

Right to Know Advisory Committee
August 19, 2014
Draft Meeting Summary

Convened 10:03 a.m., Room 438, State House, Augusta

Present:

Sen. Linda Valentino
Rep. Kim Monaghan-Derrig
Joe Brown
Richard Flewelling
Suzanne Goucher
Fred Hastings
Bill Logan
Mary Ann Lynch
Judy Meyer
Chris Parr
Linda Pistner
Harry Pringle
Luke Rossignol

Absent:

Perry Antone
Mal Leary
Kelly Morgan

Staff:

Dan Tartakoff
Peggy Reinsch

Introductions

Advisory Committee Chair Senator Linda Valentino called the meeting to order and the members introduced themselves.

Public Access Ombudsman Update

Public Access Ombudsman Brenda Kielty provided the Committee with an update on her recent activities and presented the Annual Report that summarizes the activities of the Ombudsman. Ms. Kielty explained the contacts she recorded and resolved; the bulk are from private citizens seeking advice. She also engaged in outreach and training and continues to provide information. Ms. Kielty stated that she has received lots of questions about whether the public have a right to speak at public meetings. She has also fielded questions about whether a public body can meet remotely and encouraged the Advisory Committee to make clarification of that question a priority. There have also been questions about whether certain organizations are subject to the FOAA.

Ms. Kielty reported that the Administration had committed to following through with the recommendations about coordinated access throughout the Executive Branch, but that she had not yet received an update on those activities.

Ms. Kielty mentioned that many people don't understand that it is important for the process of deliberation to be open. Members of a public body cannot use GoogleDocs or other types of technology to collect comments and make changes to proposals; those activities should be conducted in open public proceedings.

Update on Government Oversight Committee's Request to Attorney General Mills

The Government Oversight Committee requested that both Attorney General Mills and Secretary of State Dunlap address the Committee's concerns that were identified when reviewing the document shredding and the contract award process within DHHS. Deputy Attorney General Linda Pistner explained that the two key questions of the inquiry are whether documents were properly retained and disposed of and whether there was appropriate supporting documentation for contracts that were out to bid. In response, a work group has been established to regularize document retention, work out retention schedules with Archives and establish training. Senator Valentino acknowledged that GOC would keep the Advisory Committee apprised as a courtesy.

Tammy Marks, Director of Records Management, Maine State Archives, introduced herself and explained how her office is working with state agencies. She recommends that each agency appoint a records officer to ensure that the appropriate records are retained for the established time periods. Ms. Marks said that her office is working on retention policies and procedures for saving email.

Summary of Freedom of Access Actions, Second Regular Session, 126th Legislature

Staff summarized the FOAA legislative actions during the Second Regular Session of the 126th Legislature.

A. RTK AC recommendations

- LD 1809, An Act Concerning Meetings of Public Bodies Using Communication Technology

A majority of the Advisory Committee supported legislation to clarify when members of public bodies can participate and vote in public meetings when they are not physically present. A majority of the Judiciary Committee amended the proposed language to limit its application to elected municipal and quasi-municipal public bodies. The majority of the Judiciary Committee accepted the opinion of the Attorney General that, without specific authorization, a public body cannot meet remotely. The legislation passed with a floor amendment. The Governor vetoed the legislation, and the veto was sustained. The veto message expressed the Governor's belief that public entities can currently allow members who are not physically present to participate using remote technology.

The Advisory Committee discussed whether it should continue to discuss this issue, recognizing the tension between the need for certainty and the fact that there is not much else the Advisory Committee can accomplish on the topic. An agreement was reached to readdress these issues at the third meeting to determine whether the Advisory Committee should make a recommendation, and to discuss any recommendations at the final meeting.

- LD 1821, An Act to Implement the Recommendations of the Right to Know Advisory Committee

In 2013, the Advisory Committee unanimously supported the first three parts of the bill unanimously: Part A: Public records exceptions; Part B: Add a technology

member to RTK AC; and Part C: revise the Public Access Ombudsman reporting date. The Advisory Committee was divided on the fourth part, Part D: FOAA deadlines and appeals.

The Judiciary Committee voted to accept the recommendations with a few clarifications, but the Governor vetoed the bill, and the veto was sustained. The Governor's veto message expressed his frustration that the FOAA is often used to harass and delay the work of government entities. He felt the bill did not go far enough to remedy those problems.

Ms. Pistner said that the Attorney General's Office would like to submit language to fix the appeals language (amendment to 1 MRSA §409(1)). Senator Valentino noted the importance of breaking down the different recommendations from LD 1821 into separate bills for the new legislative session and to reexamine the Governor's veto message to determine if any of his suggestions for improving FOAA should be addressed by the Committee. There was agreement to discuss these issues again at the third meeting and finalize any recommendations at the last meeting.

- Relief from overly-burdensome FOAA requests

The Judiciary Committee reviewed the Advisory Committee's recommendations about providing an avenue for public agencies and officials to refuse to respond to overly burdensome public records requests, but did not support the standard of review that would apply. No legislation was printed.

The Advisory Committee agreed that the concept of providing relief from abusive requests is still worth further consideration, and directed staff to review options pursued in other states.

B. Public Access Ombudsman recommendations (PL 2013, c. 229)

- LD 1818, An Act to Facilitate Public Records Requests to State Agencies

The Judiciary Committee agreed to vote against LD 1818 because the Governor's Office agreed to implement the recommended changes without legislation.

The Advisory Committee requested a written update from Senior Policy Advisor Jonathan Nass, and requested that the Judiciary Committee contact the Legislative Council about the same coordinated access request.

C. Proposed public records exceptions reviewed by Judiciary Committee

The Judiciary Committee reviewed 7 proposed public records exceptions during the Second Regular Session, 126th Legislature.

Existing Public Records Exceptions Review Process

The Advisory Committee will not be reviewing any existing public records exceptions this year.

Public Records Exceptions on the Web

Staff updated the Advisory Committee on the public records exceptions search function on the Internet, which may be accessed from the State's Freedom of Access webpage.

Collection and Maintenance of State Agency Documents

Adam Fisher of the Maine State Library explained the project the library has undertaken to collect and maintain documents from state agencies. No action by the Advisory Committee is required at this time.

Topics and Projects for 2014

The Advisory Committee began exploring the tasks to be undertaken in 2014.

- The Advisory Committee agreed to discuss member participation in public meetings through remote communication at the third meeting to allow the development of language and legal positions prior to the making of recommendations, which will occur at the final meeting.
- The Advisory Committee agreed to submit recommendations printed as LD 1821 as separate bills and with some changes to the appeals language.
- The Advisory Committee will include an update on LD 1818 on the agenda for a future meeting.
- The Advisory Committee will explore concerns about the inappropriate use of technology – text messaging, email, chat rooms, snap chat, shared documents, etc. – that take the place of public deliberations, especially when no physical record is kept of the communications. Discussion of these issues will occur during the second meeting. Staff were asked to research any approaches that have been taken by other states with respect to these technology issues.
- During the second meeting, the Advisory Committee will also address certain issues raised in Resolve 2013, chapter 112 concerning privacy of social media and cloud data storage by government entities.

Future Meetings

Wednesday, September 17, 2014 at 9:00 a.m. if guest speakers on technology can be confirmed. If not, Wednesday, October 1, 2014 at 9:00 a.m. is the tentative back up date. Final meeting to occur prior to the Thanksgiving Break. Room 438 of the State House for all meetings.

The meeting was adjourned at 12:18 p.m.

Respectfully submitted,
Peggy Reinsch and Dan Tartakoff

Right to Know Advisory Committee
September 17, 2014
Meeting Summary

Convened 9:10 a.m., Room 438, State House, Augusta

Present:

Sen. Linda Valentino
Rep. Kim Monaghan-Derrig
Joe Brown
Suzanne Goucher
Fred Hastings
Mal Leary
Judy Meyer
Chris Parr
Linda Pistner
Luke Rossignol

Absent:

Perry Antone
Richard Flewelling
Bill Logan
Mary Ann Lynch
Kelly Morgan
Harry Pringle

Staff:

Peggy Reinsch, Colleen McCarthy Reid, Dan Tartakoff

Introductions

Advisory Committee Chair Senator Linda Valentino called the meeting to order and the members introduced themselves.

Discussion of technology, cloud computing, social media

Greg McNeal, Chief Technology Officer at the Office of Information Technology, Department of Administrative and Financial Services; Jennifer Smith, Director of Legislative Affairs and Communications, Department of Administrative and Financial Services; and Brenda Kielty, Public Access Ombudsman briefed the Committee on these matters. Mr. McNeal generally described for the Committee the various types of technologies utilized by state agency employees, noting that pursuant to a recent executive order, email is the official form of communication to be used by executive branch employees. While he acknowledged that some state agencies do have a Facebook, Twitter, or other social media presence, he suggested that these communication technologies are typically used to provide information to the public rather than to engage in a dialogue with individuals. Each agency individually manages its social media presence pursuant to the executive branch's social media policy as well as the agency's own corresponding policy. Committee members expressed interest in reviewing a copy of this social media policy, as well as any social media policy in place for the Legislature or legislative offices.

Mr. McNeal also described the use of cloud storage technology by executive branch agencies, noting that while state government servers are technically "cloud storage," unlike commercial storage providers, these servers are located on site and the State has complete control over the security, privacy, and management of stored data. State agency use of commercial cloud storage appears to be rare.

Regarding retention of emails, social media posts, and other electronic communications, Mr. McNeal noted that his office can typically recover deleted emails, which are archived nightly, while retention of social media records depends on the site in question, although most of these

sites have some sort of data recovery ability. Mr. McNeal acknowledged that the government has no control over personal email accounts of employees. Ms. Kielty added that under FOAA, it is irrelevant what sort of account or technology medium government business is transacted on; if it qualifies as a public record, an agency, office, etc. has a duty to reasonably try to acquire those records if a request is filed. She recalled dealing with a number of requests for records contained in an employee's or official's personal email accounts, noting that in all of these cases, the individual in question has voluntarily facilitated production of the records.

There was further discussion of the recent executive order instituting email as the official form of communication for executive branch employees and restricting cell phone use in the transaction of government business. The Committee requested that a copy of this order be produced for review. The Committee also agreed to discuss at the next meeting whether it should recommend that a spot check or audit of executive branch employee compliance with this order be conducted.

Ms. Smith explained to the Committee that, while there is an overarching communications policy for the executive branch, each agency has also developed its own communications policy incorporating those directives, which include retention rules for communications utilized by each agency. Ms. Kielty reiterated that all of these forms of communications the Committee had been discussing, when used to transact government business, are considered public records under FOAA. The major issue to be addressed here instead concerns retention of these often dynamic, changing records. For example, she noted, how do you adequately "capture" and then retain various iterations of a social media page as it is updated? Neither FOAA nor the retention schedules adequately answer this question in her opinion. Ms. Kielty agreed to bring back to the Committee some suggestions for addressing these specific issues.

Mr. McNeal also discussed document centric collaboration platforms, such as Google Docs or Office 365. To his knowledge, Google Docs is not utilized by state employees to conduct business; however, his office is looking into implementing Office 365 for executive agency use in the near future. Ms. Kielty noted that with these platforms, major areas of concern are the retention of drafts – does an agency have to, or can they even retain all versions of a document – and public meetings issues – if multiple members of a board, body, etc. are collaborating in real time on one of these documents, does this constitute a public meeting under FOAA?

Other state approaches

Committee staff described various approaches to these issues taken by different states, noting initially that many states are just starting to address concerns raised by new communication technology within their public records and open meetings laws. Staff noted that, like Maine's FOAA, most state's public records laws are very broad and their definition of public record encompasses all new forms of communication. Instead, as Ms. Kielty had suggested, the issues to be dealt with in this context largely concern records retention and what constitutes a public meeting. Staff described pending legislation in Minnesota that, as originally proposed, would have exempted social media use from public meeting requirements so long as certain criteria were met. Staff shared a Mississippi ethics commission opinion finding that text messages contained on private phones of government officials, but used to conduct government business, were subject to the state's public records law. Staff provided an example of a state social media policy (Ohio), noting that a number of states had set forth similar comprehensive social media and communications policies for government employees and agencies. Committee members requested that staff compile a spreadsheet comparing and contrasting Maine's social media and communications policies with approaches taken by other states, municipalities, etc.

Resolve 2013, c. 112: Study of Social Media Privacy in School and the Workplace

Committee staff summarized two bills – LDs 1194 and 1780 – that the Judiciary Committee and the Education Committee, respectively, worked on during the Second Regular Session. These bills, whose topics overlapped somewhat, were combined into this resolve to be studied over the interim. However, because the study did not receive the necessary outside funding, it was suggested that the Advisory Committee might consider addressing some of these privacy issues during its interim work. After discussion, however, Advisory Committee members decided that the issues to be addressed by the study were beyond the scope of the Advisory Committee and those members present unanimously voted to take no further action on this resolve.

Update on activities relating to LD 1818

Committee staff updated the Committee on activities related to LD 1818, An Act to Facilitate Public Records Requests to State Agencies. Staff noted that since the last meeting, the Judiciary Committee had written a letter to the Legislative Council, requesting that the Council adopt measures to increase the ability of the public to make records requests online and to discuss coordination with State agencies on these goals. Additionally, Jonathan Nass, Senior Policy Advisor to Governor LePage wrote a letter to the Committee updating it on actions taken by the executive branch with respect to LD 1818, namely coordinating meetings between DAFS staff and the Public Access Ombudsman to implement a tracking and reporting tool for requests made to executive branch agencies. Ms. Kielty, the Public Access Ombudsman, stated that she was thus far pleased with the progress made in implementing the goals outlined in LD 1818.

Topics to be addressed at next meeting

- Review and discuss state social media and communication policies;
- Review and discuss executive order regarding email communication and cell phone use policy for executive branch employees;
- Review draft language for bills related to LD 1821, An Act to Implement the Recommendations of the Right to Know Advisory Committee;
- Discuss issues and review draft language related to LD 1809, An Act Concerning Meetings of Public Bodies Using Communication Technology;
- Discuss other state approaches to abusive or repetitive public records requests;
- Discuss public records exceptions review process;
- Review draft Committee report.

Scheduling

The Committee's third and fourth meetings are scheduled for Thursday, November 6, 2014 and Monday, November 17, 2014, respectively, both starting at 9:00 a.m. in Room 438, State House.

The meeting was adjourned at 11:59 a.m.

Respectfully submitted,
Peggy Reinsch, Colleen McCarthy Reid, and Dan Tartakoff

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