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Right to Know Advisory Committee
May 28, 2008
(Draft) Meeting Summary

Convened 10:40 a.m., Room 438, State House, Augusta

Present:

Sen. Barry Hobbins, Chair
Rep. Deborah Simpson
Shenna Bellows
Karla Black
Richard Flewelling
Ted Glessner
Suzanne Goucher
Mal Leary
Judy Meyer
Linda Pistner
Harry Pringle
Chris Spruce

| Absent:

Robert Devlin
Sheriff Mark Dion
Maureen O'Brien

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Sen. Barry Hobbins convened the Advisory Committee and welcomed everyone.

Summary of 123rd Legislature's FOA actions in 2008

Staff reported on the Legislature's consideration of 4 bills that resulted from recommendations of the Advisory Committee and distributed copies of the bills, adopted committee amendments and enacted laws. All of the bills were enacted into law:

- LD 1881, An Act To Improve Transparency and Accountability in Government (Public Law 2007, chapter 501)
- LD 1923, An Act To Implement the Recommendations of the Right To Know Advisory Committee Creating the Public Access Ombudsman (Public Law 2007, chapter 603)
- LD 2198, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Training for Elected Officials (Public Law 2007, chapter 576)
- LD 2212, An Act Concerning Public Records Exceptions (Public Law 2007, chapter 597)

Senator Hobbins remarked that the Advisory Committee accomplished much with the enactment of the legislation and in its review of statutory exceptions in Titles 1 to 9-B.

Suzanne Goucher asked about the intent behind the sunset provision included in LD 1923, the ombudsman bill. Staff replied that, because General Fund monies were not available, the bill was amended to authorize the Attorney General's office to establish the ombudsman position as a pilot project with outside funding to support the costs of the position. The sunset provision which repeals the ombudsman pilot project on July 1, 2009 was added to reflect the intent that the project must have outside funding to establish the position.

DRAFT

Sen. Hobbins asked if anyone had any ideas or suggestions for sources of outside funding for the ombudsman position. Sen. Hobbins remarked that perhaps the Libra Foundation would be interested and said that he knew two of the Foundation's Trustees, Owen Wells and Bill Ryan. Sen. Hobbins asked staff to prepare a cover letter and packet of information about the Right to Know Advisory Committee to be sent to the Libra Foundation inquiring about potential funding. Judy Meyer remarked that, based on a recent article in the Sun Journal, she believed the Libra Foundation had changed its mission from downtown economic development to more rural initiatives and community building. Ms. Meyer suggested that any proposal from the Advisory Committee should be tailored to the Foundation's mission and said she would get a copy of the news article on the Libra Foundation for staff.

Staff also summarized the proposed public records exceptions reviewed by the Judiciary Committee during the session.

Discussion of existing exceptions review process

The Advisory Committee briefly discussed the process used by the Advisory Committee and the Judiciary Committee to review existing exceptions and proposed exceptions. Staff reported that the process worked best when the Advisory Committee made recommendations to the Judiciary Committee regarding specific exceptions and that the Judiciary Committee members had the most difficulty with those exceptions that the Advisory Committee referred to the Judiciary Committee without a recommendation. Sen. Hobbins told the Advisory Committee that the Judiciary Committee devoted a tremendous amount of time to review these exceptions (more time than originally thought) but that he thought the process is working. Representative Deborah Simpson agreed, but said that it was difficult to review complicated provisions in the short session and that the Judiciary Committee would benefit from the additional time if more complicated or controversial provisions could be reviewed in the 1st session, which is longer. Sen. Hobbins told the Advisory Committee that the timing for review of proposed exceptions was very late in the session and suggested that the orientation for committee chairs include a request to committee chairs to forward those bills to the Judiciary Committee as early in the session as possible.

The Advisory Committee agreed that the process used by the Legislative Subcommittee and Advisory Committee worked well and complimented the materials developed by staff to assist in the review. Linda Pistner suggested that the Advisory Committee try to flag those existing exceptions up for review that are more complicated or controversial during this interim and refer to the Judiciary Committee in the 1st session to give the committee as much time as possible for consideration.

Law School Externship

The Advisory Committee discussed the Law School externship that was recently completed by Maryann Nowak. Linda Pistner reported that it was a great opportunity for the extern and that it worked because Maryann was very motivated and capable. Ms. Pistner expressed regret that the demands of the legislative session made it difficult for her to provide more direct supervision and said that if there was one issue that it was related to Ms. Nowak moving ahead on tasks and activities without touching base beforehand.

Ms. Pistner told the Advisory Committee that the Law School was interested in another placement in Spring 2009 and that placements are not made in consecutive semesters. The placement of an extern during the fall semester would have to wait until Fall 2009. Chris Spruce

DRAFT

suggested that the Legislative Subcommittee could identify certain exceptions during the summer and fall that need additional research and develop research assignments for an extern to complete during a spring semester externship.

Sen. Hobbins remarked that he thought the externship went very well. The Advisory Committee agreed to make a proposal to the Law School for an extern.

Schedule for Review of Existing Exceptions; Proposed Changes to Schedule

The Advisory Committee reviewed the statutory schedule of existing exceptions for review. The Advisory Committee must review the existing exceptions in Titles 10 to 21-A and make recommendations to the Judiciary Committee by 2010. Staff distributed a chart outlining the existing exceptions; at this point, approximately 80 exceptions have been identified for review. The Advisory Committee agreed to follow the process used last year and referred the exceptions to the Legislative Subcommittee.

The Advisory Committee also considered 2 requests to revise the schedule of exceptions for review from Representative Dawn Hill and Mal Leary. Sen. Hobbins welcomed Rep. Hill and asked her to describe her request to the Advisory Committee. In a May 2nd letter to the Advisory Committee, Rep. Hill requested that the Advisory Committee review the statutory exemption in Title 23, section 63 relating to engineering estimates of project costs involving the Maine Turnpike Authority and the Department of Transportation. Rep. Hill explained to the Advisory Committee that, during the process of requesting information related to the construction of a new toll plaza in York by the Maine Turnpike Authority, the statute was brought to her attention. Rep. Hill believes that Title 23, section 63 appears to prohibit public disclosure of engineering estimates even after the completion of the bidding process. Rep. Hill requests that the Advisory Committee review the exception during the current process rather than during the next cycle to be completed in 2012.

Linda Pistner told the Advisory Committee that the Attorney General's Office does not provide legal advice to the Maine Turnpike Authority, which is an independent quasi-state entity, and remarked that the statute does not seem parallel to the state's general bidding laws that keep bid estimates confidential until a bid is awarded. Ms. Pistner suggested that the Advisory Committee write to the Maine Turnpike Authority to inquire as to their legal interpretation of section 63. Chris Spruce remarked that the Advisory Committee would be establishing precedent when taking action on this request to review an exception out of order and cautioned the Advisory Committee about the potential impact of the workload. Ms. Pistner agreed and suggested that the request for more information might defer the need for action. Shenna Bellows stated that, while she understands the concern, she felt that when issues are brought to the Advisory Committee after being identified by members of the public the Advisory Committee should address those issues and exceptions in a timely manner and involve public input as much as possible. Ted Glessner echoed Ms. Pistner's remarks and agreed that more information about the legal interpretation of the provision would be useful. Sen. Hobbins liked Ms. Pistner's suggestion to write to the Maine Turnpike Authority for information on the legislative history and legal interpretation of the provision. Sen. Hobbins recognized Conrad Welzel of the Maine Turnpike Authority and Theresa Savoy of the Maine Department of Transportation. Both Mr. Welzel and Ms. Savoy said that their agencies were reviewing the provision and its implications and would be happy to respond to an inquiry from the Advisory Committee. Harry Pringle said that he understood the concerns raised by Mr. Spruce but was persuaded by Ms. Bellows that the Advisory Committee should review the exception as requested as long as the

DRAFT

Advisory Committee did not get involved in any legal disputes. Mr. Pringle moved that the Advisory Committee add Title 23, section 63 to the review schedule.

Motion: To add Title 23, section 63 to the review of statutory exceptions.

Result: Unanimously adopted by the Advisory Committee.

[The Advisory Committee deferred discussion of Mal Leary's suggestion for review of teacher credentialing confidentiality until Mr. Leary was present; the Advisory Committee returned to this item after discussion of education and training activities and some of the other FOA issues on the agenda.] The Advisory Committee discussed Mr. Leary's request that the Advisory Committee review the provision in Title 20-A that prohibits the public disclosure of records related to teacher credentialing, especially related to criminal activity. Mr. Leary told the committee that the public lacks access to this information and that legislative efforts to change the law this past session were defeated. Mr. Leary suggested that this is a worthwhile issue for the Advisory Committee to discuss and asked that the Advisory Committee consider the provisions now and make recommendations to the Judiciary Committee next session. Mr. Pringle agreed and moved that the Advisory Committee include this item in its review.

Motion: To add Title 23, section 63 to the review of statutory exceptions.

Result: Unanimously adopted by the Advisory Committee.

Education and Training Activities

The Advisory Committee discussed education and training activities related to the training law that becomes effective July 1, 2008. Staff reported that Advisory Committee's extern, Maryann Nowak, has completed the podcast on the Freedom of Access laws and it will be ready soon for posting to the website. The Advisory Committee also discussed what efforts should be taken to inform the public and elected officials about the training law's requirements. Sen. Hobbins suggested that a letter might be sent to all candidates for election. Judy Meyer agreed that public notice about the law is important before it becomes effective and noted a recent news article that included some misinformation about the law's requirements. Shenna Bellows added that a letter to all associations of publicly elected officials would be a good idea along with a press release to media outlets. Sen. Hobbins concurred and said that any media release should include bullet points about the new law. Harry Pringle reminded the Advisory Committee that elected officials in office on July 1st have 120 days to complete the training and that there is plenty of time for them to do so. Richard Flewelling reported that the Maine Municipal Association has included articles about the law in its magazine and electronic newsletters. Mr. Pringle and Mr. Flewelling also told the Advisory Committee that both the Maine School Management Association and the Maine Municipal Association will sponsor training sessions at their October annual meetings that will allow their members to comply with the law. The Advisory Committee agreed to develop a media release and bullet point summary of the law. Karla Black also agreed to post the bullet point summary to the State's FOA website. Staff will distribute drafts of the media release and summary for review by the Advisory Committee. The Advisory Committee also agreed that a sample completion form should be posted on the website and made available to elected officials. Ms. Black reported that she had had a conversation with Jeff Austin of the Maine Municipal Association about the sample form and that Mr. Austin had agreed to develop the form. The Advisory Committee directed staff to work with Ms. Black and Mr. Austin to put the sample form on the website.

Discussion of additional FOA issues and activities

DRAFT

- Social Security Numbers

Staff reported that the Advisory Committee has been asked by the Judiciary Committee to consider the public disclosure and confidentiality of social security numbers. Under current law, social security numbers in the possession of the Department of Inland Fisheries and Wildlife are excluded from the definition of “public record” in Title 1, section 402, subsection 3, ¶ N; there is no specific provision in statute that addresses social security numbers in the possession of other state agencies. Ms. Pistner stated that this is an issue that the Attorney General’s Office is very interested in and offered to compile background information on this issue, including relevant federal law, for the Advisory Committee. Ms. Bellows agreed that this is a timely issue given that social security numbers are a key to identity theft and believed that a comprehensive look at the issue is warranted. Mr. Spruce stated that this is a very important issue that should be considered by the full Advisory Committee rather than through a subcommittee. Ms. Goucher and Ms. Meyer concurred. Ms. Meyer suggested that the Advisory Committee poll state agencies on how social security numbers are used to get a sense of the scope of the issue. The Advisory Committee agreed to consider the issues related to social security numbers as a whole; the item will be added to the agenda for the next meeting.

- Privileges - 1 MRSA §402, sub-§3, ¶B

Staff also reported that the Judiciary Committee has asked that the Advisory Committee review the privileges exception. During the session, the Judiciary Committee considered a proposed exception that would have designated certain records as “privileged”; concerns have been raised about what the term means outside the context of widely understood privileges recognized in law and in court proceedings. Mr. Pringle remarked that he believed the interpretation of the exception is self-evident and that he couldn’t imagine recommending a change to the statute, but suggested that the issue should be discussed by the full committee. The Advisory Committee agreed; the item will be added to the agenda for the next meeting.

- Chris Parr’s proposals for statutory changes to Title 1, chapter 13

The Advisory Committee reviewed the proposal made by Chris Parr, Staff Attorney for the Maine State Police, for statutory changes to Title 1, chapter 13. The proposal was first considered last year but not fully acted upon; however, Mr. Parr’s suggestion for changes to Title 1, section 408, subsection 1 was incorporated into the Advisory Committee’s recommendation to the Judiciary Committee on LD 1881 and enacted into law (Public Law 2007, chapter 501). The Advisory Committee agreed to refer the proposals to the Legislative Subcommittee for their review.

- Law Court decision: Portland School Committee v. Blethen Maine Newspapers, Inc.

The Advisory Committee briefly discussed the Law Court’s decision in Portland School Committee v. Blethen Maine Newspapers, Inc. In a unanimous decision, the Law Court upheld the validity of an executive session and determined that notes taken during executive session by a member of a public body are confidential and may not be disclosed if the executive session is valid.

[The Advisory Committee took up discussion of Mal Leary’s request to review teacher credentialing confidentiality; see summary of discussion above.]

DRAFT

- Public hearings outside of Augusta

The Advisory Committee briefly discussed whether to hold public hearings outside Augusta, an idea which had been previously considered. Ms. Bellows suggested that the Advisory Committee review the exceptions first and then determine which exceptions might benefit from further public input so that the public hearings could focus on current and relevant topics. Sen. Hobbins asked that the Advisory Committee plan to revisit the topic again at one of its next meetings.

- Lack of statutory requirement to record minutes of public proceedings

Ms. Meyer suggested that the Advisory Committee consider the issue of minutes for public proceedings. She noted that she had agreed to bring the issue to the Advisory Committee at someone else's suggestion. Under current law, there is no requirement that minutes of public proceedings be recorded. Ms. Meyer asked that the Advisory Committee consider whether recommending a change in the law is appropriate. The Advisory Committee agreed to review the issue; the Legislative Subcommittee will add it to the agenda for its meeting.

Future Meetings

The Advisory Committee decided to meet 3 more times before the start of the 124th Legislature in December as staff will not be available during the session. The Advisory Committee will meet in July, September and November. The July and September meetings have been scheduled; the November meeting date will be scheduled at a future time.

The Advisory Committee meetings are to be held on:

- **Wednesday, July 30th at 12:00 pm (bring your lunch); and**
- **Wednesday, September 10th at 12:00 pm (bring your lunch).**

The Legislative Subcommittee has also scheduled 2 meetings for the following dates:

- **Wednesday, June 18th at 1:00 pm; and**
- **Wednesday, July 16th at 1:00 pm.**

The meeting adjourned at 12:30 p.m.

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