



**STATE OF MAINE  
129TH LEGISLATURE  
SECOND REGULAR SESSION**

**Fourteenth Annual Report  
of the  
Right to Know Advisory Committee  
  
January 2020**

**Staff:**

**Margaret J. Reinsch, Senior Legislative Analyst  
Colleen McCarthy Reid, Senior Legislative Analyst  
Hillary Risler, Legislative Analyst  
Office of Policy & Legal Analysis  
13 State House Station  
215 Cross Building  
Augusta, ME 04333-0013  
(207) 287-1670  
<http://legislature.maine.gov/opla/>**

**Members:**

**Senator Mike Carpenter  
Representative Thom Harnett, Chair  
Taylor Asen  
Amy Beveridge  
James Campbell  
Lynda Clancy  
Phyllis Gardiner  
Suzanne Goucher  
Judy Meyer  
Paul Nicklas  
Christopher Parr  
Luke Rossignol  
William D. Shorey  
Eric Stout**

DRAFT REPORT for review



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DRAFT REPORT FOR REVIEW

## EXECUTIVE SUMMARY

This is the fourteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2019 recommendations and a summary of relevant Maine court decisions from 2019 on the freedom of access laws. This report also summarizes several topics discussed by the Advisory Committee that did not result in a recommendation or further action.

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

THESE RECOMMENDATIONS HAVE BEEN PRELIMINARILY APPROVED BY THE SUBCOMMITTEES BUT HAVE NOT BEEN ADOPTED BY THE FULL ADVISORY COMMITTEE

- Amend certain provisions of law in Titles 1 through 7-A relating to previously-enacted public records exceptions;
- Direct legislative staff to help identify nonstandard language concerning existing public records exceptions;
- Enact legislation to provide parameters on the use of remote participation by members of public bodies;
- Enact legislation to cap copying fees;
- Enact legislation to adjust the fees that may be charged for searching for, retrieving and compiling public records in response to requests;
- Enact legislation to require planning boards, additional municipal officials and specific school district officials to complete Freedom of Access Act training, and to clarify the application of existing training requirements;
- Request the Public Access Ombudsman to develop suggestions to enhance and improve FOAA training for public officials;
- Request the Judiciary Committee to establish a study group to examine the use of emerging technologies with regard to making and keeping records and to examine the use of communications technology during public proceedings;

- Request the Judiciary Committee to establish a study group to explore the need for a state Privacy Act;**
- Enact legislation to improve the review of public records exceptions by including consideration of access to information that will assist in making informed decisions about health and safety;**
- Enact legislation to revise the membership of the Archives Advisory Board to include a public member and two members representing journalistic and news perspectives;**
- Request that the Archives Advisory Board emphasize the sharing of information about its meetings to enhance public awareness and participation of the importance of records retention schedules; and**
- .

In 2020, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, . The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

DRAFT REPORT FOR REVIEW

## I. INTRODUCTION

This is the fourteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in **Appendix A**.

More information on the Advisory Committee, including meeting agendas, meeting materials and summaries of meetings and its previous annual reports can be found on the Advisory Committee's webpage at <http://legislature.maine.gov/right-to-know-advisory-committee>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee when the Legislature is not in regular or special session.

The Right to Know Advisory Committee has 17 members. Currently there are two vacancies. The chair of the Advisory Committee is elected every two years by the members. Current Advisory Committee members are:

Senator Mike Carpenter	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Representative Thom Harnett, Chair	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
James Campbell	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Lynda Clancy	<i>Representing newspaper and other press interests, appointed by the President of the Senate</i>
Amy Beveridge	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
<i>vacant</i>	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
<i>vacant</i>	<i>Representing school interests, appointed by the Governor</i>
Julie Finn	<i>Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court</i>

Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Paul Nicklas	<i>Representing municipal interests, appointed by the Governor</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>
Phyllis Gardiner	<i>Attorney General's designee</i>
Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>
William Shorey	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Eric Stout	<i>A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor</i>
Taylor Asen	<i>Representing the public, appointed by the Speaker of the House</i>

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

By law, the Advisory Committee must meet at least four times per year. During 2019, the Advisory Committee met four times: on September 5th, November 13th, December 4th and December 18th. Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

## II. COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;



- ❑ Serving as a resource to support training and education about Maine’s freedom of access laws;
- ❑ Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine’s freedom of access laws and the public’s access to public proceedings and records;
- ❑ Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- ❑ Examining inconsistencies in statutory language and proposing clarifying standard language; and
- ❑ Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to work with the Public Access Ombudsman, Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

### **III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES**

*Dubois v. Arundel*, 2019 ME 21.

Dubois Livestock submitted an application to the Town of Arundel Planning Board to renew a conditional use permit. Neither Marcel Dubois nor Sol Fedder were listed as the applicants for the renewal permit, as the property owners or as authorized agents for Dubois Livestock. The Planning Board denied the application during a public hearing that was not attended by any representative of Dubois Livestock, and Dubois and Fedder did not participate in the public hearing in any capacity. Dubois and Feder subsequently filed a complaint against the Town of Arundel, individual members of the Planning Board and the Arundel Town Planner, alleging that a memorandum drafted by the town planner and distributed to the members of the planning board led to one or more illegal executive sessions. Following submission of briefs pursuant to a Rule 80B Notice and Briefing Schedule, the Town of Arundel moved to dismiss the complaint on several grounds, including for failure to state a claim. The Superior Court granted

the motion and awarded the town reasonable attorney's fees and expenses. Dubois and Fedder appealed.

The Law Court held that Rule 80B is not the proper mechanism to assert a FOAA claim, Dubois and Fedder lacked standing to pursue a Rule 80B complaint and the complaint failed to state a claim upon which relief can be granted under the FOAA.

The Law court found that Dubois and Fedder failed to allege that any action was taken during the alleged executive session or sessions which would entitle them to relief under the appeals section of the Freedom of Access Act, Title 1, section 409, subsection 2. Rather, their complaint alleged only that the Planning Board members received a memo from the town planner that led to an executive session or sessions and the Planning Board subsequently held a public hearing where the Planning Board denied Dubois Livestock's application. They failed to allege that any action was taken during the alleged executive session or sessions which would entitle them to relief.

The Law Court had ruled in 2018 that Rule 80C is inapplicable to FOAA claims. The Law Court upheld the dismissal of the complaint, but remanded the case to the Superior Court on the issues of fees and expenses.

#### **IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES**

##### **Public Records Exception Subcommittee**

The focus of the Public Records Exceptions Subcommittee is to review and evaluate public records exceptions as required of the Advisory Committee pursuant to 1 MRSA §433, sub-§2-A. The guidelines in the law require the Advisory Committee to review all public records exceptions in Titles 1 to 7-A no later than 2019. In accordance with Title 1, §433, sub-§2-A, the Advisory Committee is charged with the review of more than 90 exceptions in Titles 1 to 7-A. As a first step, the subcommittee reached out to state and local bodies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. The subcommittee met three times in 2019 to review the responses, discuss whether each public record exception was appropriate or should be amended or repealed and submitted all its recommendations to the Advisory Committee at the December 13, 2019 meeting.

Lynda Clancy, Julie Finn, Paul Nicklas, Christopher Parr and Eric Stout serve as members of the Subcommittee, and Christopher Parr serves as Subcommittee Chair.

The public records exceptions changes recommended by the Advisory Committee in its 13th Annual Report presented in January 2019 were printed as LD 1511 as a Judiciary Committee bill considered during the First Regular Session of the 129th Legislature. Although the Judiciary Committee unanimously supported the contents of the original bill, a majority of the committee supported the remote participation language added to the bill in Committee Amendment "A" and the bill as amended died in nonconcurrence between the House and the Senate. The subcommittee is therefore recommending that the public records exceptions amendments proposed in the last report be supported again as recommendations.

The subcommittee noted that existing language establishing public records exceptions varies throughout the statutes. Recognizing that consistent language will help the public as well as agencies and public officials understand what records are accessible, the subcommittee recommends draft unallocated language directing legislative staff, in consultation with the Advisory Committee, to examine inconsistencies in statutory language related to the designation of information and records as confidential or not subject to public disclosure and recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released.

The subcommittee will continue to discuss whether to add Title 4, section 7 to provisions reviewed by the Advisory Committee. Title 4, section 7 is a statutory provision that authorizes the Court to have control over its record and is cited by the Judicial Branch as legal authority that exempts the application of the FOAA to the Judicial Branch.

The Advisory Committee reviewed the recommendations of the Subcommittee and approved

### **Improve the FOAA Subcommittee**

The Improve the FOAA Subcommittee was charged with exploring several issues, including reviewing all of LD 1575, which was carried over to the Second Regular Session by the Judiciary Committee. The subcommittee also looked at FOAA training for public officials, remote participation, appropriate costs and fees charged by government agencies when responding to public records requests and several other suggestions offered by Advisory Committee members. The subcommittee met four times: October 9th, November 13th, December 4th and December 18th.

Representative Thom Harnett, Amy Beveridge, Jim Campbell, Lynda Clancy, Julie Finn, Phyllis Gardiner, Judy Meyer, Chris Parr, Luke Rossignol and Eric Stout serve as Subcommittee members. Amy Beveridge serves as the Chair, although Chris Parr chaired a meeting in her absence.

### Warrants

The Judiciary Committee directed the Right to Know Advisory Committee to review the laws governing certain warrants, and report back to the Judiciary Committee any recommendations for providing public access to aggregate information about the warrants and whether there was a waiver of notice. Public Law 2019, chapter 489, Section 18. The warrants subject to the review authorize the installation and monitoring of tracking devices, access to electronic device content and access to electronic device location information. The subcommittee reviewed a memo from the Judicial Branch presented by Julie Finn that outlined the search warrant process, and included information about the numbers of search warrants issued in 2017, 2018 and so far in 2019. The numbers were collected by requesting court clerks in each court location to report the data, as search warrants data are collected on paper at each court location, but not in a centralized database. The current process does not track whether a waiver of the notice requirement was

requested or approved. The Judicial Branch is transitioning to an electronic court record system which, presumably, could be adjusted to include search warrant tracking.

The subcommittee reviewed draft language reporting to the Judiciary Committee pursuant to Public Law 2019, chapter 489, section 18, explaining that aggregate information about the specific search warrants is not available. The subcommittee recommends noting the value in the aggregate information, but recommends that the Advisory Committee defer to the Judiciary Committee to determine whether it is appropriate to impose the additional obligation of tracking the search warrant information on the Judicial Branch.

#### Expand who must participate in FOAA training

Public Access Ombudsman Brenda Kielty suggested including Planning Boards and other local entities in the training required by statute, based on questions and concerns she has received from members of the public. The subcommittee discussed that the required training is not onerous and, although supported by the Maine Municipal Association, may be considered a municipal mandate, requiring state funding or, to avoid the funding obligation, passage by 2/3 of the House and the Senate. The subcommittee reviewed information provided by staff outlining the 233 State boards and commissions established in law and information provided the Maine Municipal Association outlining the positions in local government required by statute. While several members expressed an interest in expanding training requirements for all members of boards and commissions and local government employees, Public Access Ombudsman Kielty suggested that, initially, the subcommittee focus on those positions that have generated concerns: members of local planning boards; code enforcement officers; and town managers and/or town administrators who are not already trained in FOAA. Ms. Kielty also noted that questions have been asked about the definition of “officials of school administrative units” when determining who is required to complete training; she suggested that the statute be clarified to specify that elected and appointed school board members and school superintendents and assistant superintendents complete FOAA training. Finally, Ms. Kielty also asked that the law be amended to clarify the timing of when training must be completed for those appointed to their positions as the current law only refers to when the oath of office is made.

The subcommittee recommends the statutory changes suggested by Ms. Kielty: 1) expand training to planning board members, code enforcement officers and town managers/administrators; 2) clarify school officials required to complete training; and 3) clarify timeline for completing the training for those in appointed positions. The subcommittee also supports directing the Public Access Ombudsman to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the University of Maine Law School Extern and to report back to the Advisory Committee in 2020.

#### Joint Select or Joint Standing Committee of the Legislature

Mr. Parr suggested that the Advisory Committee recommend that the Legislature create a Joint Standing or Joint Select Committee to review legislation and public policy issues relating to public access to, and privacy protection of, government records and data, as well as the retention and appropriate disposition of such records and data. The idea behind the suggestion is to ensure

more legislators are well-versed in freedom of access and privacy issues to understand the complexities and nuances involved, and that there would be a legislative forum beyond the Advisory Committee to discuss and resolve legislative issues on a comprehensive basis. The subcommittee discussed the fact that reference of bills to committees is not always predictable, and that legislators are already stretched pretty thin so that membership on an additional legislative committee may not have the intended positive result. The subcommittee split on whether to have a recommendation drafted, 3-4.

#### Application of FOAA to Councils of Government

(Suggested by a member of the public) The subcommittee discussed whether councils of governments (COGs) are or should be subject to the FOAA. They are not specifically listed in the description of “public proceedings” in FOAA, section 402, subsection 2. There is concern that trying to establish an exhaustive list in statute will inevitably leave out appropriate entities. Public Access Ombudsman Kielty reminded the members that the Law Court has interpreted when the FOAA applies in specific cases. In *Moore v. Abbott*, 952 A.2d 980 (2008) the Law Court established a four-prong test to determine if an entity is subject to the FOAA: (1) Whether the entity is performing a governmental function; (2) Whether the funding of the entity is governmental; (3) The extent of governmental involvement or control; and (4) Whether the entity was created by private or legislative action. These factors must be applied on a case by case basis. Although the statutes include enabling legislation for COGs, because of the multiple options available in the formation and operation of COGs, each one would need to be evaluated separately to determine if it is governed by the FOAA. The subcommittee agreed that current law and practice are sufficient, and no change in the law is necessary.

#### Responding to requests

Mr. Parr suggested legislation to allow the prioritization of fulfilling FOAA requests based on whether the requester is a Maine resident and the purpose for which the request is made. The suggested legislation would give first priority to requests to further the public’s understanding of the activities or actions of a government official or agency; a request for journalistic purposes is presumed to be made to further the public’s understanding of government activities. Second priority is given to requests made for academic or research purposes, then requests made by individuals who have an alleged grievance against an agency or official. Lowest priority would be given to requests made for a commercial or for-profit purpose. In order to apply this order, the official or agency would be able to require the requester to state his or her residence as well as the purpose of the request. Establishing this priority of fulfillment of requests would allow the FOAA to return to its central purpose: making it possible for the people to know what their government is doing, not being a source of data. Mr. Parr noted that data has surpassed oil in value as a commodity.

The subcommittee discussed the proposal, and explored whether tiered response times would be appropriate, and whether it would be permitted to say “no” to a lowest priority request. Members raised concerns about “FOAA mills” – entities that use freedom of access laws to collect volumes of information about, for example, all the routers used in state government, and then use the information for marketing purposes. Current law allows the agency to challenge

abusive requests now. Some members expressed discomfort with putting in statute that the government determines the appropriate priority: The point should not be who is requesting or why, but the nature of the request – how big a circus is it to collect the information to respond.

The subcommittee discussed whether it would be appropriate to impose an additional charge - \$25? – when the requester is not from Maine. State and local government workers who respond to FOAA requests are paid by the taxpayers of Maine to do their jobs, and out-of-state requests place costs on Maine taxpayers. The Subcommittee reiterated that the purpose of the FOAA is to ensure government is open and transparent, and “public records” is a broad concept, covering everything in possession of the agency or official. Representative Harnett noted that it was never intended to provide, for example, GIS mapping data. He expressed his sympathy for the burden on State and local government when requests are made for a commercial purpose.

Public Access Ombudsman Kielty noted that there are many policy decisions involved in these discussions. The current law provides for requests by anyone for any purpose. The law is wide open and lets the facts determine each case. She compared the FOAA with the federal Freedom of Information Act, which does include tiered responses and costs based on the purpose of the requests. But she noted that the FOIA is a very sophisticated system, and strongly recommended that any changes to the Maine FOAA be done on a systemic basis. She admits there are a large number of commercial requests, but most of them are narrow because the law says the agency does not have to create a new record to respond. The courts are clear that the fact a request is burdensome is not by itself a reason to say no.

Subcommittee members noted that it is often the case that the actual cost of complying with FOAA requests are far beyond the limits set out in the statute, capping staff time at \$15 per hour after the first hour. Eric Stout provided the example of the FOAA request related to the bear referendum that, even after negotiation to narrow the request, resulted in more than 900 hours of agency staff time and more than 240 hours of his time, produced more than 65,000 emails and resulted in a cost of \$15,000. The subcommittee asked staff to survey State agencies to see if there are common issues affecting agencies related to burdensome FOAA requests or requests for commercial purposes.

The subcommittee reviewed information about the fees and costs structures other states employ when responding to public records requests. The subcommittee also reviewed the response information reported to the Public Access Ombudsman listed in the 2018 annual report, especially the data on the number of requests, hours spent and fees collected, keeping in mind that the data is self-reported by State agencies and may not include all requests and responses. The Maine Municipal Association conducted a survey at the request of the subcommittee, and provided very helpful information. The responses to the MMA survey particularly pointed out the frustration of municipal officials in providing information for data miners (who then make a profit on the information). The subcommittee also noted that the respondents reported the fact that some requests for public records are made in bad faith as a way to spite those in office. The subcommittee discussed various aspects of the responsibilities and the resultant burdens that officials and agencies face in responding to requests for public records.

Recognizing that changing the fee structure does not solve all concerns, the subcommittee recommends that the statute be amended to establish a three-tiered fee for an agency's costs, other than translation, copying and mailing costs. Current law provides the first hour of searching for, retrieving and compiling the requested public record to be provided for free. After that, current law allows the agency to charge up to \$15 an hour. The subcommittee proposes that the first three hours of labor be provided for free, that the agency may charge up to \$25 an hour for the next three hours, and that the agency can charge up to the "actual costs" of any labor conducted after those six hours. The subcommittee proposes to define "actual costs" to cover the personnel or labor costs, not to include overhead or other expenses of the agency.

The subcommittee continued to discuss the fee issue to try to address the complaint that agencies, especially on the state level, do not waive fees when the request can be considered to be in the public interest. Agencies have discretion under Title 1, section 408-A, subsection 11, as to whether to grant such a waiver: "the request can be considered to be in the public interest because releasing the information would likely contribute to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester." The result is that most requests from journalists and news media are not given the benefit of a whole or partial fee waiver, despite the fact that their requests appear to meet the description of "in the public interest" as expressed in subsection 11. The subcommittee was reluctant to make a waiver mandatory, and agreed to table the issue for further discussion.

*Information from December 18th Subcommittee Meeting here.*

#### LD 1575, An Act To Improve the Freedom of Access Laws of Maine

The Judiciary Committee requested the Advisory Committee to review LD 1575, An Act to Improve the Freedom of Access Laws of Maine, sponsored by Representative Harnett and cosponsored by Senator Breen. The bill has been carried over to the Second Regular Session.

The purpose of the bill is to enhance access to public records without imposing undue burdens on the efficient and effective functioning of government. Representative Harnett explained the provisions of the bill: define "public or governmental business," require that a requester provide more specifics about what is requested and establish deadlines for governmental entities to respond. There was also an amendment to limit the cost of copies. Ms. Kielty reminded the subcommittee that the Ombudsman does not have authority to compel production. Ms. Meyer noted the information provided by the Maine Freedom of Information Coalition to the Judiciary Committee.

- *Define "public or governmental business"*

The subcommittee considered whether to support the suggested definition of "public or government business" included in LD 1575. Ms. Gardiner stated her belief that the current definition of "public record" works in practice and allows an agency to distinguish between public and personal communications. A majority of the subcommittee does not support the change.

- *Describe minimum requirements for a "request"*

Ms. Meyer suggested that adding the new language as suggested in LD 1575 would be redundant and, if adopted, may allow an agency to ignore a request. Ms. Kielty pointed out that the 5-day time limit under the law to deny or acknowledge a request does not begin to run until an agency has a “sufficient description” of the record being requested; she believes that language is adequate and does not need further change. The subcommittee agreed to recommend no action.

- *Change “reasonable time” for responses to specific time periods with deadlines*

Ms. Meyer expressed her preference for the word “reasonable” in current law and would not support changing to a specific deadline of 30 days as responses would regularly be delayed until close to that deadline. Information provided to the subcommittee shows that more than 95% of FOAA requests are responded to within 30 days already. The subcommittee agreed to take no action.

- *Cap on copying costs*

The subcommittee reviewed the amendment to LD 1575 that was proposed to the Judiciary Committee that sets an upper limit on per page copying costs. The subcommittee supports the amendment.

- *How to preserve communications using new and emerging technologies to ensure public access to those communications and prohibit use of electronic devices during public proceeding by member of body/agency*

LD 1575 proposed directing the Right to Know Advisory Committee to conduct a study focusing on the question of making and preserving records when emerging technologies, such as Snap Chat, are used for governmental communications. Transparency in governmental activities includes the public’s access to communications and other records of government officials, so when technology that by design does not create and retain a record of the communication is used, one of the underlying principles of the Freedom of Access Act is thwarted. The subcommittee agreed that it is important to understand the technology landscape and develop recommendations effectively supporting transparency, but does not believe that the Advisory Committee has the expertise to successfully carry out the study. The subcommittee therefore recommends that the Advisory Committee support the establishment of a study that includes stakeholders with a better collection of skills and experiences. It also supports including in the study the consideration and development of best practices and guiding principles on the use of all communication technologies by public body officials during public proceedings.

### Remote participation

The subcommittee discussed remote participation and reviewed the language adopted by the majority of the Judiciary Committee as a committee amendment to LD 1511 (which was not finally enacted). Members noted that there appears to be a philosophical position in the Legislature opposing the legislation, focusing mainly on the proposition that hard votes by policy makers need to be taken personally and physically in front of their constituents. Ms. Gardiner noted that the identified Attorney General opinion cited as the basis for the interpretation that the FOAA does not permit remote participation is 40 years old and was about a specific situation in which members of a board voted on the phone without any members of the public being able to hear the conversation. That is still an appropriate decision and everyone would agree.



Subcommittee members wondered what more could be done to move this issue forward as last year's language represents the Advisory Committee's best effort to recommend legislation. The subcommittee agreed to add a preamble to the proposal to further explain the rationale for why the Advisory Committee believes the legislation is needed.

#### Add to criteria considered in evaluating public records exceptions

The subcommittee reviewed proposed language that directs the Judiciary Committee, when considering new public records exceptions, to weigh the fact that public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions. (The same criteria apply to the existing public records exceptions review conducted by the Right to Know Advisory Committee.) The members discussed whether the proposed consideration is currently covered, or could be easily worked into existing criteria, and decided a stand-alone paragraph is appropriate.

#### Eliminate agency FOA request reporting requirement

Mr. Parr requested that the subcommittee consider repealing the requirement that agencies report information about public records requests and response efforts to the Public Access Ombudsman. His concerns stem from the fact that it takes significant time and effort, which are not always available. The resulting data, therefore, may not be accurate. The subcommittee discussed the concerns and also recognized that the information agencies reported had played a significant role in the discussion on responses, including appropriate fees. The subcommittee agreed to table the discussion on the proposal.

*Information from December 18th Subcommittee Meeting here.*

### **Issues Subcommittee**

The Issues Subcommittee was tasked with examining privacy issues, including surveillance videos and the over-arching topic of a State Privacy Act, as well as looking at records retention schedules and how they intersect with the Freedom of Access Act. The Subcommittee met three times, October 9th, October 21st and December 18th.

Representative Thom Harnett, Amy Beveridge, Jim Campbell, Lynda Clancy, Julie Finn, Phyllis Gardiner, Judy Meyer, Paul Nicklas, Chris Parr, Luke Rossignol and Eric Stout serve as Subcommittee members. Luke Rossignol serves as the Subcommittee Chair.

#### Record retention schedules, Archives Advisory Board

Advisory Committee members raised the issue of records retention schedules, noting that recent changes in the local government retention schedule that appear to restrict the public's access to records. The Advisory Committee agreed that it should learn more about the process used by the State Archives to develop these retention schedules. The subcommittee invited Tammy Marks, Director of the Maine State Archives, and Felicia Kennedy, Records Management Analyst, to

provide information about record retention schedules and to answer questions. They provided a handout with information about the State Records Center (state agencies still own the records even though they are stored in a central location) and the State Archives, located in the Cultural Building. Records that are sent to the State Archives have historical value and will stay with the Archives permanently.

A “Records Retention Schedule” is a policy document that defines the minimum time a record must be retained and contains disposition instructions on how the record must be handled when no longer needed for agency business. Records retention schedules are based on the following four-part criteria: legal requirements; fiscal and audit requirements; historical value; and research value. All records retention schedules apply to records regardless of their physical format. There are three types of schedules: State General Schedules; State Agency Schedules; and Local Government Schedules.

The subcommittee was most interested in understanding how the records retention schedules are developed. Ms. Marks, Ms. Kennedy and Ms. Gardiner assured the subcommittee that the statute governs confidentiality of records, not the schedules, and that the Archives Advisory Board – which recommends records retention schedules to the State Archivist for adoption – never attempts to revise the public status of records. The Legislature significantly amended the Archives Advisory Board composition in Public Law 2019, chapter 50, and the new board has not yet been appointed. In addition, the post of State Archivist is currently vacant. Although the process to develop records retention schedules has always been public, the subcommittee was concerned that not enough is publicly known about the entire process, and recommended that the membership of the Archives Advisory Board be expanded to include two individuals representing journalistic/press interests and a member to advocate for privacy interests. The subcommittee was satisfied that the records retention schedule development process is flexible enough to allow public participation and questions without creating a formal judicial review or other method of challenging the State Archivist’s decisions when there is a concern about an adopted schedule.

The subcommittee also recommended that the Advisory Committee send a letter to the Archives Advisory Board, once it is appointed, to emphasize the importance of providing public notice of the board’s meetings, recognizing that the development of records retention schedules is an important element ensuring public access to public records at all levels of government. The subcommittee will suggest including the ability for interested parties to subscribe to an email distribution list to facilitate the sharing of meeting notices.

#### Surveillance videos

LD 639, An Act To Protect Student Privacy, referred to the Judiciary Committee, provides that video and audio recordings made by security or surveillance camera on school grounds or in school vehicles are not public records. A similar bill, LD 296, was also considered by the Education Committee. Because proposed amendments and discussions of both bills suggested broader issues related to the Freedom of Access Act, the Legislature retained one bill, LD 639, through which the policy issues could be explored and carried the bill over to next session. The Judiciary Committee asked the Advisory Committee to explore the topic of public accessibility

of surveillance recordings made by public entities, including schools, and start with the premise that the recordings are a type of public record subject to the Freedom of Access Act, and then determine if there are appropriate exceptions – weighing privacy and other interests supporting confidentiality against the public’s interest in the disclosure of a record collected and maintained by a governmental entity.

Staff identified three factors in considering the public records status of surveillance and safety videos – purpose, scope and exceptions – and prepared draft legislation to create an exception to the definition of “public records” for surveillance and security videos, including different options with regard to privacy concerns. Subcommittee members suggested that the default should be that the videos are public unless there is a reason to make it confidential completely or to redact identifying information. The subcommittee agreed it is a tricky issue, balancing why we have a FOAA to begin with and how to deal with this security information that never existed before, and many people don’t know it exists now. There is still a concern about children, employees and people in general who have no idea they are being recorded.

The subcommittee wrestled with the idea that there is no expectation of privacy on a public street, with the countervailing argument that there is also no expectation that the government will create a public governmental record, accessible to the public, of all public spaces. There is a difference between being in a public place and the government making a public record of your being in that public place. Under the federal Privacy Act, an agency cannot accept a record with personally identifying information without providing the appropriate Privacy Act disclosures.

The subcommittee discussed the importance of making the existence of a video record publicly-known even if the content cannot be shared. The subcommittee discussed how to make the existence of the record – and the fact that it is being used in an investigation – public without revealing how it is being used. Can an electronic redaction policy be developed and applied to ensure the protection of the identity of minors? Although such a system might be helpful, there could be significant cost considerations, and it would not address security concerns, such as where cameras are focused. Does the price of running government include having a video editor on staff? Redaction can be a difficult process in many situations, and working with videos can be more complex.

In personnel investigations, all records are confidential until there is a final decision imposing discipline. Under the Intelligence and Investigative Information Act, there are circumstances in which a criminal justice agency may not confirm the existence or nonexistence of confidential intelligence and investigative record information. Ms. Kielty raised the issue of “intelligent transportation” – there are cameras on highways, all major bridges in Maine and in many parking lots. She noted she was confused about the existence question – there is no requirement that any governmental entity create a list of all records in its possession; requiring an agency to list all videos would be imposing a new obligation.

Mr. Nicklas explained that recreation programs sometimes have surveillance cameras on the buses they use, and there was at least one instance of a person requesting access to the video of a child captured on a library camera. Public Law 2019, chapter 318 limits the public accessibility of videos from cameras placed on school bus stop arms. The members discussed many issues

involved with the surveillance videos, including who owns the video when the school district contracts with a private bus company, and what about adults on the bus that are captured on the video? Subcommittee members suggested that the key is to focus on the governmental function for the surveillance videos. Who reviews, and for what purpose? The public has a right to review governmental activities, but on the other hand, someone could want the videos for nefarious purposes. There are legitimate purposes for accessing the videos, such as in student discipline cases, but the privacy interests of others captured on the video must be considered. If videos are made confidential, there must be a safety valve to allow access in appropriate situations.

The subcommittee decided to not focus on the stop arm video cameras, as that is currently in law, and several states have similar enabling legislation. The chances of misuse are small as the videos are not to be kept for more than 30 days unless being used in an investigation.

If the purpose is to encourage good behavior, then just the appearance of a video camera on a school bus will have that effect, even if it is not recording. That is a different purpose than security. A member raised concerns about facial recognition, and how that can affect the autonomy of the individual. Another member noted that public access to video footage will provide information about where cameras are, and, therefore, where they are not, revealing information about the vulnerabilities of security systems.

Public records exemptions in many states include exemptions of records, including surveillance videos, that are created and maintained for security purposes. Maine's law is narrowly focused on anti-terrorism activities. 1 MRSA §402, sub-§3, ¶L. Some states specifically address invasion of privacy concerns as the reason for the protection.

*Information from December 18th Subcommittee Meeting here.*

### Privacy

The subcommittee discussed the development of a State Privacy Act to complement the FOAA in a similar way as in federal law as well as to consider adding a specific member to the Advisory Committee representing personal privacy interests.

Staff provided an outline of the elements in the federal and other states' privacy acts. One element – giving the subject of the data an opportunity to review it and ask for corrections of the data about that person – could cause the government to track citizens more, since under current records practice there would be no way for most governmental entities in Maine to be able to tell someone what information was collected and maintained about that person. Subcommittee members queried whether any members were hearing from their constituents or the public that there is a need for statutory privacy protections that should be addressed? Is the topic appropriate for the RTKAC, or should it be sent to another entity to work on?

After much discussion, the subcommittee was divided in its support for making a recommendation to the full Advisory Committee: Five members supported the RTKAC recommending to the Judiciary Committee that a separate committee, like RTKAC, be

established to look at privacy and related issues, and to look at developing a privacy act. At least one member would overlap with the RTKAC, while four members opposed the recommendation.

## V. COMMITTEE PROCESS

The Advisory Committee held four meetings, the Public Records Exceptions Subcommittee met three times, the Improve the FOAA Subcommittee met three times and the Issues Subcommittee met three times. Each Subcommittee explained their discussions and recommendations to the full Advisory Committee. The Advisory Committee engaged in robust discussions and submits recommendations for consideration, including legislative recommendations for the Joint Standing Committee on Judiciary. See Part VII of this report for the specific recommendations. The Advisory Committee members agreed that more time is needed to thoroughly research and discuss a few topics that were on the agenda before making recommendations, and therefore tabled them until 2020.

*List tabled topics?*

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**VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN THIRTEENTH ANNUAL REPORT**

The Right to Know Advisory Committee made the following recommendations in its Thirteenth Annual Report. The legislative actions taken in 2019 as a result of those recommendations are summarized below.

<p><b>Recommendation:</b></p> <p>Amend certain existing public records exceptions as recommended by the Public Records Exceptions Subcommittee</p>	<p><b>Action:</b></p> <p>LD 1511, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions – died in nonconcurrence because of the remote participation provisions included in Committee Amendment “A.”</p>
<p><b>Recommendation:</b></p> <p>Amend the Freedom of Access Act to establish a tiered schedule of fines for repeated willful violations within a four-year period</p>	<p><b>Action:</b></p> <p>LD 1414, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Penalties for Violations of the Freedom of Access Act – enacted, now Public Law 2019, Chapter 247, codified in Title 1, section 410.</p>
<p><b>Recommendation:</b></p> <p>Amend the Freedom of Access Act training requirements to include officials who are appointed to the offices for which elected official must complete training</p>	<p><b>Action:</b></p> <p>LD 1416, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials – enacted, now Public Law 2019, Chapter 300, codified in Title 1, section 412.</p>

Recommendation:	Action:
<p>Enact legislation that creates a legislative study on the use of remote participation by public bodies at the state, regional and local level</p>	<p>LD 1183, Resolve, To Implement the Recommendations of the Right To Know Advisory Committee Concerning Remote Participation by Members of Public Bodies – voted ONTP, but statutory language to implement the parameters on the use of remote participation by members of public bodies was included in Committee Amendment “A” (majority report) of LD 1511, which subsequently died between the House and Senate.</p>

## VII. RECOMMENDATIONS

The Advisory Committee makes the following recommendations.

THESE RECOMMENDATIONS HAVE BEEN PRELIMINARILY APPROVED BY THE SUBCOMMITTEES BUT HAVE NOT BEEN ADOPTED BY THE FULL ADVISORY COMMITTEE

- ❑ Amend certain existing public records exceptions as recommended by the Public Records Exceptions Subcommittee

(The following recommendations were made in 2018 and included in LD 1511, which did not pass, so they are recommended again.)

- 1 MRSA §402, sub-§3, ¶C-1, sub-¶(1) (amend to remove the listing of Social Security numbers as to what is confidential in communications with constituents because SSNs are already not public records) (Ref #4)
- 1 MRSA §402, sub-§3, ¶ K (amend to delete requirement that a municipality adopt an ordinance in order to protect personally identifying information about minors that is obtained and maintained in the process of providing recreational or nonmandatory recreational programs or services) (Ref #12)
- 1 MRSA §402, sub-§3, ¶M (amend to add “including records or information maintained to ensure government operations and technology continuity and disaster recovery”; ¶M provides a public records exception for records and information about public agency technology infrastructure, systems and software) (Ref #14)
- 3 MRSA §997 (amend to remove duplicative language from draft provided; OPEGA confidentiality of working papers) (Ref ##30-34)
- 5 MRSA §4572, sub-§2, ¶C, sub-¶(2) (amend to clarify terminology about medical and disability information; Maine Human Rights Act description of unlawful employment discrimination against a qualified individual with a disability) (Ref #48)

- 5 MRSA §4572, sub-§2, ¶E (amend to clarify terminology about medical and disability information; Maine Human Rights Act description of unlawful employment discrimination against a qualified individual with a disability) (Ref #48)
- 5 MRSA §4573, sub-§2 (amend to clarify terminology about describing physical or mental disabilities; Maine Human Rights Act description of employer actions that are not unlawful employment discrimination) (Ref # 49)

### Sections from this year's review

See recommended legislation in **Appendix C**, and the list of public records exceptions for which no amendments are recommended in **Appendix D**.

- Direct legislative staff to help identify nonstandard language concerning existing public records exceptions; *Part of Appendix C*
- Enact legislation to provide parameters on the use of remote participation by public bodies; *Appendix E*
- Enact legislation to cap copying fees; *Appendix F*
- Enact legislation to adjust the fees that may be charged for searching for, retrieving and compiling public records in response to requests; *Appendix F*
- Enact legislation to require planning boards, additional municipal officials and specific school district officials to complete Freedom of Access Act training, and to clarify the application of existing training requirements; *Appendix F*
- Request the Public Access Ombudsman to develop suggestions to enhance and improve FOAA training for public officials; *Appendix F*
- Request the Judiciary Committee to establish a study group to examine the use of emerging technologies with regard to making and keeping records and to examine the use of communications technology during public proceedings; *Appendix F*
- Enact legislation to improve the review of public records exceptions by including consideration of access to information that will assist in making informed decisions about health and safety; *Appendix F*
- Request the Judiciary Committee to establish a study group to explore the need for a state Privacy Act; *Appendix G*



Enact legislation to revise the membership of the Archives Advisory Board to include a public member and two members representing journalistic and news perspectives; *Appendix G*

Request that the Archives Advisory Board emphasize the sharing of information about its meetings to enhance public awareness and participation of the importance of records retention schedules; *Appendix G*

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## VIII. FUTURE PLANS

In 2020, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report . The Advisory Committee will also continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

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