers are not a public record; 2) it prohibits the collection of an individual's social security number by agencies or officials of the State or any of its political subdivisions unless specifically required by federal or State law or court order; 3) it prohibits the disclosure of social security numbers collected on or after January 1, 2011 and authorizes an agency or official to redact or otherwise refuse to disclose a social security number collected prior to January 1, 2011; and 4) it states the circumstances when an agency or official may disclose a social security number.

Linda Pistner liked the way the language was drafted, but asked whether the language in section 1 should be amended to cross-reference the new language of the proposed subchapter relating to social security numbers. Diane Godin, Register of Deeds in Somerset County, asked whether the subcommittee had considered the impact of the proposal on records maintained in the Registry of Deeds. Mr. Leary responded that Beverly Bustin-Hathaway had attended prior subcommittee meetings and brought the issues affecting Registries of Deeds to the subcommittee's attention.

Chris Parr, Staff Attorney for the Maine State Police, Department of Public Safety, said the draft raised 3 questions: 1) Is a social security number a record by itself or is it part of a record? 2) Why is an agency given the authority to redact a social security number rather than required to redact? Will this allow some agencies to redact and establish fees while others will not? 3) What is the penalty? Judy Meyer responded that the subcommittee recognized the potential for only some agencies to use the authority to redact social security numbers, but that a mandate to redact would result in increased costs. With regard to the penalty, Chair Leary said the intent was that the same penalty as for other violations of the Freedom of Access laws would apply—$500 civil penalty for "willful" violations.

The subcommittee agreed to forward the draft to the Advisory Committee for their consideration and note the issues raised about the draft proposal during this discussion to the full Committee.

Minutes

The Subcommittee reviewed the draft legislation. The draft incorporates a requirement that a minimum record of public proceedings must be made promptly and open to public inspection unless any record or minutes is required by another provision of law. The minimum requirements as proposed in the draft include the date, time and place of the meeting; the members recorded as present or absent; the general substance of the meeting; and a record of all motions and votes taken.

Using schools as an example, Harry Pringle asked how the word "promptly" should be interpreted. Mr. Pringle noted that with school boards minutes are recorded but not approved until the next board meeting. Is the language intended to change current practice of how minutes are taken and made available? Judy Meyer responded that the intent was not to change current practice where boards are regularly keeping a record or minutes, but to require that a minimum

record of meetings be kept (not detailed minutes) for those boards that do not. Chair Leary agreed with Ms. Meyer that the intent was to make local governments, especially, meet a minimum standard for a record of their official actions.

Linda Pistner noted the subcommittee's earlier discussions related to audio tapes of meetings and suggested that perhaps the language could be amended to require that a tape be preserved until any written record is available. Chair Leary stated his belief that a written record should not be required and suggested instead that language should be added to the draft to state that an audio or video recording of a meeting satisfies the requirement to make a record available to the public.

The subcommittee agreed to forward the draft to the Advisory Committee for their consideration and note the issues raised about the draft proposal during this discussion to the full Committee.

Ad hoc internal review

The Subcommittee reviewed the revised draft legislation.

Harry Pringle suggested that the draft legislation may be too broad and needs rethinking. Mr. Pringle asked about the potential impact of the draft on an investigation of an employee's conduct or other personnel issues, noting that there was a Law Court decision involving an investigation of an employee by the Madawaska School District. Would this draft require the disclosure of confidential information about an individual employee? Linda Pistner responded that the subcommittee was not intending to require the release of confidential information used during an investigation and suggested that the language could be amended to protect against the disclosure of information designated confidential in other statutes.

The subcommittee agreed to forward the draft to the Advisory Committee for their consideration and note the issues raised about the draft proposal during this discussion to the full Committee.

Next Meeting

No additional subcommittee meetings scheduled; next full Advisory Committee meeting scheduled for Wednesday, October 21, 2009, 12:30 p.m., Room 438, State House.

Adjourned, 12:35 p.m.

Respectfully submitted
Peggy Reinsch and Colleen McCarthy Reid

RIGHT TO KNOW ADVISORY COMMITTEE

LEGISLATIVE SUBCOMMITTEE MEETING
DRAFT AGENDA
October 13, 2009
10:30 a.m.
Room 438, State House

Welcome and introductions

1. Review of "serialized e-mail" issue
   - Rep. Dostie's draft
   - Other states' approaches?
   - Discussion

2. Requests for bulk electronic data
   - Identify issues
   - Other states' approaches?
   - Discussion

3. Additional matters

Adjourn

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
October 13, 2009
(Draft) Meeting Summary

Present:
Shenna Bellows, Chair
Suzanne Goucher
Chris Spruce

Absent:
Linda Pistner
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Shenna Bellows convened the Subcommittee and provided an overview of the planned agenda.

Review of Draft Changes to Existing Public Records Exceptions

The subcommittee reviewed 5 exceptions previously approved with changes:
- 10 §945-J (Maine International Trade Center)
- 12 §550-B (Bureau of Geology and Natural Areas - well drilling)
- 12 §549-B (Bureau of Geology and Natural Areas - mining)
- 12 §6445 (Lobster Promotion Council)
- 12 §8869 (Bureau of Forestry)

Staff distributed the draft proposals to amend the exceptions to the affected agencies before the meeting and sought comments and input on the drafts.

Title 10, section 945-J and Title 12, section 6445. With regard to the changes proposed affecting the Maine International Trade Center (Title 10, section 945-J) and the Lobster Promotion Council (Title 12, section 6445), there were no comments submitted on the draft. The subcommittee agreed to forward the recommended changes as drafted to the Advisory Committee.

*Title 12, section 8869, subsection 13.*The Department of Conservation indicated that they had no objections to the proposed changes. The subcommittee agreed to forward the recommended draft to the Advisory Committee.

Title 12, section 549-B. Tom Weddle of the Maine Geological Survey attended the subcommittee on behalf of Bob Marvinney, State Geologist. Mr. Weddle provided an overview of the information relating to water well location used for geographical maps available for purchase and, as an examples, distributed 3 maps to the subcommittee. He also explained that the statutory provision providing confidentiality for reports submitted by well drillers was included in the law at the request of well drillers because of concerns raised about the potential release of proprietary information. He pointed out that the mapping information made available to the public includes information about well location and well depth to bedrock and depth to water table. Chris Spruce asked about the specific concerns of well drillers about disclosure of well location and well depth. Mr. Weddle responded that he could not answer for well drillers, but noted that, during the meeting of the Water Well Commission, concerns were raised about the release of proprietary information. Although staff had understood that members of the Water Well Commission would

provide comments at the meeting, no one was present. Subcommittee Chair Bellows noted that the proposed draft still allows the designation of proprietary information as confidential at the request of the well driller submitting the information if the bureau makes a determination that the information is proprietary. The subcommittee agreed to forward the recommended changes as drafted to the Advisory Committee.

Title 12, section 550-B. The subcommittee reviewed information provided by Bob Marvinney on the process for granting a mining lease on State lands. The information noted that a permit to mine from the Department of Environmental Protection is also required after a mining lease on State lands is granted by the Maine Geological Survey and that there are at least 3 opportunities for public comment and hearing. Subcommittee Chair Bellows reiterated her concerns about this information being kept confidential and suggested she would be more comfortable if the provision governing annual reports were amended to keep confidential only proprietary information. The subcommittee agreed and asked staff to provide a revised draft for consideration.

Review of Criminal History Record Information Act

Staff distributed proposed revisions to Title 16, chapter 3, subchapter 8: Criminal History Record Information Act and Title 16, section 614, subsection 1-A. Staff developed the draft with input from Charles Leadbetter, Special Assistant Attorney General. Staff also distributed a draft proposal and background information from the Maine Civil Liberties Union with regard to amending the law to require notice to an individual if criminal history record information is used as a basis for the denial of employment or credit. Ms. Bellows asked whether this issue should be separated from the other recommendations on existing exceptions as some of the proposed changes are substantive and may draw the interest of numerous interested parties. Before taking further action, the subcommittee agreed to share the draft proposals with the full Advisory Committee and circulate among interested parties for comment.

Appropriate standard statutory language for protected information provided in applications for government funding, technical assistance, etc.

The subcommittee reviewed draft model language prepared by staff based upon the provisions in Public Law 2009, chapter 372 and also reviewed the chart prepared by staff outlining the provisions in current law addressing the confidentiality of records provided by applicants for technical or financial assistance. Ms. Bellows explained that she was comfortable with the proposed model language as applied to businesses, but suggested that a distinction be made for information provided by individuals applying for financial assistance. Ms. Bellows indicated that the current law relating to applicants for education loans protects the confidentiality of all records provided by the applicant and that this might be appropriate model language to use. The other members of the subcommittee agreed that it would be useful to develop one proposal for model language related to businesses and one proposal for model language related to individual applicants. The subcommittee asked staff to provide revised model language related to individual applicants.

Appropriate standard statutory language for review panels, such as Homicide Review panel

The subcommittee reviewed the statutory examples governing records of review panels similar to Title 19-A, section 4013 and copies of 2 annual reports from review panels. Ms. Bellows noted the disagreement among the subcommittee and other advisory committee members on the issue and suggested that 2 alternatives be brought to the advisory committee. Mr. Spruce agreed and pointed out the overlap between the issue of review panel records and the ad hoc internal review draft brought forward by the Ongoing Issues Subcommittee. The subcommittee agreed to forward 2 alternatives to the advisory committee: a recommendation to maintain the current law and a recommendation to amend the law to provide discretion to release certain confidential information held by the domestic abuse homicide review panel.

Next Meeting

The next meeting is scheduled for October 21st at 11:30 am.

The meeting adjourned at 2:25 p.m.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Other Scheduled meetings

Public Records Exception Subcommittee
Wednesday, October 21, 2009
11:30 a.m., Room 438, State House

Full Advisory Committee
Wednesday, October 21, 2009
12:30 p.m., Room 438, State House

Legislative Subcommittee
Tuesday, November 10, 2009
10:30 a.m., Room 438, State House

Right to Know Advisory Committee
Public Records Exceptions Subcommittee
October 21, 2009
(Draft) Meeting Summary

Present:
Shenna Bellows, Chair
Bob Devlin
Suzanne Goucher
Mal Leary
Linda Pistner
Harry Pringle
Chris Spruce

Also in attendance:
Ted Glessner
Justice Andrew Mead

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Shenna Bellows convened the meeting at 10:35 a.m., and welcomed the participation of Advisory Committee members that serve on other RTK AC subcommittees, and Supreme Judicial Court Associate Justice Andrew Mead.

Juror confidentiality statutes

Justice Mead was invited to participate with the Subcommittee in discussing, at the request of Mal Leary, the existing confidentiality protection of information pertaining to jurors. Ted Glessner accompanied Justice Mead.

Justice Mead currently chairs the Judicial Branch's committee that has jurisdiction over issues concerning court records. Justice Mead also explained his experience with juries, including 16 years as a Superior Court Justice, overseeing many jury trials. He encouraged jurors to share their concerns, and the top three reported back to him were parking costs, the per diem paid for jury service and a profound concern about whether parties will be able to find the jurors after the case is concluded. Criminal cases are often overwhelming. Maine jurors are great, Justice Mead said; 99.9% take their role seriously. Some are lost along the way because of their concerns about making decisions on serious injuries, large monetary values and horrific crimes.

Justice Mead stated that the current law is elegant in the way it balances the need for government openness with personal privacy. Justice Mead clarified that he can offer comments on the administration of justice, but he cannot make further comments about the law.

Mr. Leary explained why he asked the Subcommittee to review the juror statutes - the juror confidentiality statutes are the total reverse of all the other laws: where most statutes presume records are open and provide exceptions, Title 14, sections 1254-A and 1254-B presume confidentiality and allow release only as exceptions. Mr. Leary also mentioned the history of criminal trials being open. In addition, Mr. Leary noted that there is nothing you can do to prevent someone from identifying a juror who is serving on a jury just by attending court, or watching who enters or leaves the court house. Judges can take steps to protect jurors in federal

courts and in some states. Mr. Leary mentioned the notorious prosecution of an alleged mobster in which the jury was kept anonymous and sequestered during the trial, and only after the acquittal was it discovered that a juror was a cousin of the defendant on trial. Mr. Leary has spoken to Chief Justice Saufley and agrees with her that many areas of the juror questionnaire should be kept confidential. When he served on a criminal jury presided over by Justice Skolnick, Mr. Leary said that the question of names becoming public was inconsequential.

Justice Mead agreed that government needs to be open, and information about how the government does business needs to be public. But Justice Mead asserted that juror names and addresses are not really "court records;" they are very different from the usual type of record that must be public. Although it is true that you cannot avoid being identified, just the fact that the defendant knows who the juror is can affect how the juror behaves. The court used to give out the entire juror list - names, addresses, juror questionnaire when requested - and never heard of a problem. But what if the defendant is a sociopath? The fact that the name and address are <u>not</u> released serves as some protection. If a juror asks if the defendant can get to him or her, the judge can say generally no.

Chris Spruce asked whether we need to have a blanket approach; what if we develop a set of criteria for certain cases, but have a presumption that the information is open? Justice Mead was concerned about the practical application of such an approach; you can't tell the juror whether the information will or won't be public. One judge may apply the law inconsistently from another judge. From a philosophical point of view, if this isn't really court data, then releasing it is inconsistent. The current practice is to presume the information is confidential unless a requester can prove a "need to know." If the requester makes a responsible inquiry, then it can be released.

Ms. Bellows reiterated the subcommittee's focus on the right to know how the government operates. Does juror information fall into that category? The government is collecting more and more personal, sensitive data. Justice Mead agreed that the courts have a lot of personal data, and he explained that the courts have carefully defined "court records." There has to be some ability to look at evidence in a case, and many records contain certain bits of personal information, such as Social Security numbers, drivers' license numbers and date of birth. Justice Mead identified media requests as generally being responsible inquiries. Illegitimate requests could include pedophiles looking for juror questionnaire information relating to child victims of sexual abuse. The law recognizes an overriding interest in keeping personal juror information confidential; there should be some assurances that the sociopathic defendant won't end up with a juror's name and address.

Linda Pistner questioned whether there are statutes or court orders that limit a juror from speaking to the Press once a case is complete. Justice Mead said that judges make clear that there is no duty to speak, but there is also no restriction on a juror speaking with the Press, or anyone else, once the case is over. When asked what standard judges apply when deciding whether to release juror information, Justice Mead said that as justices of the court, the concern is really about a person who wants to track down a juror, harass the juror or injure the juror. Research inquiries and media inquiries are responsible uses. The court wants the ability to say no to less than legitimate requests, the ability to say no to people who want the information for mischievous reasons.

Ms. Pistner asked Justice Mead about the juror questionnaire. Justice Mead described the questions as fairly intrusive.

Harry Pringle asked the Subcommittee members if there is a serious problem with the current law that needs to be addressed? Mr. Leary responded that these statutes turn the usual public records-confidentiality presumption on its head. Mr. Pringle understands the jurors' concerns about being tracked down; he said he is less guided by a general philosophical standard than the facts presented here.

Suzanne Goucher asked about the release of the names of potential jurors as well as the questionnaire forms, to the parties and attorneys for voir dire. Justice Mead explained that while the defense attorney is given copies, the attorney is not permitted to release that information to the defendant. The attorney takes notes, and acts as a buffer between the juror and the defendant. On the day of the trial, the defendant gets a list of the names of the potential jurors to see if the defendant knows any, but the defendant does not see the questionnaires. Ms. Goucher asked whether the release of the list of the potential jurors to the defendant is turning the protections of the law on its head. Justice Mead replied that if the defendant does not know the person on the potential list of jurors, the defendant will not know when the person is chosen as a juror, as the jurors are identified in voir dire by number only.

Mr. Leary said that his concern is about both the pool of potential jurors and the panel of jurors sitting in judgment, although he agreed that some information on the questionnaires should be kept confidential. But it is necessary to release some personal information to identify whether there is bias, discrimination, overreaching. Why would a person's occupation be deserving of protection? The fundamental problem in this country, Mr. Leary said, is that people distrust government. Sometimes getting the information after the trial is too late. The records are designated confidential, and there is not a right to obtain the information. What if the court does not consider a reporter "responsible?" Ms. Bellows expressed her doubts that a juror's occupation is a "governmental function." Although the Judicial Branch is a separate branch of government, a juror is different than a public employee. She asked whether there is a practice in Maine of <u>not</u> providing the information when requested. Ms. Goucher noted that there are judges who say they will never have cameras in the courtroom, so it would be easy to predict that a judge may refuse to release the information. Ms. Goucher asked what happened – from the time Maine became a state in 1820 to 2005, the information was open. Justice Mead explained that Society changed – we live in an increasingly hostile, violent society with heightened concerns. He believes television contributes to the unease. He thinks that people are more concerned now about others having their information; he likes being able to tell jurors that we have done what we can to protect them. Ms. Goucher described the jury room as a "black box" – just about the only place we allow complete secrecy. But when the trial is complete, the interests of justice are served by knowing who was there and what transpired.

Ms. Bellows agreed there are competing interests. She brought the focus back to the Subcommittee's charge: to review the statutes, after having already voted as a Subcommittee to leave as is. Mr. Pringle saw no need to make a change – nothing was presented that had persuaded him otherwise. He moved that the Subcommittee recommend no change to the juror confidentiality statutes. Mr. Spruce moved to table; Ms. Goucher seconded the motion. The subcommittee voted 4-1 to table (Ms. Bellows, Ms. Goucher, Ms. Pistner, Mr. Spruce voting in favor; Mr. Pringle voting against).

The Subcommittee agreed to meet on Tuesday, November 10th at 12:30 p.m., following the meeting of the Legislative Subcommittee. [Note that both meetings have been rescheduled for November 17th.]

The meeting adjourned at 12:40 p.m.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Right to Know Advisory Committee
Legislative Subcommittee
November 17, 2009
Room 438, State House, Augusta
Meeting Summary

Present:
Chris Spruce, Chair
Karla Black
Robert Devlin
Suzanne Goucher
Linda Pistner
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee at 10:33 a.m...

Serialized email issue

Rep. Dostie has proposed legislation (approved by the Legislative Council for introduction to the Second Regular Session of the 124th Legislature) to prohibit communications by members of governing bodies outside of public proceedings. At the last Legislative Subcommittee meeting, the members agreed that the offending activity that triggered Rep. Dostie's proposed bill is already illegal. The Subcommittee requested that staff prepare drafts for two approaches: 1) draft legislation making it explicitly clear that decisions can be made only in public proceedings; and 2) draft guidance on the issue to make use of the Advisory Committee's responsibility to provide information about "best practices" for public officials.

The Subcommittee considered two slightly different versions of statutory language, building on the law governing executive sessions ("An ordinance, order, rule, resolution, regulation, contract, appointment or other official action may not be finally approved at an executive session." 1 MRSA §405, sub-§2) and the definition of "public proceeding" ("The term "public proceedings" as used in this subchapter means the transactions of any functions affecting any or all citizens of the State by any" of listed or describe governmental boards and agencies. 1 MRSA §402, sub-§2). The members agreed that the drafts did not meet the needs of the Subcommittee. Everyone knows, Linda Pistner, asserted, that taking final action outside of a public proceeding is improper, and suggested instead language that applies to informal discussions used to circumvent the law. Bob Devlin agreed that the focus needs to be on improper discussions. Harry Pringle, noting that this is probably the most important issue the Advisory Committee has dealt with so far, reiterated that there are two factors that must be included in any discussion of limiting communications among public officials. First, the Constitution; the First Amendment protects Freedom of Speech, and the State must have a compelling interest in restricting such communications. Second, Mr. Pringle reminded the members of the long tradition of conversation between citizens in Maine, in particular talking with local legislators about issues of concern.

Mr. Pringle referred to a draft proposal prepared by Sigmund Schutz, Clerk of the Maine Freedom of Information Coalition and participant later in the meeting. The draft proposes a definition of

"meeting" that includes communication by a quorum with other members "contemporaneously or by the use of serialized or sequential telephone or electronic communication." Those are the main factors, Mr. Pringle said: contemporaneous communications that substitute for decision-making at a public meeting. Mr. Spruce said he was not comfortable going forward with legislation on this issue. Karla Black agreed; if there is a problem with outside e-mail, address that through guidance and training. If it is still a problem, maybe consider legislation then.

The Subcommittee reviewed the draft question-and-answer document intended to be added to the Frequently Asked Questions webpage of the State's Freedom of Access website. Mr. Spruce supported moving forward with a revision of the draft after making sure it is correct. He noted that e-mail is not the only problem, that other forms of electronic communication represent the same concerns; these technologies were not in existence when the Freedom of Access laws were first adopted, so their use was not contemplated by the statute. Mr. Pringle reminded the Subcommittee that local elected bodies have two roles: Legislative, in which they enact laws, ordinances, rules; and judicial, in which they reach judgments about certain issues, such as personnel. It is clear that there should not be communication outside the judicial proceedings, but part of the legislative job is talking with people and gathering information. Mr. Pringle voiced concern about the "Scarlet Letter" approach employed by some state laws (and incorporated into the guidance text), in which any communications between meetings must be disclosed at the next meeting. He reiterated the focus: e-mail among a quorum cannot be used to substitute for decision-making at a public meeting. Mr. Devlin recommended including, along with e-mail, discussion in any format, if it takes the place of making decisions in public meetings.

Suzanne Goucher suggested amending §403 ("Meetings to be open to the public") to add a prohibition on circumventing the open meeting requirement by using e-mail or other methods of electronic communications. Mr. Spruce said he preferred not to go the statutory route, and suggested working with the Attorney General and Ms. Black to come up with language for the FAQs. Mr. Pringle agreed to put his comments in writing and share them with the staff. Ms. Goucher agreed with that route because Rep. Dostie's bill will keep alive the debate about a legislative solution; she was concerned that the guidance materials would not be utilized as a resource by enough people.

The Subcommittee agreed with Mr. Spruce that there was consensus to proceed with further development of the guidance language.

Bulk data

The Subcommittee turned to Dick Thompson, Chief Information Officer, to start the discussion on bulk data requests. He provided a packet of information that included the InforME (Maine's web portal) statute, a list of the bulk data services currently provided through the web portal, a copy of the portal contractor's parent corporation's position on bulk data as a portal service, and a sample of bulk data requests (crash reports, employee contact information, request for non-resident IF&W licenses, request for IF&W licenses by town). Mr. Thompson characterizes bulk data requests in several ways:

- Premium bulk data requests - where data is managed through software to provide format, appropriate character, content, sort and other value-added services;
- Bulk data requests against existing databases;
- Bulk data requests across several databases; and
- Bulk data requests for protected information (in whole or in part).

A significant concern is that when InforME was originally conceived, the statute provided that the revenue it produced would support its operation, and there was no provision for the General Fund to

support the portal and its operation. If the fees for premium services cannot be collected, InforME will have to scale back or ask for General Fund support. Mr. Thompson said that most uses of the premium services have been for commercial purposes. The data provided is approved by the agency before the response is provided. The main subscriber for Bureau of Motor Vehicle data is interested in vehicle damage, not any personal information contained in the reports.

Mr. Thompson explained that a law firm request for the crash reports originated with a request through InforME, but the requestor instead made a Freedom of Access request for the same data after finding out how much the data would cost. The Office of Information Technology and the Bureau of the State Police believed they had to comply, and did so. Mr. Thompson included a copy of the letter from the Maine Information Network (the InforME contractor) to Attorney General Mills asserting that the provision of the data without going through InforME and paying the fees violated the InforME law.

Mr. Thompson discussed the request for a laundry list of state employee information, which is difficult to provide because not all the data elements are kept by the State, and those that are do not reside in a single database. The request is clearly for a commercial purpose, and he is unwilling to undertake the complex chore of providing the information as requested for $10 per hour. He will not be able to verify the accuracy of individual data points because of the nature of some of the databases. Mr. Pringle said he has never understood the Freedom of Access law to require anyone to create a document; the State should give the requestor the documents and let the requestor make what it will out of it. Mr. Thompson explained that the data is not in documents, but in databases. He could, however, give the requestor a couple of lists. Mr. Pringle said that it is fine to be responsive, but it should not be confused with what is required by the law.

Mr. Thompson moved on to the requests to the Department of Inland Fisheries and Wildlife. The information available through InforME about licenses included only those licenses transacted via the web portal. In addition, a request sorted by town was not accurate because the town of North Yarmouth was listed in different ways. This brings up the question, Mr. Thompson said, of what the Public Records law is all about: sunshine on the things we do. But not all data in government's hands is really about what government does and how government does it. Some of this data is extremely valuable. And all the data is collected and housed at taxpayer expense. Mr. Thompson said he will put together information about how other states are dealing with similar bulk data requests. He also said that the Office of Information Technology has begun the practice of posting information that is the subject of requests if the information is generic and there is public benefit in having it available easily, rather than only through a request.

The Subcommittee then welcomed Sigmund Schutz, at attorney at Preti Flaherty in Portland, who serves as the Clerk for the Maine Freedom of Information Coalition and who has extensive experience in media law and Freedom of Access issues. He serves as counsel to MacImage of Maine, LLC, in its lawsuits against Hancock County and other counties, seeking digital registry of deeds information. He explained how access to public records is critically important, and much of that information is collected through bulk data. Law enforcement can use bulk data for important public safety and criminal investigation purposes. Journalists investigating all sorts of issues, including fraud, correction, bias, etc., make use of bulk data. Many other professions and governmental workers access the information, including public health researchers and real estate professionals. Public land records are used by many entities for many purposes. As an example, the records must be accessible to support our credit system. Commercial requestors serve a necessary public purpose - they collect raw data, then add value. Most business transacted is based on public record databases.

Mr. Schutz explained that public access to real estate databases is critically important. Many private companies provide access to digital land records in other states, but not so much in Maine so far. These private companies are important to the continuation of records: A fire in Chicago wiped out all of a county's files, but the title company had copies and was able to repopulate the database. A glitch affected some of the digital records in Hancock County, and MacImage was able to fill in the gaps. Mr. Schutz mentioned the Property Records Industry Association (PRIA) as a national resource for information about property records access and preservation.

Mr. Schutz spoke about the MacImage litigation. First, public databases are public records. He said that was decided by Justice Marden in a Superior Court case. Second, what is a "reasonable fee" for digital records - can you charge a "per page" fee when it has no relation to the electronic database? He likened MacImage's request to a request for the contents of a library: All the books on the shelves (all the land records) and the card catalog (the indices the registries keep). The judge in the case said there are three possible ways to charge fees:

1. The actual cost (based on the Freedom of Access law);
2. Modified actual cost, related to the response costs (more than just the incremental costs of copying); and
3. Fee set by county, which may have no relation to the request.

The court chose option 2; no state agency that is subject to the Freedom of Access law can set a fee that is unrelated to the costs.

MacImage wants to collect all the land records in the state and make them available in a useful way. The counties will remain the only place to obtain a certified record. Since the lawsuit against Hancock County, that county is now making the records available online for free. MacImage has filed requests with other counties, and no county has provided the records as requested so far. MacImage filed a second lawsuit because the counties did not comply quickly enough.

Mr. Schutz provided as a handout excerpts from a PRIA Power Point presentation. He focused on a few points. First, the ownership of public records. Mr. Schutz asserted that public records are owned by the people, and the people have the ability to profit from those records, and the government serves as custodian of the records. Mr. Spruce asked about whether there is any recognition of the cost in transferring records from paper format to electronic databases. Mr. Schutz referred to the registries of deeds covering their costs through filing fees. Mr. Pringle tried to focus on Mr. Schutz's position on recovery of digitizing costs; Mr. Schutz elevated the importance of making records available over the need to cover costs. If the government thinks it is important to have a database for efficiency or other purposes, not to create revenue, it is presumed that there is an offsetting public benefit to having the database. He noted that there are some states that look at the commercial value of data, but then there is no guarantee that it won't be provided to the next person.

Mr. Devlin, who is the county administrator for Kennebec County, wanted to make clear that Kennebec County is no longer part of the MacImage lawsuit.

Mr. Devlin asked what is "reasonable" in setting fees for digitized records. The governmental entity is investing in security and preservation of information, not necessarily to sell records and make money. Mr. Schutz pointed to the handout, which suggested a list of factors appropriately taken into account when setting fees:

- Cost to set up access to a FTP secure website between county and requestor (if used);
- Fee for Programmer's time to set up electronic request;
- Fee for actual time of additional service personnel;
- Cost of Delivery Media – External Hard Drive, DVD, CD, etc.;

- Fee for CPU time; and
- Additional charge of 10 percent of the actual charges above for additional overhead.

Mr. Schutz mentioned an additional benefit that the governmental entity reaps from digitizing records: it saves storage space. Mr. Devlin assured the Subcommittee that Kennebec County has its digitized records backed up in three physically separate locations.

Ms. Pistner asked whether a company that is making money in making public records available has any responsibility to protect private information. And how does such a company decided who to disseminate information to? Mr. Schutz's response pointed out that all the registries of deeds, except Oxford County East, provide online access to their records 24/7. All the data is already out there. He recognized that isn't necessarily true for other agencies, and mentioned a white paper by PRIA on Social Security Numbers and redacting them from public records. He also noted that there is no study that shows that identity thieves are obtaining data from public records, but such thieves are using other sources. If a state imposes a restriction on the release of personally identifying information, it should be done prospectively because of the cost of going back to address existing records. The State can always allow people to request a redaction of their own information, and the requestor can pay for that work.

Ms. Pistner disagreed with Mr. Schutz's characterization of public records being "owned" by the public. The public has the right to access, she said, but holds no other indicia of ownership. Mr. Schutz said he agreed from a legal perspective, but it is really a question of perception: the public must be able to always access, always inspect. And the government has the custodian's responsibilities.

Beverly Bustin Hatheway, Register of Deeds for Kennebec County, and President of the Registers of Deeds Association was given the opportunity to make a few comments. She mentioned that the Registry of Deeds no longer has any paper copies of records, except for maps that are required to be recorded. The registries' job is to make sure the records are intact; she said it is the county commissioners' job to make decisions about contracts, hiring, fees, etc. She asserted that the bulk sales issue is a big one; maybe everyone should have access for free. Mr. Simpson (MacImage) stipulated in the most recent litigation that since Hancock County has been providing its records for free, his business has been ruined. Ms. Hatheway said there is nothing anywhere in the nation that mandates that registries sell records in bulk. She mentioned that Representative Treat is submitting legislation on this issue on behalf of the Registers of Deeds Association. Digitizing the data is an incredible amount of work, and it needs to be recognized. The Oklahoma FOIA law saws public records are not for commercial purposes. Diane Godin, the Register of Deeds in Somerset County explained that her registry is getting all the data into a digital database. It is to their detriment if they can't recoup their transfer costs, and they lose revenue because other businesses provide the documents. The counties will end up going to the taxpayers to cover costs.

Mr. Schutz wrapped up his comments by cautioning against getting into the very dangerous game of selling public records to profit, to fund other government activities. States and municipalities can't do that; counties shouldn't be able to do so either.

The Subcommittee agreed to meet at 10:30 a.m. before the full Advisory Committee meeting on December 1st to try to develop recommendations to the full Advisory Committee. At Ms. Hatheway's request, the Subcommittee will provide 15 minutes for the county commissioners association to respond to Mr. Schutz comments, if need be. Any additional information should be shared with staff prior to the meeting.

Staff will contact Representative Treat and Representative Crockett about making their bill proposals available to the Advisory Committee.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

Next Legislative Subcommittee meeting
Tuesday, December 1, 2009
10:30 a.m., Room 438, State House
Full Advisory Committee
Tuesday, December 1, 2009
12:30 p.m., Room 438, State House

Right to Know Advisory Committee
Legislative Subcommittee
December 1, 2009
Room 438, State House, Augusta
Meeting Summary

Present:
Chris Spruce, Chair
Shenna Bellows
Karla Black
Robert Devlin
Suzanne Goucher
Linda Pistner
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee at 10:35 a.m.

Communications outside of public proceedings/use of email issue

At the last meeting, the subcommittee agreed not to recommend legislation but to develop guidance for elected officials on the Freedom of Access website. There was consensus that the example raised by Rep. Dostie in her previous remarks relating to actions of local officials was already a violation of law. Chris Spruce also noted that Rep. Dostie's proposed legislation will be considered in the next legislation session and individual Advisory Committee members will have an opportunity to comment at that time if they choose.

Staff reviewed the revisions made to the Frequently Asked Question (FAQ) draft based on comments from Harry Pringle; the FAQ is intended to provide guidance on email communications outside of public proceedings. The subcommittee approved the revised draft and agreed to recommend to the full Advisory Committee that the FAQ be added to the State's Freedom of Access website.

Bulk data

Beverly Bustin-Hatheway, Register of Deeds for Kennebec County, and President of the Registers of Deeds Association was given the opportunity to make comments in response to Sigmund Schutz's presentation at the last subcommittee meeting. Ms. Bustin-Hatheway noted that the issue impacts all state and local government records, but her remarks were focused on how bulk electronic data requests affect counties and particularly registries of deeds. Until recently, there had not been many requests for these records in Maine, but as requests become more frequent several public policy questions have arisen:

- Should the law set administrative standards and rules for the dissemination of public documents?
- Should requests for obtaining public records in bulk be an exception to the FOA law?
- Should the FOA law make a distinction between records requested in bulk for commercial purposes vs. non-commercial purposes?

- Should there be an exception for requests made in bulk by the media or for use by nonprofit entities?
- Should there be "notwithstanding" language in the FOA law that allows other statutes to prevail in setting fees for copies of public records?
- Should the law define "reasonable" fee? What measurements should be used to determine "reasonableness"?
- Should FOA permit a public agency to make a determination whether to sell public records as a bulk sale?
- Should government agencies be required to make bulk sales when there is an established procedure for allowing public inspection and copying of records in their custody?
- Are public agencies allowed to collect revenues for these sales to offset the burden on taxpayers to fund state and local government operations?

Ms. Bustin-Hatheway explained that the Maine County Commissioners Association and Maine Registry of Deeds Association will jointly propose 2 bills in the next legislation session to address the issue of bulk sales of records in the registries of deeds. The associations are concerned about the integrity of records after sale and the use of bulk data requests for commercial purposes and believe that the issue should be addressed in the next legislative session. Ms. Bustin-Hatheway also called the subcommittee's attention to the written materials outlining the statutes enacted in other states relating to bulk data requests.

Linda Pistner inquired as to the costs incurred by Kennebec County to digitize the records in the Registry of Deeds and provide access to the database electronically. Ms. Bustin-Hatheway estimated that the total cost has exceeded $1 million dollars and has taken several years to complete; the costs were paid for through a $3.00 surcharge on documents recorded in the registry. Bob Devlin also clarified that, on an annual basis, the county budget reflects approximately $100,000 to maintain the electronic database.

Ms. Pistner asked Ms. Bustin-Hatheway for more information about the proposed legislation in the next session. One of the bills will propose to raise the document fee for copying records in the registry of deeds to $2.00 per page for the 2nd and subsequent pages; the sponsor of the other bill has asked that that proposal remain confidential until printed as a bill.

The Subcommittee then heard from Dick Thompson, Chief Information Officer, who was following up on a request from the subcommittee for further information on how other states address bulk data requests. Mr. Thompson highlighted the efforts of 2 states---Ohio and Kansas, noting that Ms. Bustin-Hatheway had already brought the Ohio law to the subcommittee's attention. Under Ohio law, there appears to be authorization for the adoption of rules to address the costs of bulk data requests, including the costs of extraction. Mr. Thompson also pointed out the definition of "bulk data request" specifically recognizes a data entry within a database as a record. In Kansas, the law includes language stating that a fee for copies of public records that is equal to 25 cents or less per record is deemed a reasonable fee.

Staff also distributed a letter from Sigmund Schutz, at attorney who made a presentation at the last subcommittee meeting, providing his comments and recommendations relating to proposed legislation that might carve out exceptions in FOAA for requests for bulk electronic data.

The Subcommittee discussed whether to make a recommendation relating to bulk data requests to the Advisory Committee. Harry Pringle reminded the group that the Advisory Committee has been reluctant to distinguish requests for public records for commercial purposes from other types of

requests and suggested that, if the subcommittee wants to move forward, the focus should be on defining what is a reasonable fee for requests for bulk data and whether that fee should allow government to recoup the costs invested to make records accessible electronically. Mr. Pringle would support allowing government to recover a reasonable portion of its investment. Ms. Pistner generally agreed with Mr. Pringle, but noted that the Registry of Deeds has been able to recoup their investment through the surcharge but State government has spent millions of dollars which have not been recovered in that manner. Ms. Pistner suggested that the Law School extern might be able to further research this issue for the subcommittee although she recognized that the policy issues will be before the Legislature this session. Suzanne Goucher concurred that the best action might be to defer to the Legislature. Mr. Spruce wondered how helpful a recommendation from the Advisory Committee would be and wasn't sure whether the subcommittee could make any decision or recommendation. Mr. Devlin agreed that there will be a lively debate on the issue and the debate should take place in the Legislature. Karla Black said she understands the reluctance to weigh in on this issue, but raised concerns about the impact on state agencies as requests for bulk data continue to be made; she hoped that the Legislature will take action this session.

The subcommittee agreed not to make a specific recommendation to the Advisory Committee at this time, but decided that the issues and concerns discussed should be included in the Advisory Committee's report. The subcommittee also agreed to include this as a research topic for the extern.

Ms. Bustin-Hatheway reiterated that the issue needs to be addressed by the Legislature, especially as it relates to the ability of state, county and local governments to recoup their investments. Mr. Pringle noted that the public would not be served if an incentive is created not to digitize records if costs are not able to be recovered. Rep. Terry Hayes, member of the State and Local Government Committee, expressed her interest in having a public policy discussion within the Legislature focused on the difference between access and ownership.

The meeting adjourned at 11: 37 a.m.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff