

Right to Know Advisory Committee
Legislative Subcommittee
July 19, 2012
Meeting Summary

Convened 9:08 a.m., Room 438, State House, Augusta

Present:
Judy Meyer
Richard Flewelling
Mal Leary
Bill Logan
Kelly Morgan
Harry Pringle
Linda Pistner

Absent:
Mike Cianchette
Ted Glessner

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

Judy Meyer, Subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Application of FOA laws to Maine Public Broadcasting Network

The Subcommittee discussed the application of the Freedom of Access laws to Maine Public Broadcasting Network. Last year, the Advisory Committee was asked by Mike Brown, a newspaper reporter and columnist, to consider the issue after Maine Public Broadcasting Network, in response to a request for certain financial records, stated that MPBN was only required under the law to make proceedings of its board of directors public and records held by MPBN were not “public” under the FOA laws.

Mark Vogelzang, President and CEO of Maine Public Broadcasting Network, and James Zimpritch, legal counsel to MPBN, gave brief remarks to the Subcommittee explaining that MPBN’s board meetings and materials from those meetings are open to the public and that, under federal law and guidelines, annual tax filings with the Internal Revenue Service and certain donor information are made public. Mr. Vogelzang stated that he believed MPBN has been transparent and open over the years and faithful to the requirements of its enabling Act. The request for job title and salary information about MPBN employees made by Mr. Brown raised concerns about the privacy of employees; although MPBN does receive some public funding, it was specifically established as a private, nonprofit corporation, not a state agency.

Judy Meyer and Harry Pringle asked what the harm was in releasing general information about job titles and salary ranges for employees. Mr. Vogelzang acknowledged that MPBN’s response to Mr. Brown was not as forthcoming or clear as possible, but there were concerns about whether releasing the information would establish a precedent in addition to the belief that MPBN employees have an expectation of privacy. Mr. Zimpritch also expressed concern that broadening

the law to make MPBN's records public would have unintended consequences and again noted the ability of the public to access MPBN's audited financial statements and IRS Form 990.

Mal Leary described the legislative history and debate when MPBN was established by the Legislature and explained that the law required MPBN to have public board meetings because it receives public funding and the Governor has a role in making appointments to the board. Mr. Leary also said that MPBN provided the same information requested by Mr. Brown in previous years. Mr. Leary noted that MPBN's response to Mr. Brown upset folks, but that he doesn't see the need to change the law. Mr. Leary encouraged MPBN to be more open about its salary information in the future.

Mr. Pringle stated that he would not favor changing the statute; a broad change would be problematic for MPBN and other quasi-state agencies. The current law seems to strike a good balance for both MPBN and the public. Linda Pistner expressed the opinion that the current law is ambiguous and it is not clear in its enabling law that MPBN is only subject to the public proceedings part of the FOA laws. Mr. Pringle and Richard Flewelling agreed that the current law is ambiguous, but would not recommend changes to the law at this time.

The Subcommittee voted 5-0, with Kelly Morgan and Ms. Pistner abstaining, that the Subcommittee recommend no change in current law. Ms. Morgan abstained because she was not present for all of the discussion and agreed with the concerns raised above by Ms. Pistner.

Status of email addresses collected by schools and towns

The Subcommittee reviewed the letter from Rep. Nelson requesting that the Advisory Committee clarify the law regarding the confidentiality of parents' email addresses collected by schools. Staff also distributed a news article and other materials related to a request made to the town of Falmouth for email addresses of its residents.

Ms. Meyer commented that government databases include both email addresses and telephone numbers. Given the widespread use of technology, Ms. Meyer stated she believed the Subcommittee should consider the issue. Ms. Pistner wondered if there was a principled way to distinguish parents' email addresses from other email addresses at the state and local level; she indicated her belief that federal law already protects the confidentiality of parent email addresses. Ms. Pistner also raised concern about the potential costs to state and local governments to redact this information when responding to requests if email addresses were designated confidential.

Mr. Pringle disagreed with Ms. Pistner, stating his belief that parents' email can be distinguished from other email addresses because of the unique manner that parents' email addresses are used to access a student's electronic school records. While Mr. Pringle believes that a good argument can be made that federal law (FERPA) may protect a parent's email address because it is linked to a student's record, the federal law does not specifically reference parents' email addresses. Rep. Nelson's position is that parents' email addresses should be designated confidential.

Ms. Meyer asked if there should be a distinction between the purposes for which parents' email addresses are used, e.g. to access student records versus to notify about school soccer games or other events. Mr. Pringle stated he would not make any distinction when the communication is related to a student, but if a parent communicated with a school board member about a pending matter, that would be public information. Bill Logan agreed that parents' email addresses should be confidential and that public policy should err on the side of the privacy of the student and

parent. The issue could be clarified through an opt-out provision for parents wanting confidentiality, but Mr. Logan would prefer protecting the confidentiality of all addresses.

Mr. Leary inquired whether Rep. Nelson had prepared any draft legislation for the Subcommittee to review. Staff responded that they were not aware any draft has been prepared as Rep. Nelson has not yet formally requested a bill. Mr. Pringle offered to prepare a discussion draft for the Subcommittee to review, which would specifically address parents' email addresses collected by schools.

The Subcommittee agreed to table the discussion and to review a discussion draft at the next meeting. Staff will also review existing law and provide examples of statutory exceptions in other areas of law that protect the confidentiality of individual email addresses, e.g. Department of Inland Fisheries and Wildlife licensees.

PL 264: email and other communications of elected/public officials

Staff reviewed Public Law 2011, chapter 264, which directed the Advisory Committee to examine the benefit of public disclosure of elected officials' emails and other records balanced with the availability of technology and other systems to maintain the records and provide public access and to submit its findings and recommendations as part of its 2012 Annual Report. As the Subcommittee and Advisory Committee were not able to complete the project last year, staff inquired whether the Subcommittee was interested in pursuing the project.

Before proceeding further, the Subcommittee agreed that it be useful to have input from the State Archivist. Staff will invite the State Archivist to make a presentation at the next meeting on any best practices and recommended retention policies for elected officials' records.

Use of technology in public proceedings (participation in proceedings from remote locations)

Staff provided copies of the draft legislation developed by the Subcommittee to govern the ability of public bodies to allow the use of technology for remote participation of a member. The draft legislation was previously recommended by the Subcommittee, but has not yet been adopted by the full Advisory Committee because of lingering concerns about the effect of the draft on 4 state agencies currently authorized to conduct meetings through the use of technology.

The Subcommittee agreed to review the draft legislation at the next meeting and directed staff to seek additional input on the draft from state agencies and the Office of Information Technology (OIT).

Templates for drafting specific confidentiality statutes

Staff provided draft templates for drafting specific confidentiality provisions concerning records provided by individuals and businesses to governmental agencies. The templates were developed for the subcommittee by former Law School extern, Sean O'Mara, in response to suggestions originally made by the Judiciary Committee that the Advisory Committee develop standard statutory language for confidentiality statutes when appropriate. The Subcommittee did not make any recommendation to the Advisory Committee on the templates in 2011.

The Subcommittee agreed to review the draft templates at the next meeting and asked staff to solicit comments from state agencies that may be affected by adoption of the standard language.

Other issues

Ms. Meyer told the Subcommittee she had been contacted by Rep. Peggy Rotundo, who raised concerns about state agencies charging the same fees for identical requests for public records when subsequent requests after the initial request would not involve the same amount of time for search, retrieval and compilation of the records. Ms. Meyer asked for comments from the Subcommittee about whether this was a permissible practice under the current law; she noted that the situation was particularly irksome to her as the Sun Journal was one of the parties affected.

Ms. Pistner stated that she believed that current law may prohibit such a practice as agencies are limited by the statute to charging a fee for the “actual cost” of compiling the information. Mr. Pringle agreed with Ms. Pistner that the current law already addressed the issue. Mr. Flewelling noted that this was a perfect example of the type of issue that the Ombudsman could resolve and looked forward to when the position would be filled. Mr. Logan also agreed that the practice should not be permitted under existing law and believed that it would be difficult for the Subcommittee to craft a legislative response to address the equity issue as the initial requester may bear higher costs to access the records than subsequent requesters for the same records.

The Subcommittee agreed to take no action; Ms. Pistner will communicate with the state agency involved and the Assistant Attorneys General representing that agency to clarify the agency’s permissible fees under existing law.

Future Meetings

The Subcommittee agreed to meet next on Thursday, August 23, 2012, starting at 9:00 a.m.

Other scheduled meetings:

The Encryption Subcommittee will meet Wednesday, August 8, 2012, starting at 9:00 a.m.

The Public Records Exception Subcommittee will meet on Wednesday, August 8, 2012, starting at 1:00 p.m.

The Bulk Records Subcommittee will meet on Thursday, August 23, 2012, starting at 11:00 a.m.

The Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Meyer adjourned the meeting at 10:35 a.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee
Encryption Subcommittee
July 16, 2012
Meeting Summary

Convened 9:16 a.m., Room 438, State House, Augusta

Present:
Rep. Joan Nass
Linda Pistner
AJ Higgins
Joe Brown
Mike Cianchette
Mal Leary
Judy Meyer

Absent:
Perry Antone

Staff:
Curtis Bentley
Peggy Reinsch

Introductions

Linda Pistner called the meeting to order at 9:16 a.m. and asked all the members to introduce themselves.

Suzanne Goucher, Maine Freedom of Information Coalition and Maine Association of Broadcasters

Ms. Goucher reiterated the concerns outlined in the Maine Freedom of Information Coalition's letter of April 27, 2012 to the Maine Right to Know Advisory Committee regarding the possible increase in the encryption of radio transmissions by public safety agencies after switching from the current analogue radio system to a digital radio system. Ms. Goucher said agencies are moving to a digital radio system to improve interagency operability but is concerned the switch will impede the media's ability to obtain public safety information that is readily accessible through the current analogue system. The media uses analogue scanners as its primary tool to monitor public safety matters. Ms. Goucher said there isn't any concern about digitally encrypting those communications that are currently encrypted (hostage negotiations, tactical, SWAT Team transmissions, etc.) but any expansion would cause headaches and foster paranoia and fear in the public. She also stated that it should be fairly easy for law enforcement and interested parties to prepare a mutually agreed upon list of communications that should remain encrypted.

Department of Public Safety, Lt. Col. Raymond Bessette

Lt. Col. Bessette said the state is using an antiquated 1974 radio system that is no longer supported and is difficult to maintain. He stated that the department will not encrypt any transmissions under the digital system that had not always been encrypted under the old system. Lt. Col. Bessette likened the move to digital to switching from AM to FM and stated that the switch itself will not encrypt the information but people will need to purchase a digital scanner to listen in. He said that Region-Net will simultaneously rebroadcast transmissions in analogue so public safety partners not switching to digital can hear transmissions and scanners will be able to pick up those transmissions.

Lt. Col. Bessette said the department does not have any protocols or rules on encryption and each agency has the ability to decide what transmissions should be encrypted. He said no one is asking for additional encryption because each entity wants the ability to know what the others are doing. He did not think the Maine Criminal Justice Academy did any training on encryption, only the operation of the radio system.

Lt. Col. Bassette expressed his opinion that this is really a public policy question of whether the public has a right to access these transmissions.

Office of Information and Technology-Wayne Gallant.

Mr. Gallant said there is a common misunderstanding that digital implies encryption which it does not; encryption would be done on top of going to digital. His office is working on MSCOMNET to consolidate radio communications for all state agencies under one system instead of several different ones. Mr. Gallant said MSCOMNET should be operating in the fall of 2013.

The FCC mandated that states narrowband communications by January 2013.

General Discussion.

Broadcasters' concerns about encryption are not at the state level but at the local level. The media wants to preserve what is available now and is concerned the switch over may result in more transmissions being encrypted. They are not too concerned about police going off-radio after initial call by using cell phones, texts and laptops because the media will have been alerted to the situation by the initial radio broadcast.

While encryption isn't a problem in Maine, the policy discussion needs to happen before it becomes a problem.

Encryption doesn't necessarily protect the transmissions because there is always someone who will be able to put in the effort to access encrypted messages but the general public will be the ones without access.

Next meeting.

The next meeting is scheduled for Wednesday, August 8, 2012 at 9:00 a.m. in room 438, State House, Augusta.

The subcommittee asked staff to search for any federal rules or laws dealing with encryption and to talk with AG criminal attorneys about Maine's law regarding encryption.

The subcommittee also asked the Department of Public Safety to provide a list of subject matter and situations that should be confidential.

The meeting was adjourned at 10:10 a.m.

Respectfully submitted,
Curtis Bentley and Peggy Reinsch

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Right to Know Advisory Committee
Public Records Exceptions Subcommittee
July 16, 2012
Meeting Summary

Convened 1:08 p.m., Room 438, State House, Augusta

Present:
Rep. Joan Nass
Shenna Bellows
Joe Brown
AJ Higgins
Linda Pistner

Absent:
Perry Antone

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

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

Issues remaining from 2011

- Title 22, section 8754, reporting of sentinel events

Staff provided a summary of the 2011 discussions about the confidentiality provisions in the sentinel event reporting statute, and distributed a copy of the most recent report submitted by the Department of Health and Human Services. Ms. Bellows stated that she would prefer to repeal the confidentiality provisions completely, although she knew it would cause a lot of concern and require a public hearing and thorough discussion involving many people. Other members agreed that a thorough process would be required, but either full Advisory Committee or the Judiciary Committee of the Legislature could host that process.

Jeff Austin of the Maine Hospital Association was in the audience and indicated that the staff summary mischaracterized his comments last year; if the confidentiality protections were no longer law, he said hospitals would still report because such reporting is mandatory, but it would be much hard for DHHS and the facilities to collect candid information from those who may have something to share if individuals were not protected by confidentiality. The purpose of the sentinel event reporting, he said, is for hospitals to get to the whole truth – the underlying cause of the event – and would that be possible if people with information are reluctant or refuse to come forward? Confidentiality, he said, helps provide the full truth.

AJ Higgins identified the tension between the public's right to get full information and therefore be able to make informed decisions and the hospitals benefiting from full

information, plus fairness to the facility. Ms. Bellows expressed her concern that the public doesn't get full information, so there needs to be an external source of accountability.

The Subcommittee voted 5-0 to repeal the confidentiality provisions. Mr. Higgins said it was hard for him to come down on either side, which made it an appropriate case for the Judiciary Committee to take up and hold a public hearing. Ms. Bellows suggested that the recommendation for repeal include a recommendation that the Judiciary Committee take up this public records exception separately so it can receive appropriate attention.

Staff will provide draft language for the proposed repeal at the next meeting.

- Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act

The "Community Right-to-Know Act" was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. It purported to require reporting of the presence of hazard substances to the Department of Health and Human Services. It is unclear whether any part of the program was ever implemented. The confidentiality provisions are broad and ambiguous about the public's right to access information collected by the Department. Trade secrets are completely protected.

The Right to Know Advisory Committee asked for guidance from two joint standing committees of the Legislature: Environment and Natural Resources (which oversees other toxic and hazardous substances programs) and Health and Human services (which oversees the Department of Health and Human Services). HHS responded by deferring to ENR, which did not respond before the 125th Legislature, Second Regular Session adjourned.

Ms. Pistner move to amend the statute to make the language protecting trade secrets clear and consistent. Ms. Bellows noted that she would repeal all of the confidentiality provisions. The Subcommittee voted 4-1 to support Ms. Pistner's motion; Ms. Bellows supports a minority report as described.

Staff will provide draft language for the majority and minority at the next meeting.

- Title 22, section 3188, related to the Maine Managed Care Insurance Plan
- Title 22, section 3192, related to the Community Health Access Program

Two programs that were enacted and never implemented are the Maine Managed Care Insurance Plan and the Community Health Access Program. The Right to Know Advisory Committee requested assistance from the Health and Human Services Committee on both of these programs. In a letter to the Advisory Committee in January 2012, HHS recommended that both programs be repealed. The Judiciary Committee

chose not to include the repeal in LD 1804, An Act to Implement the recommendations of the right to Know Advisory Committee Concerning Public records Exceptions because the proposed repeals had not had a public hearings.

Ms. Bellows expressed her concern that the Subcommittee's charge is about public records exceptions, not repealing programs. She suggested that the report keep the confidentiality but note that the programs had never been implemented. She thinks it is important to tread carefully because of the controversy over health care access.

The Subcommittee voted 5-0 to keep the confidentiality provision while sending a letter to the Department of Health and Human Services about the programs, with the suggestion that if the Department believes the statutory language is not necessary, then perhaps the Department is best situation to propose repeal in departmental legislation.

Review of Existing Exceptions –Titles 26 through 39-A

Binders including all the statutes subject to review this biennium were distributed to subcommittee members. Subcommittee members did not have enough time to review the initial packet of agency questionnaire responses before the meeting, so the members agreed to start the review at the next meeting with those provisions.

Public Comments on Existing Public Records Exceptions

Ms. Bellows explained that a couple of people had contacted the Advisory Committee with concerns about an existing public records exception that was reviewed during the last cycle. Ms. Bellows and Advisory Committee Chair Senator Hastings had discussed the concerns, and agreed that it was appropriate to provide an opportunity for any member of the public to come forward with comments about existing public records exceptions. The remainder of the meeting was devoted to public comments on existing public records exceptions.

All but one of the commenters expressed concerns about the confidentiality provisions included in the statute concerning public-private partnerships for transportation projects (Title 23, section 4251). The "East-West Highway/Corridor" may be the first project that falls under the public-private partnership law, and residents of the counties affected by the potential routes expressed their frustration at being unable to access any information about the project, its pathway and its impacts. They appealed to the Subcommittee to assist in accessing information. Subcommittee members made clear that even if the Advisory Committee recommended changes to the confidentiality provisions, no changes would be made unless and until the Legislature takes action.

One member of the public expressed concern about the need to have more health data accessible to the public. He provided examples of the usefulness of different sets of data, and expressed his support for making more information about sentinel events available.

Future Meetings

The Subcommittee agreed to meet next on Wednesday, August 8, 2012, starting at 1:00 p.m.

Other scheduled meetings:

The Encryption Subcommittee will meet Wednesday, August 8, 2012, starting at 9:00 a.m.

The Legislative Subcommittee will meet on Thursday, August 23, 2012, starting at 9:00 a.m.

The Bulk records Subcommittee will meet on Thursday, August 23, 2012, starting at 11:00 a.m.

The Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Bellows adjourned the meeting at 3:10 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee
Encryption Subcommittee
August 15, 2012
Meeting Summary

Convened 9:20 a.m., Room 438, State House, Augusta

Present:

Rep. Joan Nass (arrived 9:20 a.m.)
Linda Pistner
Perry Antone
AJ Higgins (arrived 9:30 a.m.)
Joe Brown
Mike Cianchette
Mal Leary
Judy Meyer

Staff:

Curtis Bentley

Introductions

Linda Pistner called the meeting to order at 9:20 a.m. and asked all the members to introduce themselves.

Review of federal and state laws pertaining to encryption, Curtis Bentley, staff.

At the request of the subcommittee, Curtis Bentley provided information about the applicability of federal and state laws to the encryption (scrambling) of certain police and first responder radio transmissions. The subcommittee discussed the potential applicability of Maine's Freedom of Access Act (1 MRSA, chapter 13) and Maine's law regarding the interception of wire and oral communications (15 MRSA, chapter 102). The subcommittee asked Assistant Attorney General Laura Yustak Smith about the applicability of the state prohibition against the interception of oral communications to en route radio transmissions. Ms. Smith said that encrypted radio transmissions might be considered "oral communications" as defined in the statute because the act of encrypting radio transmissions could indicate an expectation that the communications are not open to the public. Title 15 MRSA § 709, sub-§ 5 defines "oral communications" to mean "any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

In sum, Mr. Bentley did not find a federal or state statute or regulation that authorizes, prohibits or provides guidance on the encryption of police or first responder radio transmissions. It appears that it is within the discretion of an agency or entity making such radio transmissions whether or not to scramble a particular radio transmission.

Department of Public Safety, Maine State Police, Major Grotton, Lt. Pomelow, Col. Williams.

Major Grotton said the goal of the department is to keep general radio transmissions open and transparent to the public and that there are no plans to encrypt anything beyond what has always been encrypted. Moving to a digital system will require people who want to listen in on those calls to use a compatible scanner but nothing new will be encrypted. Major Grotton said that encrypted radio transmissions are not recorded so there wouldn't be a record for purposes of FOA. He was not aware of any agency that plans to increase its use of encryption.

Major Christopher Grotton was unaware of any investigations under the interception of wire and oral communication laws and felt that the kind of technology available today was not contemplated when those laws were enacted.

In response to a question from the subcommittee, Major Grotton estimated that approximately 1-2% of all radio transmissions (approximately 55 tactical operations annually) are encrypted. He noted that it is critical they remain encrypted and the department would be very concerned about anyone breaking into those transmissions.

Major Grotton said it is the on-scene commander who makes the decision to switch to an encrypted frequency. He thought the public would be aware of an encrypted transmission because the initial call would be audible and then there wouldn't be any other radio traffic regarding that matter. If encryption becomes too prevalent it should be reviewed as a policy issue.

Lt. Don Pomelow informed the subcommittee that the state will need a number of FCC licenses for its digital bandwidth; each municipality and county must obtain its own license. FCC licenses do not dictate the use of encryption.

Col. Williams stated that currently there isn't an issue with encryption and there are no plans to increase its use because the police derive benefits from having transmissions open to the public. He provided examples of receiving information from the public in response to radio calls and the public avoiding accident scenes. He said that there are ways for police to communicate now without the use of the radio but they want and need the public to hear what is going on.

Col. Williams cautioned the subcommittee against recommending a change in the law that would encourage officers to use private means of communication. He stated that the department only uses encryption for public safety and the safety of the department's officers and that they will continue to find ways to protect officer and public safety even if the use of encryption is regulated in the future.

Subcommittee general discussion

Mal Leary stated that there are real concerns about encryption and there needs to be accountability as encryption has been used at the federal level and by other states to avoid the detection of illegal behavior such as racial profiling and some agencies have started encrypting all calls.

A.J. Higgins suggested that there needs to be a balance between the needs of the police/first responders and public access. This is a valid issue to explore even if it isn't a huge issue right now. He felt this is a community relations issue.

Perry Antone said that there has been considerable confusion caused by the switch from analogue to digital and that going digital does not mean increased encryption. He also said there isn't anything in law that prevents the use of encryption but agencies have used it very little because it is important for them to freely share information between agencies. Radio dispatches are the most efficient way to get information to and from agencies and encryption limits that efficiency. Mr. Antone expressed concern that the subcommittee is working off assumptions that something will happen when there is no evidence that going from analogue to digital will encourage more encryption. He stated that the law doesn't need to be changed because there isn't a problem to fix and any changes could have far reaching unforeseen affects. He pointed out that if en route radio transmissions become "public records" then we will have to figure out a way to protect confidential information sent via these transmissions as is currently required for written records which isn't feasible.

Linda Pistner suggested that FOA was not intended to deal with oral communications and if there is a policy issue to resolve it may be better dealt with under some other section of law.

Judy Meyer reiterated that she just wants to maintain the current level of public access because that is working for everyone. She would like to see the current practice of encrypting put in writing either in policy or statute so everyone is aware of the protocol and also to reduce the possibility that the current practices will be changed with the arrival of new technology. Ms. Meyer agreed that there isn't a problem in Maine yet but it has become one in other states so should do something now.

Joe Brown said that we need to be careful not to impede police operations by removing the ability to encrypt certain types of calls. He suggested that the subcommittee could continue to watch the issue and if a problem arises. He said there isn't a problem that needs to be addressed today.

Mike Cianchette felt that what is happening out there now is working so it might be worthwhile to ask State Police to formally adopt a policy or guidelines for encrypting transmissions. Putting the current practice on paper might be helpful.

Subcommittee actions. The Encryption Subcommittee took the following actions.

A.J. Higgins made a motion to recommend to the full committee that no changes be made to current law. The motion was seconded by Joe Brown. The subcommittee voted 8-0 in favor of the motion.

The subcommittee unanimously agreed to recommend to the full RTK Committee that it send a letter to the Board of Trustees of the Maine Criminal Justice Academy requesting that it adopt an encryption policy for police that reflects the current practice and to have the board report back to the RTK Committee on any decisions or actions taken pursuant to this request.

Next meeting.

The subcommittee did not schedule an additional meeting.

The meeting was adjourned at 11:05 a.m.

Respectfully submitted,
Curtis Bentley

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Right to Know Advisory Committee
Bulk Records Subcommittee
August 23, 2012
Draft Meeting Summary

Convened 11:08 a.m., Room 438, State House, Augusta

Present:

Michael Cianchette, chair
Perry Antone
Judy Meyer
Richard Flewelling
Mary Ann Lynch
Kelly Morgan

Absent:

Mal Leary

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Introductions

Michael Cianchette, Subcommittee chair, called the meeting to order and asked all the members to introduce themselves. Mr. Cianchette also welcomed Mary Ann Lynch, who has replaced Ted Glessner as the Advisory Committee's representative of the Judicial Branch.

Review of Law Court Decision in MacImage Care and Legislative Response

Mr. Cianchette explained that the Advisory Committee requested that the Subcommittee revisit the issue of bulk data in light of the Law Court's decision in the MacImage case to close the "loop" on the discussion and determine whether additional action and/or recommendations on the issue are needed. Last year, the Bulk Records Subcommittee did not make a specific recommendation related to bulk data given the unresolved court case.

Staff summarized the Law Court's opinion in the MacImage case decided March 27, 2012 and provided a copy of the law enacted by the Legislature (PL 2011, c. 518) which makes permanent the statutory fees determined to be reasonable by the Law Court. The Law Court found that the specific statute in Title 33 regarding the registries controlled the dispute over the reasonableness of the fees charged by the registries—not the general language of the FOAA. Staff also distributed an outline of the Bulk Data Services offered by InforME on behalf of several state agencies, including information about the number of requests, fees for access, and the number of records sold.

Mr. Cianchette opened the discussion, noting that the Law Court's decision has settled the issue with regard to the Registries of Deeds but did not provide any particular guidance for the State and local governments with regard to requests under FOAA for bulk records. Mr. Cianchette also noted that representatives of the Registries of Deeds are happy with the decision. Susan Boulay and Diane Godin, 2 registers of deeds attending the Subcommittee, agreed, and said they were satisfied with the status quo. Rep. Brad Moulton, who serves on the State and Local Government and Judiciary Committees, told the Subcommittee that the deeds issue is only one symptom of what the State is facing. Rep. Moulton encouraged the Subcommittee to continue its

consideration of bulk records issues to establish a policy for all state and local government agencies. Ms. Lynch told the Subcommittee about the experience of the Judicial Branch with requests for bulk records. Ms. Lynch stated that the courts face similar issues and struggle with finding the resources to respond to requests in the spirit of openness while maintaining the court's ongoing operations.

Richard Flewelling reminded the Subcommittee of the recent legislative changes (endorsed by the Advisory Committee) that clarify an agency's responsibility under FOAA is to provide information in the medium in which it is stored. Mr. Flewelling stated he believed the amendment to the law may assist agencies in fulfilling requests for bulk records. Judy Meyer and Mr. Cianchette agreed that the new law seeks to strike the appropriate balance for both the person making the request for records and the agency fulfilling the request.

Mr. Cianchette remarked that the State will face continuing issues related to bulk data, but wondered whether there was a way forward to specifically address the issue. Mr. Flewelling stated that he was not sure there is a clear way forward; he was not particularly interested in pursuing the same approach as some other states that distinguish between requests for bulk data made for commercial and non-commercial purposes. Chief Perry Antone agreed that it would be difficult for agencies to determine the purposes for which FOA requests are made.

Mr. Cianchette told the Subcommittee that the current law and structure seems to be working for state agencies; he is not aware of any issues or concerns. State agencies do make available various categories of bulk data through InforME and establish fees for access to that data through rulemaking.

Chief Antone made a motion that no changes are needed and Ms. Meyer seconded the motion. The Subcommittee unanimously agreed to take no action; additional statutory changes are not needed at this time.

Future Meetings

The Subcommittee agreed that additional meetings are not needed.

Other scheduled Subcommittee meetings:

- Public Records Exception Subcommittee will meet on Thursday, September 13, 2012, starting at 9:00 a.m.; and
- Legislative Subcommittee will meet on Thursday, September 13, 2012, starting at 1:00 p.m.

The full Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Mr. Cianchette adjourned the meeting at 11:30 a.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

Right to Know Advisory Committee
Legislative Subcommittee
September 13, 2012
Meeting Summary

Convened 1:08 p.m., Room 438, State House, Augusta

Present:
Judy Meyer
Mike Cianchette
Richard Flewelling
Bill Logan
Mary Ann Lynch
Kelly Morgan
Harry Pringle
Linda Pistner

Absent:
Mal Leary

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

Judy Meyer, Subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Linda Pistner introduced the newly-appointed Public Access Ombudsman, Brenda Kielty. Ms. Kielty expressed her enthusiasm for the new position and joined in the discussions with the Subcommittee

PL 264: email and other communications of elected/public officials

The Legislature asked the Advisory Committee to provide guidance for legislators and other elected officials in storing and retrieving emails and other communications that are public records. At the last meeting, the State Archivist David Cheever explained that all governments are struggling with the best ways to identify and keep emails and other correspondence. His office has prepared materials that are posted online that should provide some assistance to local government officials in handling records. Staff provided a copy of the “general schedules” for records common to most or all agencies (on the Maine State Archives webpage), as well as sample records retention schedules for specific agencies (the Bureau of Forestry, Maine State Archives, Office of the Governor and the Legislature). Staff also provided proposed updates for the Frequently Asked Questions (on the State’s FOAA webpage) concerning the keeping of public records, and whether emails are public records. The proposed language includes links to the materials on the Maine State Archives website.

Ms. Meyer suggested that the Advisory Committee request that the Legislature revise its record retention schedules to specifically mention “correspondence” as that category of records appears to have been omitted. The Subcommittee agreed to recommend to the full Advisory Committee that the Legislature revise its training and education for legislators to include an explanation of the benefits of using the State-provided email addresses. The Legislature’s information

technology resources can provide email storage and search functions that are not as easily available to legislators using personal email addresses for legislative work. The training should still continue to make clear that emails about their legislative work are most likely public records, regardless of which email address is used.

Status of email addresses collected by schools and towns

The Subcommittee reviewed the draft, originally prepared by Harry Pringle, but revised in the last subcommittee meeting (divided report) that would make parents' email addresses and other personal information confidential when collected by school administrative units. The changes from the original version limited confidential telephone numbers to those that are unlisted.

Mr. Pringle reminded the Subcommittee how the issue arose, and that the issue was brought forward because the federal law isn't specific about protecting parents' email addresses. He started with the protection of personal contact information of public employees as a model, and noted that it didn't matter whether email addresses or phone numbers are available from other sources, the public employer is not required to release the information about the public employees. Mr. Pringle thought the same protection was appropriate for parents' personal contact information, as well. Going forward with the latest draft may produce lists of telephone numbers that are not necessarily associated with useful information as names, addresses and other personal information would not be included. The harder we work at this, he said, the worse it becomes. He would protect all telephone numbers, not just those that are unlisted.

Linda Pistner expressed her concerns that the draft would create more problems than it solves, and she did not agree that parents of public school children should be treated like public employees with regard to personal contact information. She emphasized that making pieces of data confidential increases the costs of responding to public records requests because of the close review and redacting that must take place.

Bill Logan supported the draft; if parents are required to provide personal contact information then it is not right to make that information available to the public. Email communications with the school board can be handled separately

Ms. Meyer reminded the Subcommittee that the issue being considered is before the Subcommittee because of one town and one particular person. Maybe it is not a widespread problem? Perhaps no action should be taken until information about whether it is a problem can be gathered, then revisit the issue next year. Public Access Ombudsman Kielty said that would right up her alley, and suggested that the Advisory Committee outline the research request in writing to her, and she will report next year.

Use of technology in public proceedings (participation in proceedings from remote locations)

Staff provided copies of the new draft legislation developed by the Subcommittee to govern the ability of public bodies to allow the use of technology for remote participation of a member. The draft deletes the paragraph that allows a member of a board or commission to participate from a remote location only if actual physical attendance is "not reasonably practical," but includes language indicating that the board's or commission's policy can establish the requirements for participating remotely. The Subcommittee members had requested that change, but Mr. Pringle

opposed the deletion, believing that the standard is good and appropriate. He would like to maintain the historical tradition of meeting face to face. Richard Flewelling recognized that tradition, but pointed out that those who had commented on the draft believed that the standard was problematic. He preferred to trust boards to decide on their own whether the participation is in good faith.

Mr. Logan recommended deleting the paragraph prohibiting a member from voting if he or she does not have the same materials as those who are physically present if those materials would influence the member's vote. Mr. Pringle agreed, noting that the language could lead to a lot of appeals based on what materials were provided at what time. Mary Ann Lynch agreed, saying that the limitation was too prescriptive, and that we should trust our public officials. She also noted that it would be legal malpractice to NOT provide last minute documents that could not be shared in order to upset a vote that was going in the unwanted direction. Richard Flewelling thought the most important and necessary protections are included in paragraph B: requiring the physical presence of any member participating in a quasi-judicial or judicial proceeding. Ms. Pistner and Ms. Meyer disagreed, finding that it is important to be present and have the public see you participating in any proceeding.

Mr. Logan thought the fact that the requirement that each board would have to adopt a policy that establishes when remote participation is allowed will eliminate most of those problems. Ms. Lynch said she likes that requirement but doubts whether most towns will take advantage of the provision. Kelly Morgan asked why the voting limitation is there. If the benefit of remote participation is a more full discussion including all members, then just prohibit voting if you are not physically present.

The Subcommittee voted 4-3 to delete subsection 2, paragraph A (In favor: Ms. Lynch, Mr. Cianchette, Mr. Logan and Mr. Flewelling; Against: Ms. Pistner, Ms. Meyer, Ms. Morgan).

The Subcommittee then discussed whether to keep the prohibition on use of remote participation in public hearings. Ms. Meyer remembered earlier discussions in which the idea of members of the public participating remotely was considered. The Subcommittee agreed that this provision focused only on members of boards and commissions; extending it to the public would be difficult to police and logistics could be difficult. The Subcommittee voted unanimously to strike the limitation on public hearings.

The Subcommittee voted 5-2 to recommend the revised draft to the full Advisory Committee for a full discussion (In favor: Ms. Lynch, Mr. Cianchette, Ms. Morgan, Mr. Logan, Mr. Flewelling; Against: Ms. Pistner, Ms. Meyer; Abstain: Mr. Pringle).

Templates for drafting specific confidentiality statutes

Staff provided draft templates for drafting specific confidentiality provisions concerning records provided by individuals and businesses to governmental agencies. Bill Norbert of the Finance Authority of Maine had provided suggested additions for clarification as to what information submitted by an applicant would be public.

The Subcommittee agreed to recommend to the Advisory Committee that the template be used as guidance for drafting new statutes.

Future Meetings

The Subcommittee members determined that all projects assigned to the Subcommittee have been completed. The Subcommittee will not meet again before the full Advisory Committee meeting on October 11th.

Other scheduled meetings:

The Public Records Exception Subcommittee will meet on Thursday, October 11, 2012, starting at 9:00 a.m.

The Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Meyer adjourned the meeting at 2:50 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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Right to Know Advisory Committee
Public Records Exceptions Subcommittee
September 13, 2012
Meeting Summary

Convened 9:08 a.m., Room 438, State House, Augusta

Present:
Rep. Joan Nass
Shenna Bellows
Joe Brown
AJ Higgins
Linda Pistner

Absent:
Perry Antone

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

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

Title 22, section 8754, reporting of sentinel events

Ms. Bellows noted that the Subcommittee received joint comments from the Maine Hospital Association, Maine Medical Association, Maine Osteopathic Association and Maine Medical Mutual Insurance Company related to the Subcommittee's working draft to repeal the confidentiality provision. Because of the interest the draft has generated, the Subcommittee agreed to table the issue for further discussion to a meeting when all Subcommittee members are able to attend.

Exception # 14: 29-A MRSA §257

The Subcommittee agreed to table discussion of the provision to the next meeting pending comments from the Office of Information Technology.

Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act

The Subcommittee approved the draft, which amends the provision to clarify that all the information provided upon request to the Director of the Bureau of Health about toxic or hazardous substances in use or present at a specific location are public and repeals the requirement that a requester reside within 50 miles of the specific location.

Exception #37: 32 MRSA § 9418

Lt. Scott Ireland, Department of Public Safety, provided information and answered questions about exception 37 related to license applications for private contract security companies and their employees.

Subcommittee members noted that the provision protects the confidentiality of the entire contents of a license application and asked why that was necessary. Lt. Ireland responded that several questions on the application relate to pending criminal charges and adjudications and that it would be difficult to redact certain information from the application. Ms. Bellows agreed that some information should remain confidential, like social security numbers, but raised concerns about the inability of the public to access information about a private security guard given their increased role in a variety of settings. How would a member of the public lodge a complaint against a private security company? Lt. Ireland said that complaints would be addressed by the Department of Public Safety in a timely way and handled in a similar manner as complaints about law enforcement personnel.

Lt. Ireland further stated that security guards are often engaged in the protection of individuals and information should remain confidential about the scope of that work for the safety of those individuals. He also reminded the Subcommittee that, under current law, the Department of Public Safety makes public a listing of the names and addresses of licensed security companies and their employees.

The Subcommittee voted 5-0 to keep as is the provision relating to licenses of private security companies.

Public-private projects under 23 MRSA §4251

At the previous Subcommittee meeting, the Subcommittee voted 3-2 in favor of leaving the language as is. The Subcommittee reviewed a draft supported by the minority (Ms. Bellows and AJ Higgins) that would make public all records, notes, summaries, working papers, plans, interoffice and intraoffice memoranda or other materials prepared, used or submitted in connection with any proposal considered under section 4251. The minority expressed support for the draft with minor changes to correct the section headnote and clarify that the provision applies to records prepared, used or submitted in connection with any proposal *to be* considered by the Department of Transportation.

Joe Brown reiterated his position that the law should not be changed; proposals should be made public once they become formal and are determined to meet the statutory criteria. Linda Pistner, who was not present for the Subcommittee's earlier discussion and vote, said she would prefer to recommend a middle of the road approach to the Advisory Committee and would favor a compromise between the current law and the minority's draft. Ms. Pistner suggested that the public should have access to information about a public-private proposal at a stage in the process when the public may provide meaningful input. Ms. Bellows expressed her strong support for the minority draft, but said she was willing to discuss alternative proposals if the Subcommittee were able to make a unanimous recommendation.

The Subcommittee agreed to table the discussion to the next meeting when all members are present. Ms. Pistner will work with the Advisory Committee's Law School Extern and staff to develop an alternative proposal.

Review of Existing Exceptions –Titles 26 through 39-A

The Subcommittee continued its review of the existing public records exceptions, starting with those tabled from the August 8th meeting and then returning to the beginning with the exceptions in Title 26.

46: 34-A MRSA §9877, sub-§4

The Subcommittee voted 5-0 to keep as is the provision relating to the Interstate Commission for Adult Offender Supervision records that adversely affect personal privacy rights or proprietary interests.

47: 34-A MRSA §9903, sub-§8

The Subcommittee voted 5-0 to keep as is the provision relating to the Interstate Commission for Juveniles records that adversely affect personal privacy rights or proprietary interests.

51: 34-B MRSA §3864, sub-§5

The Subcommittee voted 5-0 to keep as is the provision relating to mental health involuntary commitment hearings.

52: 34-B MRSA §3864, sub-§ 12

The Subcommittee voted 5-0 to keep as is the provision relating to the abstract of mental health involuntary commitment hearings provided to the State Bureau of Identification.

53: 34-B MRSA §5005, sub-§ 6

The Subcommittee voted 5-0 to table the provision relating to records and accounts requesting action by the Office of Advocacy for persons with an intellectual disability or autism. This provision was repealed and replaced as part of Public Law 2011, chapter 657; services previously provided by the Office of Advocacy will now be performed by the Disability Rights Center through a contract with the Department of Health and Human Services. Staff will get input from the Department about how the confidentiality of records will be addressed under this arrangement.

54: 34-B MRSA §5475, sub-§3

The Subcommittee voted 5-0 to keep as is the provision for confidentiality of judicial certification hearings relating to an intellectual disability or autism.

55: 34-B MRSA §5476, sub-§6

The Subcommittee voted 5-0 to keep as is the provision for confidentiality of mental judicial commitment hearings relating to an intellectual disability or autism.

56: 34-B MRSA §5605, sub-§15

The Subcommittee voted 5-0 to table the provision relating to records of persons with an intellectual disability or autism as it raises similar issues as exception # 53.

57: 34-B MRSA §7014, sub-§ 1

The Subcommittee voted 5-0 to keep as is the exception relating to court proceedings concerning sterilization.

1: 26 MRSA §3

Adam Fisher and Susan Wasserott of the Department of Labor provided information and answered questions of the Subcommittee related to exceptions 1 to 4 and exception 7.

With regard to the provision in Title 26, section 3, Mr. Fisher explained that the law protects the release by the Department of records relating to workplace safety investigations. However, he noted that once a report is made to a county or municipality, the report becomes a public record in the hands of that county or municipality. Ms. Bellows noted her concerns about the inconsistency—why is the same information confidential in the hands of one governmental entity but not another? Ms. Bellows suggested that the provision might be amended to require the Department of Labor to make the report public, but otherwise protect the confidentiality of the underlying information. Mr. Fisher responded that the department would prefer to maintain current law as it is consistent with federal law for private employers, but was willing to discuss possible alternatives.

The Subcommittee agreed to table the provision; staff will work with the department to consider possible amendments to the provision.

2: 26 MRSA §43

The Subcommittee voted 5-0 to keep as is this exception relating to the names of persons, firms and corporations providing information to the Department of Labor, Bureau of Labor Standards.

3: 26 MRSA §665, sub-§1

The Subcommittee voted 5-0 to keep as is this provision relating to records submitted by an employer concerning wages to the Bureau of Labor Standards.

4: 26 MRSA §685, sub-§3

The Subcommittee voted 5-0 to keep as is this provision relating to substance abuse testing by an employer.

5: 26 MRSA §934

The Subcommittee voted 5-0 to table this provision relating to reports of the State Board of Arbitration and Conciliation in a labor dispute. Staff will solicit further input from the State Board.

6: 26 MRSA §939

The Subcommittee voted 5-0 to table this provision relating to information disclosed by a party to the State Board of Arbitration and Conciliation.

7: 26 MRSA §1082, sub-§7

The Subcommittee voted 5-0 to keep as is this provision relating to employers' unemployment compensation records concerning individual information.

8: 27 MRSA §121

The Subcommittee voted 5-0 to keep as is this provision concerning the identity of library patrons and the use of books and materials by patrons.

9: 27 MRSA §377

The Subcommittee voted 5-0 to table this provision relating to the location of archeological research sites, pending further information and input from the Maine State Museum.

10: 28-A MRSA §755

The Subcommittee voted 5-0 to table this provision relating to the business and financial records of liquor licensees. Based on input from the Department of Administrative and Financial Services, Bureau of Alcoholic Beverages and Lottery Operations, it is expected that legislation will be considered in the 126th Legislature's First Regular Session. The Subcommittee agreed to table consideration of this exception until 2013.

Executive Clemency Process; Exception #45

At the invitation of the Subcommittee, Michael Cianchette, Acting General Counsel for Governor LePage, described the current process used by the Governor when considering requests for pardons. By executive order, the Governor has established an Executive Clemency Board to advise him on applications for pardon; this practice has been used by former Governors for some time. Mr. Cianchette explained that the Board holds public hearings on applications, but meets in executive session to make its recommendations. Reports made by the board to the Governor are confidential.

Ms. Bellows expressed her opinion that the report or recommendation of the board should be made public. Mr. Cianchette responded that the report made to the Governor does not contain formal findings, but is more of a collection of information about an individual seeking pardon as well as the board's recommendation. Some of that information is confidential under other provisions of state law and it would be difficult to redact that information. Ms. Bellows wondered if report was too broad and suggested that only the Board's recommendation could be made public. Mr. Cianchette was concerned that the Board might be reluctant to provide candid advice and recommendations to the Governor. Ms. Pistner noted the Governor's plenary power to grant clemency and agreed that confidentiality of the process makes sense. Ms. Pistner compared the process to the process used by the Governor to get advice on appointing judges; the selection process and recommendations of that advisory committee are also kept confidential.

In the interest of time, the Subcommittee agreed to table the discussion of the provision to the next meeting.

Future Meetings

The Subcommittee agreed to meet next on Thursday, October 11, 2012, at 9:00 a.m.

The Advisory Committee will meet:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

Ms. Bellows adjourned the meeting at 12:05 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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

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

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

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

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

Public-Private Partnerships for transportation projects

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

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

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

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

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

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

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

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

Confidentiality of Sentinel Events reporting

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

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

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

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

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

Review of Existing Exceptions in Titles 26 through 39-A

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

32: 32 MRSA §2599 (Osteopathic Board) 34: 32 MRSA §3296 (Board of Licensure in Medicine)

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

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

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

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

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

Future Meetings

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

The Advisory Committee will meet:

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

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

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid