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Ninth Annual Report of the RIGHT TO KNOW ADVISORY COMMITTEE

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F. Recommended Draft Legislation: Establish a process for continuing the review of public records exceptions
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EXECUTIVE SUMMARY

This is the ninth 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 16 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. More information is available on the Advisory Committee's website located at www.maine.gov/legis/opla/righttoknow.htm. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2014, the Advisory Committee met on August 19, September 17, November 6 and November 17.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2014 recommendations and a summary of relevant Maine court decisions from 2013 and 2014 on the freedom of access laws.

For its ninth annual report, the Advisory Committee makes the following recommendations, although not all are unanimous:

- ❑ **Enact legislation adding an IT professional to the Right to Know Advisory Committee**
- ❑ **Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee**
- ❑ **Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A, and repeal the Community Right-to-Know Act**
- ❑ **Establish a process for continuing the review of public records exceptions**
- ❑ **Enact legislation to address deadlines and appeals under the Freedom of Access Act**
- ❑ **Enact legislation to clarify the date of receipt of a request for public records**
- ❑ **Enact legislation to provide government relief from unduly burdensome or oppressive public records requests**
- ❑ **Enact legislation clarifying whether and under what circumstances public bodies are authorized to use technology to allow for remote participation in public meetings**

In 2015, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.

I. INTRODUCTION

This is the ninth 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. Title 1, section 411 – the Advisory Committee's authorizing legislation – is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at www.maine.gov/legis/opla/righttoknowreports.htm.

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. Current Advisory Committee members are:

Sen. Linda M. Valentino Chair	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Rep. Kimberly Monaghan	*House member of Judiciary Committee, appointed by the Speaker of the House*
Perry Antone Sr.	*Representing law enforcement interests, appointed by the President of the Senate*
Percy Brown Jr.	*Representing county or regional interests, appointed by the President of the Senate*
Richard Flewelling	*Representing municipal interests, appointed by the Governor*
Suzanne Goucher	*Representing broadcasting interests, appointed by the Speaker of the House*
Frederick Hastings	*Representing newspaper and other press interests, appointed by the President of the Senate*
Mal Leary	*Representing broadcasting interests, appointed by the President of the Senate*
William Logan	*Representing the public, appointed by the Speaker of the House*
Mary Ann Lynch	*Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court*
Judy Meyer	*Representing newspaper publishers, appointed by the Speaker of the House*

Kelly Morgan	*Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House*
Christopher Parr	*Representing state government interests, appointed by the Governor*
Linda Pistner	*Attorney General's designee*
Harry Pringle	*Representing school interests, appointed by the Governor*
Luke Rossignol	*Representing the public, appointed by the President of the Senate*

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

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, former Special Assistant Attorney General Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

By law, the Advisory Committee must meet at least four times per year. During 2014, the Advisory Committee met on August 19, September 17, November 6 and November 17. All of the meetings were held in the Judiciary Committee Room of the State House in Augusta and were open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage, which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas, meeting materials and summaries of the meetings are available on the webpage.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of recent developments in case law relating to Maine's freedom of access laws. For its Ninth Annual Report, the Advisory Committee has identified and summarized the following court decisions related to freedom of access issues.

2013-2014 Maine Supreme Judicial Court Decisions

Duffy v. Town of Berwick

In *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148, the Law Court considered the appeal of a metal and automobile recycling business from a Superior Court judgment vacating the Berwick Planning Board's decision to grant a conditional use and site plan permit to the business to allow for the operation of a metal shredder on its property. One issue was that a number of non-public proceedings and ex parte communications had occurred during the Planning Board's consideration of the business's permit application. Noting that an earlier Superior Court decision had resolved many of these alleged due process deficiencies, the Law

Court focused only on the Planning Board's ex parte communication with the business asking and receiving approval of the Board's selection of an independent consultant to conduct a peer review of conflicting air emissions studies; a communication not made available to the public or to a group of abutting landowners. Recognizing first that the State's Freedom of Access Act requires meetings, records, actions and deliberations of government actors, with very limited exceptions, to be open to the public (1 M.R.S. §§403, 405), the Law Court further explained that such proceedings must be conducted consistent with due process such that an objective participant, win or lose, would conclude that he or she had been heard, that the result was not preordained and that the process was fair. Because the communication merely sought the business's approval for a decision the Board had already made, the abutters had full opportunity to respond to the selection and findings of the consultant at a public hearing and as there was sufficient evidence to support the Board's determination as to air emissions based in part on the consultant's findings, the Law Court concluded that the ex parte communication did not taint the Board's decision under the circumstances. Accordingly, the Court vacated the judgment and remanded the case for entry of judgment affirming the Planning Board's approval of the permit.

Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor

In *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, 86 A.3d 30, the Law Court found that the confidentiality provisions of Title 36, section 191 apply to all information appearing in any report, return or other information provided pursuant to Title 36, including the methodologies, formulas or calculations relating to apportionment of Maine income tax liability for nonresident partners of a professional services partnership entity based in or with a significant business presence in Maine. Such information, even if provided by Maine Revenue Services, is excepted from the definition of "public records" in the Freedom of Access Act (FOAA) because it is designated confidential, an express exception to the definition of public record in Title 1, section 402, subsection 3, paragraph A.

The law firm sued Maine Revenue Services under the FOAA seeking documents containing methodologies, formulas or calculations relating to apportionment of Maine income tax liability for nonresident partners of a professional services partnership based in or with a significant business presence in Maine. Maine Revenue Services had denied the request, citing the privacy protections in 36 §191, sub-§1. The Superior Court sided with Maine Revenue Services and the law firm appealed. The Law Court affirmed, finding that the documents covered by the request for information consist entirely of information deemed confidential pursuant to §191, sub-§1, so no redacted document is available for release. The Law Court disagreed with the law firm's argument that the only information that is confidential is information provided by the taxpayer. The Court, required to strictly construe all exceptions to the FOAA, interpreted §191, sub-§1 as applying to all information, from whatever source, provided pursuant to Title 36, including information generated by Maine Revenue Services. The Law Court held that the statutory context confirms this interpretation because §191 includes many detailed exemptions from the privacy protections, some of which would not be necessary if the law firm's interpretation was correct.

Turcotte v. Humane Society Waterville Area

In *Turcotte v. Humane Society Waterville Area*, 2014 ME 123, an individual appealed a Superior Court dismissal of her complaint against the Humane Society Waterville Area (HSWA) to compel HSWA to permit inspection of certain records pursuant to Maine's Freedom of Access Act (FOAA). The central issue in this appeal concerned whether HSWA is in fact a public agency whose records are subject to the FOAA (see 1 M.R.S. §402(3)). Citing prior precedent (*Dow v. Caribou Chamber of Commerce & Industry*, 2005 ME 113), the Law Court recognized that whether an entity qualifies as a public agency under the FOAA hinges on an analysis of four factors: (1) whether the entity performs a governmental function; (2) whether the entity's funding is governmental; (3) the extent of governmental involvement in or control of the entity; and (4) whether the entity was created by statute or by private action. Applying this analysis to the facts at hand, the Court first held that HSWA does not perform a traditional governmental function but merely provides services under a contract with a public agency, namely the City of Waterville. Next, the Court noted that HSWA receives the bulk of its funding from private donations rather than public funds. Turning to the third prong of the analysis, the Court determined that HSWA's need to comply with the terms of its contract with the City and to abide by certain licensing requirements merely constituted limited governmental interaction, rather than government involvement or control. Finally, the Court recognized that HSWA was created by private action rather than by statute. Based on its analysis of these four factors, the Court concluded that, although HSWA performs a function benefitting the public and assisting municipalities, it is not a public agency subject to the FOAA. Accordingly, the Court affirmed the Superior Court's dismissal of the individual's complaint.

IV. COMMITTEE PROCESS

In previous years, the Right to Know Advisory Committee has divided its workload among two or more subcommittees, which have reported recommendations back to the full Advisory Committee for action. This year, the Advisory Committee chose to handle its work in the four full committee meetings, which are summarized below.

Summary of August 19, 2014 meeting

Public Access Ombudsman update

Public Access Ombudsman Brenda Kielty provided the Advisory 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 of which 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 many 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 do not understand that it is important for the process of deliberation to be open. Members of a public body cannot use Google Docs or other types of technology to collect comments and make changes to proposals; those activities must be conducted in open public proceedings.

Government Oversight Committee's request to Attorney General and Secretary of State
The Government Oversight Committee (GOC) requested that both the Attorney General and the Secretary of State address the GOC's concerns that were identified when reviewing a document shredding incident and the contract award process within the Department of Health and Human Services. Chief 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 to these concerns, a work group has been established to regularize document retention, work out retention schedules with State 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 recommended that each agency appoint a records officer to ensure 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 as well.

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.

Summary of September 17, 2014 meeting

Discussion of technology, cloud computing and social media
Greg McNeal, Chief Technology Officer, 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 Advisory Committee on technology, cloud computing

and social media. Mr. McNeal generally described for the Advisory 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. Advisory 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 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 or official 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 Advisory Committee requested that a copy of this order be produced for review and 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 Advisory 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 communication, when used to transact government business, are considered public records under the FOAA. The major issue to be addressed here 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 that is constantly updated? In her opinion, neither the FOAA nor the retention schedules adequately answer this question. Ms. Kielty agreed to bring back to the Advisory 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 the FOAA?

Other state approaches

Advisory 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. Advisory Committee members requested that staff compile a spreadsheet comparing and contrasting Maine's social media and communications policies with approaches taken by other states and municipalities.

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

Advisory 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 of the 126th Legislature. These bills, whose topics overlapped somewhat, were combined into Resolve 2013, chapter 112 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

Advisory Committee staff provided an update on activities related to LD 1818, An Act to Facilitate Public Records Requests to State Agencies, noting that since the last meeting, the Judiciary Committee had written a letter to the Legislative Council requesting that it adopt measures to increase the public's ability to make records requests online and to discuss coordination with State agencies on these goals. Additionally, Jonathan Nass, Senior Policy Advisor to the Governor, wrote a letter to the Advisory 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 stated that she was thus far pleased with the progress made in implementing the goals outlined in LD 1818.

Summary of November 6, 2014 meeting

Public Access Ombudsman update

Brenda Kielty, Public Access Ombudsman, updated the Advisory Committee on the activities of the work group on the State's records retention framework. The work group is aiming to complete a review of the State's records retention requirements and policies at the request of the Government Oversight Committee (GOC) and will report back to the GOC by February 15, 2015. Ms. Kielty anticipates that the GOC will provide additional opportunities for public and state agency input following submission of the report. Ms. Kielty reviewed a summary chart outlining the tasks requested by the GOC and the group's work plan to complete the report. The Advisory Committee requested that Ms. Kielty provide the members with a copy of the draft report so that they may comment individually. Formal comments from the Advisory Committee cannot be provided since the draft report will not be completed until after the Committee's final meeting of 2014 on November 17th. Harry Pringle suggested that the work group take into account the practical impact of its recommendations for records retention on custodians of public records, particularly the impact and burden on local government officials.

Social media policies

Advisory Committee staff reviewed a summary chart comparing state social media policies, including Maine. The Office of Information Technology, Department of Administrative and Financial Services, has posted a social media policy (adopted in 2011) on its website. Although Jennifer Smith, Director of Legislative Affairs and Communications, Department of Administrative and Financial Services, informed staff that the policy was not the "official" policy and was currently under review by the Bureau of Human Resources, staff provided copies of the policy to the Advisory Committee and included it for comparison purposes in the chart. Ms. Smith told Advisory Committee staff that the executive branch does not have a current social media policy applicable to all state agencies. Mr. Parr remarked that it was important for the executive branch to clarify the status of its social media policy and educate employees about the use of social media by government.

With regard to freedom of access and records retention, staff noted that all state social media policies make clear that all social media content, when used to transact government business, are considered public records under their respective freedom of access laws and subject to state records retention requirements.

The Legislature and the judicial branch have not adopted social media policies. Ms. Lynch stated that the primary reason the judicial branch does not have a policy is because it only uses social media in a limited manner, namely utilizing Twitter to make public announcements of court schedules and the release of court decisions. Ms. Lynch indicated that it would be inappropriate and contrary to how judges decide cases to be active on Facebook or other social media sites, which provide an opportunity for public comment.

At the September 17th meeting, Ms. Smith had advised the Advisory Committee that state agencies were required by executive order to conduct all official state business through email and told the Advisory Committee she would provide copies of that order. Following the meeting, however, Ms. Smith notified staff that there was no executive order, but that the communications policy for all executive branch agencies applies, which includes a directive that all executive branch employees use email as the official form of electronic communication to allow for more efficient retention of records. Senator Valentino noted that the Advisory Committee was given inaccurate information by Ms. Smith at the September 17th meeting relating to the existence of an executive order and requested that it be reflected in the meeting summary.

Electronic communications between legislators and the public during committee hearings and work sessions and House and Senate sessions

At Mr. Parr's request, the Advisory Committee discussed the issue of electronic communications between legislators and the public during committee hearings and work sessions and House and Senate sessions. Currently, there is no uniform prohibition on the use of email, texting or other forms of electronic communication between legislators and the public during these events. Staff researched the issue and reported that there are no statutes in other states that govern the use of electronic communication by legislators, although chamber rules in some legislatures prohibit texting by legislators during certain proceedings.

Senator Valentino and Representative Monaghan both felt rules related to these types of communications would be difficult to enforce and wondered how different such communication was from the passing of written notes or private conversations. Mr. Parr's concerns related to the lack of courtesy to a member of the public testifying at a public hearing and to the lack of transparency if electronic communications are being used during these events. Chief Antone and Ms. Goucher reiterated Mr. Parr's concern about transparency, stating that the public must know how legislative decisions are made and that records of these decisions must be retained.

Ms. Goucher moved the Advisory Committee write a letter to the Legislative Council asking them to adopt the executive branch's directive that email is the official form of communication. Mr. Parr seconded the motion. Ms. Pistner suggested that this was not a freedom of access issue, as all forms of communication, whether a written note or electronic text, would be considered a public record. Ms. Lynch did not think these types of communications among legislators were all that different from partisan caucuses, which are not considered public proceedings. Ms. Lynch also stressed that the public and lobbyists must be able to petition the government. After this discussion, Mr. Parr withdrew his second of the motion and no further action was taken.

Remote participation by members of public bodies

The Advisory Committee discussed the issue of remote participation by public bodies and reviewed the legislative recommendation it made last year. Because the bill was not enacted, Senator Valentino stated that she did not think the Advisory Committee would be successful if the same proposal was submitted again, but she welcomed further discussion.

Mr. Parr agreed, but noted that the failure of the legislation was related to differing legal opinions from the Attorney General's Office and the Maine Municipal Association (MMA) about whether current law permits public bodies to meet remotely. Since interpretation of

current law is not consistent in this respect, Mr. Parr suggested that the Legislature needs to clarify the issue one way or another. Fred Hastings stated he would not be comfortable if the Advisory Committee did not discuss the issue further. Mr. Hastings pointed to the Utah statute included in the background materials prepared by staff as an approach for the Advisory Committee to consider. Judy Meyer also expressed concern that, if the Advisory Committee did not make a recommendation, other proposals might come forward that they would not support. Senator Valentino suggested that if the Advisory Committee wants to continue this discussion, representatives of the MMA and other stakeholders be invited to provide comments. Although he could not speak to the MMA's position, Richard Flewelling stated that MMA representatives would be available to participate in a discussion at the next meeting. The Advisory Committee agreed to discuss remote participation by public bodies at the next meeting and directed staff to invite comments from the MMA and other stakeholders. Mr. Pringle noted that this was also an important issue to the Maine School Management Association (MSMA), which he represents. Although Mr. Pringle would not be present for the next meeting, Senator Valentino stipulated that a representative for the MSMA would be invited to provide comments during the discussion.

Remedies for abusive or burdensome public records requests

Staff reviewed a chart comparing other states approaches to abusive, repetitive or unduly burdensome public records requests. While legislation has in the past been proposed in California, Virginia and Washington, Connecticut is the only state to provide statutory authority to a state agency to seek declaratory or injunctive relief from abusive, repetitive or unduly burdensome public records requests. Several states—California, Illinois, Kansas, Kentucky, New Jersey, Pennsylvania and Utah—have laws allowing agencies to deny records requests if the request is unduly burdensome or meets other criteria. Alaska, Connecticut, Georgia, Illinois, Tennessee and Utah are examples of states that provide authority for an agency to require fees to be paid in advance or to impose fines for frivolous or repetitive requests.

The Advisory Committee reviewed draft language recommended last year, which was not advanced as a bill by the Judiciary Committee. The draft would have added a statutory provision to allow a public body, agency or official to seek relief from overly burdensome requests under the Freedom of Access Act by filing an action in Superior Court seeking a determination whether the request may be denied.

The Advisory Committee also reviewed an alternative draft proposal introduced by Ms. Pistner. Ms. Pistner told the Advisory Committee that the draft is intended to achieve the same goal as the previously recommended draft. Instead of establishing a "new" standard for the court to interpret, however, the draft uses a standard and process similar to the one used by the courts to grant exemptions from discovery. The burden remains on the State agency to seek relief from the court before denying a public records request on the basis that the request is unduly burdensome or oppressive. Mr. Parr inquired whether the draft would preclude an agency from asking requesters of public records to narrow their request. Ms. Pistner stated that the intent was to allow negotiation and discussion to continue between parties. Mr. Parr also asked if Ms. Pistner has considered language authorizing the State to seek attorney's fees. Ms. Pistner responded that she had not considered such a provision, but preferred to leave that issue out. Mr. Pringle complimented the draft as proposed, and noted that that the Advisory Committee had considered the attorney's fee provision in the past, but had felt that it might have a more chilling

effect on records requests than they were comfortable with. Ms. Lynch said she was concerned about the language requiring a scheduled hearing by the court because of the potential impact on court resources. Ms. Lynch wondered whether the court could use other summary approaches to resolve an agency's request for relief. Ms. Pistner agreed that a formal hearing would not be necessary in all instances and agreed to look into revising the language. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee, subject to review of a revised draft at the November 17th meeting.

New existing public records review schedule
Advisory Committee staff outlined proposed draft language to codify the new existing public records review schedule, which was recommended to the full Advisory Committee by the Public Records Subcommittee in 2013. Under the new schedule, the Advisory Committee will begin its review of existing public records exceptions enacted after 2004 and before 2013 during 2015 or 2016. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Review of other legislative recommendations from 2013
The Advisory Committee reviewed draft legislation to implement recommendations made to the Judiciary Committee last year, which were incorporated into LD 1821, An Act to Implement the Recommendations of the Right to Know Advisory Committee. LD 1821 was enacted by the Legislature, but was vetoed by the Governor and did not become law. The Advisory Committee directed staff to prepare individual drafts of each part of LD 1821 to be reviewed separately.

Public records exceptions. The proposed draft incorporates the same provisions relating to existing public records exceptions in Title 22 and Titles 26 to 39-A that were included in draft legislation recommended to the Judiciary Committee in 2014. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Advisory Committee membership—add IT expert. The proposed draft adds a representative with expertise in information technology as a member of the Advisory Committee. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Reporting date for Public Access Ombudsman. The proposed draft changes the reporting date for the annual report of the Public Access Ombudsman to January 15th, the same date by which the Advisory Committee is required to submit its annual report to the Legislature. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Deadlines and appeals. The Advisory Committee reviewed two draft proposals addressing deadlines and appeals for public records requests. One proposal was recommended last year to the Judiciary Committee. That draft clarifies that the date of receipt of a request to copy or inspect a public record is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record; stipulates that refusing to allow inspection or copying is considered a denial, as is the failure, within 10 days of the receipt of a request, to provide a written notice that the request is denied; and provides that, if no written notice of denial is provided, the requestor may file an appeal within 40 calendar days of the request.

The Advisory Committee also reviewed an alternative draft introduced by Ms. Pistner on behalf of the Attorney General. This draft makes clear that an agency's or official's written notice of denial in response to a request to copy or inspect records may be a statement that the agency or official expects to deny the request in full or in part, but that the decision can be made only after reviewing the records subject to the request; eliminates the need for a de novo trial, and instead requires the Superior Court to conduct a review of an appeal de novo; and amends the laws governing public access officers by specifically requiring that a request for public records be acknowledged within five working days of receipt of the request.

Ms. Meyer expressed concern that the Attorney General's draft removed the "grace period" for acknowledgment of public records requests. Ms. Meyer recalled that language was added to accommodate representatives of certain water districts that have limited business hours and limited staff available to respond to requests. Ms. Kielty and Ms. Pistner understood the concern, but noted that this "grace period" did not represent a significant area of complaint from the public. Ms. Kielty stated that the larger concern in preparing the draft was to be consistent and address the timeline and process for making appeals.

The Advisory Committee tabled discussion of the drafts until the next meeting. Ms. Pistner agreed to review both drafts and amend the proposal to address the Advisory Committee's concerns.

FOAA training for elected officials

Advisory Committee staff asked whether members had suggestions for changes to the FOAA training required for elected officials, including legislators. Mr. Pringle noted that there is no need for additional training or changes in the way training is provided, but that many issues are in need of clarification for elected officials, e.g., responsibility for retention of electronic records and authority to conduct meetings remotely. Once these issues are clarified, they can be incorporated into existing training materials. At this time, however, the Advisory Committee has no suggestions for changes.

FAQs

Staff asked whether the Advisory Committee had suggestions for changes or updates to the "Frequently Asked Questions" document. Ms. Kielty has assumed responsibility for management and oversight of the State's Freedom of Access website and periodically updates the content, including the FAQs. At this time, the Advisory Committee has no suggestions for changes or updates.

Draft report

The Advisory Committee approved the general format for the draft report and agreed to include copies of the veto letters of bills implementing Advisory Committee recommendations in the appendices. Mr. Flewelling advised that the Law Court had issued a decision related to the FOAA on November 4th; staff agreed to summarize the decision and include it in the report along with summaries of other FOAA-related cases decided in 2013 and 2014.

Summary of November 17, 2014 meeting

Remedies for abusive or burdensome public records requests

Ms. Pistner introduced an updated draft on creating a remedy for officials and agencies faced with unduly burdensome or oppressive public records requests. At the November 6th meeting, Ms. Lynch had noted that Ms. Pistner's original draft required a scheduled hearing, and suggested rewording that would allow a summary process when appropriate. Ms. Pistner's new draft made that change, but retained the 14-day deadline for an official or agency to file a complaint. Ms. Pistner suggested that the 14-day deadline from the date of the receipt of the request was to ensure that agencies and officials would be actively involved in responding to each request. Mr. Parr noted that the next agenda item dealt with when a request is actually "received," which starts the clock running for the deadlines on acknowledging receipt of a request (statutory deadline of five working days) and for issuing a written denial (statutory deadline of five days). Chief Antone said the 14-day deadline would be hard on small agencies, especially if the person to whom the request is addressed is out sick, on assignment or on vacation.

Ms. Pistner raised the issue of law enforcement often having a particularly difficult time responding within five days, and asked whether carving out an exception for either the Department of Public Safety or law enforcement in general was appropriate. She said most State agencies with whom she works satisfy those acknowledgment and denial deadlines. Ms. Pistner said that although "reasonable time" sounds appropriate in some situations, it may result in delays in situations in which a specific deadline would work. Chief Antone noted that he has never had a problem with requesters being litigious if he has been out and the response was received more than five days after the request, but he is concerned that the 14-day deadline in the draft would mean an official or agency would be foreclosed from seeking protection from the court for an overly burdensome or oppressive request if the request was left unopened on an absent person's desk and the deadline passed.

The Advisory Committee discussed whether the phrase "as soon as practicable" would work instead of a specific day deadline. Although Mr. Parr supported language based on some form of reasonableness, Luke Rossignol and Fred Hastings thought a specific deadline was preferable to avoid vagueness and to ensure that everyone knows what is required. Ms. Pistner suggested that maybe agencies with significant problems responding within the statutory deadlines should seek a legislative change for them to meet their actual work schedules. Bruce Smith, representing school interests in the absence of Harry Pringle, asked whether an agency can use the "unduly burdensome or oppressive" categorization as a defense when a requestor appeals a refusal or denial in court, which can only happen 30 days after the request is received by the official or agency. Ms. Pistner mentioned that because FOAA appeals of denials are created by statute, she believes that the remedy for an agency needs to be included in statute as well. Ms. Meyer noted that using "as soon as practicable" will make requestors more of pests because they would be contacting agencies every day to find out when the records would be released.

The Advisory Committee voted 9-1 (Mr. Parr dissented) to recommend Ms. Pistner's draft to the Judiciary Committee with two changes: first, change the deadline for filing the action from 14 to

30 days, and second, change the language in the last section to make clear that a hearing is not required for a court to make a determination under the statutory provision.

Define receipt of a public records request
Mr. Parr introduced draft language to address problems faced by the State Police within the Department of Public Safety in responding to requests for public records and information. He maintained that it is almost impossible for his department to acknowledge receipt of public records requests within five days because of the volume of requests and because of the different State Police offices and locations. An even bigger problem for them is providing written notice of denial within five working days. Mr. Parr's draft changed both those deadlines from five days to "within a reasonable time" and clarified when a request is received. The Advisory Committee discussed the deadlines and generally decided that five days to acknowledge that a request has been received is achievable, but that sometimes denying within five days may be much harder (see Ms. Pistner's draft from November 6th providing for a response that the agency expects to deny all or part of the request and why). There was discussion about a concept draft that would allow law enforcement agencies more leeway, but the Advisory Committee decided not to move forward with that approach. There was, however, support for Mr. Parr's proposal to amend the FOAA to more clearly define when a public records request is "received."

The Advisory Committee voted 9-1 (Mr. Leary dissented) to recommend to the Judiciary Committee that the FOAA be amended to include language clarifying when a request is received.

Legislative recommendations in Eight Annual Report
At the November 6th meeting, the Advisory Committee reviewed draft legislation to implement the recommendations made to the Judiciary Committee last year, which were incorporated into LD 1821, An Act to Implement the Recommendations of the Right to Know Advisory Committee.

Public records exceptions. The proposed draft incorporates the same provisions relating to existing public records exceptions in Title 22 and Titles 26 to 39-A that were included in draft legislation recommended to the Judiciary Committee in 2013. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Advisory Committee membership - add IT expert. The proposed draft adds a representative with expertise in information technology as a member of the Advisory Committee. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Reporting date for Public Access Ombudsman. The proposed draft changes the reporting date for the annual report of the Public Access Ombudsman to January 15th, the same date by which the Advisory Committee is required to submit its annual report to the Legislature. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

New schedule for reviewing existing public records exceptions
The Advisory Committee accepted the recommendations made in 2013 to restart the in-depth review of public records exceptions that are currently part of Maine law. The proposal is to review exceptions enacted since 2004 in the first two-year period, and then start with Titles 1

through 7-A of the Maine Revised Statutes and proceed through the titles by two-year review periods until completed, making recommendations for the Judiciary Committee to review through 2029. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

Deadlines and appeals

Ms. Pistner explained the draft legislation on simplifying appeals that she had prepared for review on November 6th. Current law requires an agency or official to provide a written denial within five days of the request if the agency or official will not provide the record requested. The draft makes clear that an agency's or official's written notice of denial in response to a request to copy or inspect records may be a statement that the agency or official expects to deny the request in full or in part, but that decision can be made only after reviewing the records subject to the request. The draft also clarifies that a requester's appeal must be filed in the Superior Court for the county in which the requester resides or in which the agency has its principal office. The agency or official is not required to file a formal answer in the appeal, but may instead file a statement of position explaining the basis for the denial. The draft eliminates the need for a de novo trial and instead requires the Superior Court to conduct a de novo review, giving no deference to the agency. The draft also takes up a housekeeping issue by amending the laws governing public access officers by specifically requiring that a request for public records be acknowledged within five working days of the receipt of the request.

The Advisory Committee voted 9-1 (Mr. Parr dissented) to recommend to the Judiciary Committee that the FOAA be amended to include these changes concerning deadlines and appeals.

Remote participation by members of public bodies

The Advisory Committee invited all Right to Know Advisory Committee interested parties, as well as all those who had testified on remote participation bills before the Judiciary Committee during the 126th Legislature, to provide comments on the issue of remote participation by public bodies. Several individuals, government entities and organizations made use of the opportunity to submit written comments. In addition, the following individuals provided oral testimony to the Advisory Committee: John Lisnik on behalf of the University of Maine System; Bruce Smith on behalf of the Maine School Management Association; Jeff McNelly on behalf of the Maine Water Utilities Association; Paulina Collins on behalf of the Public Utilities Commission; and Garrett Corbin on behalf of the Maine Municipal Association. These comments were very useful and identified particular concerns about the quorum requirement and the narrowness of the exception for emergencies. Among commenters, there was greater support for the original LD 258, introduced in the First Regular Session of the 126th Legislature, because of its broader application as compared to LD 1809, which was introduced in the Second Regular Session.

After considerable discussion, the Advisory Committee unanimously agreed to recommend that the FOAA be amended to clearly state whether members of public bodies can participate remotely. The current silence in the FOAA concerning remote participation has led to battling legal opinions and questions about the legality of actions taken by a public body when one or more members are participating from a different location through the use of telephone or video link. The Attorney General does not support public bodies allowing members to participate and

vote when not physically present, without specific authority. Governor LePage, in his veto message on LD 1809, stated his opinion that such meetings are legally permissible. The Advisory Committee believes that such an impasse is untenable. Mr. Rossignol reminded the group that one of the primary responsibilities of the Right to Know Advisory Committee is to give guidance, and the Advisory Committee should make it clear that action needs to be taken to revise the law.

Mr. Parr recommended the addition to the FOAA of a very general statement: that public proceedings, including executive sessions, during which public or governmental business is discussed or transacted through telephonic, video, electronic or other similar means of communication, may not be held unless the body holding such proceedings has first adopted a policy that establishes guidelines regarding the use of such technology and means of communication during its proceedings. Representative Monaghan, Chief Antone, Mr. Flewelling, Ms. Meyer and Mr. Parr supported this approach. The other members in attendance (Commissioner Brown, Mr. Hastings, Mr. Leary, Ms. Pistner and Mr. Rossignol) supported starting with the language of LD 258 and making accommodations for quorum requirements and emergencies that affect the public body involved but do not rise to the level of statewide concern.

The Advisory Committee voted unanimously, however, to recommend that the Judiciary Committee amend the Freedom of Access Act to specifically address the legality of remote participation by members of a public entity. The Advisory Committee will offer the two approaches described above as alternative methods of resolving the problem by allowing remote participation, relying on the Judiciary Committee and the Legislature to determine the best way to balance the needs of governmental bodies to be productive and efficient with the right of the public to attend and observe public proceedings where governmental business is transacted.

Review draft report

The Advisory Committee approved the current draft report. Staff will update it to include all meeting summaries, to list and explain final recommendations and to designate and fill in the appendices to the report. The final draft will be emailed to Advisory Committee members no later than November 24th for final approval. The Advisory Committee voted 9-0 to send the report with the approved revisions to the Judiciary Committee (Mr. Parr abstained).

V. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN EIGHTH ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its eighth annual report. The actions taken in 2014 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Enact legislation to expand the membership of the Right to Know Advisory Committee to include an information	The Judiciary Committee voted "Ought to Pass as Amended" on the recommendations of the Advisory Committee contained in *LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee.* The recommendation to expand the membership of the Right

technology professional	to Know Advisory Committee to add a member experienced in information technology issues was included as Part B of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Communicate to the Joint Standing Committee on Veterans and Legal Affairs about the public records exception in Title 28-A, section 755 relating to business and financial records of liquor licensees	**Action:** Letter from the Advisory Committee to the Veterans and Legal Affairs Committee; no legislative action taken.
Recommendation: Continue without modification, amend and repeal the specified existing public records exceptions in Titles 26 through 39-A	**Action:** The Judiciary Committee voted "Ought to Pass as Amended" on the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in *LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee*. The Judiciary Committee made a date change with regard to when a report submitted by the State Board on Arbitration and Conciliation must be made public, but otherwise accepted the Advisory Committee's recommendations, printed as Part A of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Make no change to the confidentiality provision in the sentinel events reporting law	**Action:** No action was taken.
Recommendation: Repeal the Community Right-to-Know Act in Title 22	**Action:** The Judiciary Committee voted "Ought to Pass as Amended" on the Advisory Committee's recommendation to repeal the Community Right-to-Know Act because it has never been implemented. The Judiciary Committee received written comments from the Health and Human Services Committee supporting the proposed repeal. The repeal of the Act was included as section 1 of Part A of *LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee*. Governor LePage vetoed LD 1821 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Establish a future process for review of public records exceptions	**Action:** No legislative action recommended for 2014 but new proposed schedule expected for review in 2015.

Recommendation: Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)	**Action:** A majority of the Judiciary Committee voted "Ought to Pass as Amended" on the recommendations of the Advisory Committee with regard to remote participation in meetings as proposed in *LD 1809, An Act Concerning Meetings of Public Bodies Using Communications Technology*. The majority report, with the new title of *An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi Municipal Corporations and Districts That provide Water, Sewer and Sanitary Services*, limited the bill's application to the governing bodies of quasi-municipal corporations and districts. Governor LePage vetoed LD 1809 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Enact legislation to address overly burdensome FOAA requests	**Action:** The Judiciary Committee decided not to support the proposed legislation and no bill was printed or considered during the Second Regular Session of the 126th Legislature.
Recommendation: Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (divided report)	**Action:** The Judiciary Committee voted "Ought to Pass as Amended" on the recommendations of the Advisory Committee contained in *LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee*. The Judiciary Committee made changes in the recommended language to clarify the date of receipt of a request to inspect or copy a public record, and modified other proposed language concerning appeals and deadlines, all incorporated as Part D of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee	**Action:** The Judiciary Committee voted "Ought to Pass as Amended" on the recommendations of the Advisory Committee contained in *LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee*. The recommendation to align the reporting date of the Public Access Ombudsman with the annual report date of the Right to Know Advisory Committee was included as Part C of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained *(see veto letter in Appendix J).*
Recommendation: Communicate with the Joint Standing Committee on State and Local Government about issues identified by the Registers	**Action:** Letter from the Advisory Committee to the State and Local Government Committee; no legislative action taken.

of Deeds relating to the redaction of Social Security numbers from filed documents	

VI. RECOMMENDATIONS

Arising from its activities and discussions in 2014, the Advisory Committee makes the following recommendations in this its Ninth Annual Report.

❑ Enact legislation adding an IT professional to the Right to Know Advisory Committee

The Advisory Committee recommends the enactment of legislation to add an Information Technology professional to the membership of the Right to Know Advisory Committee, to be appointed by the Governor. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

See draft legislation in Appendix C.

❑ Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee

The Advisory Committee recommends legislation changing the date of the Public Access Ombudsman annual report to January 15th to align the date with the annual report of the Advisory Committee. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

See draft legislation in Appendix D.

❑ Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A, and repeal the Community Right-to-Know Act

As required by law, the Advisory Committee reviewed existing public records exceptions identified in Title 26 through Title 39-A. The Advisory Committee's recommendations are summarized below and are also posted at www.maine.gov/legis/opla/righttoknow.htm. The Advisory Committee made the same recommendations in its Eighth Annual Report, but they did not become law.

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification.

- Title 30-A, section 503, subsection 1-A, relating to county personnel records concerning the use of force
- Title 30-A, section 2702, subsection 1-A, relating to municipal personnel records concerning the use of force

- Title 32, section 2599, relating to medical staff reviews and hospital reviews – osteopathic physicians
- Title 32, section 3296, relating to Board of Licensure in Medicine medical review committees
- Title 32, section 13006, relating to real estate grievance and professional standards committees hearings
- Title 32, section 16607, subsection 2, relating to records obtained or filed under the Maine Securities Act
- Title 34-A, section 5210, subsection 4, relating to the State Parole Board report to the Governor
- Title 35-A, section 1311-B, subsections 1, 2 and 4, relating to public utility technical operations information
- Title 35-A, section 1316-A, relating to Public Utilities Commission communications concerning utility violations
- Title 35-A, section 9207, subsection 1, relating to information about communications service providers
- Title 36, section 575-A, subsection 2, relating to forest management and harvest plan provided to Bureau of Forestry and information collected for compliance assessment for Tree Growth Tax Law
- Title 36, section 579, relating to the Maine Tree Growth Tax Law concerning forest management plans
- Title 37-B, section 708, subsection 3, relating to documents collected or produced by the Homeland Security Advisory Council
- Title 37-B, section 797, subsection 7, relating to Department of Defense, Veterans and Emergency Management, Maine Emergency Management Agency reports of hazardous substance transportation routes
- Title 38, section 470-D, related to individual water withdrawal reports
- Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans
- Title 38, section 1610, subsection 6-A, paragraph F, relating to annual sales data on the number and type of computer monitors and televisions sold by the manufacturer in this State over the previous 5 years
- Title 38, section 1661-A, subsection 4, relating to information submitted to the DEP concerning mercury-added products
- Title 38, section 2307-A, relating to information submitted to the DEP concerning toxic use and hazardous waste reduction
- Title 39-A, section 153, subsection 9, relating to the Workers' Compensation Board audit working papers
- Title 39-A, section 355-B, subsection 11, relating to records and proceedings of the Workers' Compensation Supplemental Benefits Oversight Committee concerning individual claims
- Title 39-A, section 403, subsection 3, relating to workers' compensation self-insurers proof of solvency and financial ability to pay
- Title 39-A, section 403, subsection 15, relating to records of workers' compensation self-insurers

- Title 39-A, section 409, relating to workers' compensation information filed by insurers concerning the assessment for expenses of administering self-insurers' workers' compensation program

The Advisory Committee recommends that the following public records exceptions be amended.

- Title 26, section 3, relating to information, reports and records of the Director of Labor Standards within the Department of Labor
- Title 26, section 934, relating to report of the State Board of Arbitration and Conciliation in labor dispute
- Title 29-A, section 152, subsection 3, relating to the Secretary of State's data processing information files concerning motor vehicles
- Title 29-A, section 257, relating to the Secretary of State's motor vehicle information technology system
- Title 29-A, section 517, subsection 4, relating to motor vehicle records concerning unmarked law enforcement vehicles
- Title 35-A, section 8703, subsection 5, relating to telecommunications relay service communications
- Title 38, section 585-B, subsection 6, paragraph C, relating to mercury reduction plans for air emission source emitting mercury
- Title 38, section 585-C, subsection 2, relating to the hazardous air pollutant emissions inventory

The "Community Right-to-Know Act" was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public's right to access information collected by the Department of Health and Human Services. Trade secrets are completely protected. The Advisory Committee understands that the Community Right-to-Know Act has never been implemented by the Department of Health and Human Services so no records subject to the confidentiality provisions exist. Based on this information, the Advisory Committee recommends repeal of the Act. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

See draft legislation in Appendix E.

❑ Establish a process for continuing the review of public records exceptions

The Advisory Committee discussed draft legislation, proposed by the Public Records Exception Subcommittee in the Eighth Annual Report, to require the Advisory Committee to review public records exceptions according to a new schedule, starting in 2015. The Advisory Committee recommends that the Judiciary Committee pass legislation implementing the new public records exceptions review schedule.

See draft legislation in Appendix F.

❑ **Enact legislation to address deadlines and appeals under the Freedom of Access Act**

The Advisory Committee discussed draft legislation proposed in the Eighth Annual Report that addressed sections of the FOAA concerning deadlines and appeals, which did not become law. Ms. Pistner, on behalf of the Attorney General, introduced a new draft proposal to address certain portions of the deadlines and appeals sections pertaining only to records requests denials and appeals. After discussion, the Advisory Committee voted 9-1 to send Ms. Pistner's draft legislation to the Judiciary Committee (In favor: Representative Monaghan, Mr. Antone, Mr. Brown, Mr. Flewelling, Mr. Hastings, Mr. Leary, Ms. Meyer, Ms. Pistner and Mr. Rossignol; Opposed: Mr. Parr).

See draft legislation in Appendix G.

❑ **Enact legislation to clarify the date of receipt of a request for public records**

The Advisory Committee discussed draft legislation proposed in the Eighth Annual Report that addressed sections of the FOAA concerning deadlines and appeals, but which did not become law. After the Committee decided not to pursue reintroduction of the previous draft, Mr. Parr introduced a smaller portion of the previous draft intended to address acknowledgment and response deadlines for public records requests as well as to clarify the date of receipt of a request for public records. After discussion, the Advisory Committee voted 9-1 to send only the portion of Mr. Parr's draft legislation concerning clarification of the date of receipt of a request for public records to the Judiciary Committee (In favor: Representative Monaghan, Mr. Antone, Mr. Brown, Mr. Flewelling, Mr. Hastings, Ms. Meyer, Mr. Parr, Ms. Pistner and Mr. Rossignol; Opposed: Mr. Leary).

See draft legislation in Appendix H.

❑ **Enact legislation to provide government relief from unduly burdensome or oppressive public records requests**

The Advisory Committee discussed draft legislation proposed in the Eighth Annual Report that would allow government agencies to seek judicial relief from abusive public records requests, but upon which the Judiciary Committee took no action. Ms. Pistner, on behalf of the Attorney General, introduced a new proposal to address unduly burdensome or oppressive public records requests by allowing a government entity to seek an order of protection from a court when faced with such a request. After discussion, the Advisory Committee voted 9-1 to send Ms. Pistner's draft legislation to the Judiciary Committee (In favor: Representative Monaghan, Mr. Antone, Mr. Brown, Mr. Flewelling, Mr. Hastings, Mr. Leary, Ms. Meyer, Ms. Pistner and Mr. Rossignol; Opposed: Mr. Parr).

See draft legislation in Appendix I.

❑ **Enact legislation clarifying whether and under what circumstances public bodies are authorized to use technology to allow for remote participation in public meetings**

The question of whether it is legal for a member of a public body to participate in proceedings when not physically present – through a telephone, video or other communication connection – was put to the Right to Know Advisory Committee several years ago, and the Advisory Committee has since been trying to develop a legislative response that balances the ability of public bodies to do their work efficiently with the public's right to a transparent process and the ability to observe and, when authorized, participate in the action. The Advisory Committee strongly recommends that the Freedom of Access Act be amended to clearly state whether remote participation is permitted and, if so, under what circumstances.

The Attorney General has not supported the use of technology for remote participation by members of public bodies for several reasons, including: the Freedom of Access Act does not specifically authorize remote participation; there are specific requirements for public proceedings contained in the FOAA and participating remotely (without specific statutory authorization) does not guarantee that such requirements will be met; and the Legislature has specifically authorized by statute certain public bodies to conduct their public proceedings, sometimes in very narrow circumstances, using teleconferences or other communications technology when not all the members can be physically present.

The Advisory Committee has wrestled with the issue of remote participation while other states have enacted provisions allowing members of public bodies to participate when not physically present with various restrictions and in a wide range of situations. In 2013, a majority of the Advisory Committee recommended draft legislation to enable any public body interested in allowing non-present members to participate electronically to do so (see LD 258 in Appendix J). The Advisory Committee grappled with issues of whether public bodies made up of elected members should ever allow a member to participate from a location other than the public body's meeting room where the electorate attends and is involved in the proceedings. Questions about the appropriateness of a non-present member voting, whether the materials have been provided or witnesses have been examined by the public body, were discussed and, although no unanimous resolution was found, the Advisory Committee believed the topic needed discussion at the legislative level, and forwarded its divided recommendation. The Judiciary Committee rejected LD 258 as too restrictive and failing to accommodate the needs of entities already engaging in remote participation, and others that would like to do so. Instead, the Judiciary Committee asked the Advisory Committee to try to resolve its concerns regarding the proposed LD 258 during the legislative interim.

During the Second Regular Session of the 126th Legislature, a majority of the Judiciary Committee accepted the Advisory Committee's majority recommendation on remote participation, but made additional changes to narrow the application of the legislation to governing bodies of quasi-municipal corporations, such as sewer and water districts (see LD 1809 in Appendix J). The majority Committee Amendment allowed a pilot project and in the process made clear that a majority of the Judiciary Committee supported the Attorney General's interpretation of the FOAA that remote participation is prohibited unless there are specific provisions authorizing it. Specific statutory authorizations allowing for some form of remote

participation already exist for the following entities: the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Emergency Medical Services Board and the Workers' Compensation Board. After significant debate in the House and the Senate, the amended bill was enacted by the Legislature, but vetoed by Governor LePage and the veto was sustained. In his veto message, the Governor expressed the opinion that "[i]t is currently legal to conduct a remote meeting as long as it complies with the other requirements of the law" (see veto letter to LD 1809 in Appendix J).

The Advisory Committee believes that, in order for remote participation to be legal, the statutes need to be amended to specifically authorize the use of remote technology by public entities, whether such amendment is to the FOAA to allow any entity to do so, or to the statutes governing each individual entity that seeks to engage in remote participation. Accordingly, the Advisory Committee unanimously recommends that the FOAA be amended to address whether members of public bodies who are not physically present may participate in public proceedings using remote communications technology. The Advisory Committee members unanimously support enabling legislation that applies in at least some situations to most entities.

Should the Legislature decide that remote participation should not be authorized, whether broadly or narrowly, the Advisory Committee strongly recommends that the FOAA be amended to explicitly prohibit remote participation, unless expressly authorized in a public body's governing statute. No matter which policy approach the Legislature chooses to adopt, the Advisory Committee believes it is imperative to definitively resolve these questions about remote participation within the FOAA.

If the Legislature supports the ability of members of public bodies to participate in public proceedings from a remote location, members of the Advisory Committee support two different methods of authorization. At the final meeting of the Advisory Committee, the members present were evenly split as to whether it is more appropriate to adopt a simple authorization statute for remote participation or a more detailed enabling provision.

The first method, supported by five of the ten members present at the final meeting, is to amend the law to allow remote participation simply upon the adoption of a remote participation policy by the public body seeking to engage in remote participation (see summary of November 17th meeting for Mr. Parr's suggested language). Under this approach, the various organizations that provide professional resources and support for local and regional public entities, such as the Maine Municipal Association, the Maine School Management Association and the Maine County Commissioners Association, would most likely be relied upon to develop model policies that meet the requirements of the FOAA.

The second approach, supported by the other five of the ten members present, is to enact a version of LD 258, which spells out the specific elements of remote participation that must be part of a policy adopted by a public body before it can allow remote participation. After receiving many comments from interested and affected parties, Advisory Committee members supporting this approach believe that the proposal contained in LD 258 would need adjustment to clarify both quorum requirements and the emergency exception to make the process useable for individual public bodies, depending on size, geographic location and responsibilities.

It should be noted that the Advisory Committee has not unanimously supported extending authorization for remote participation to all public bodies or in every circumstance. Commissioner Brown has consistently opposed allowing elected public bodies to use remote participation. Ms. Meyer has expressed concerns about allowing members who are not physically present to vote, even though they may participate in deliberations remotely. Notwithstanding these strong objections to particular elements of remote participation, the Advisory Committee unanimously recommends to the Judiciary Committee and the Legislature that legislation be enacted to clearly and definitively address the issue of remote participation.

See additional materials in Appendix J for a copy of LDs 258 and 1809, the Judiciary Committee's majority amendment to LD 1809 and Governor LePage's veto letter for LD 1809.

VII. FUTURE PLANS

In 2015, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

APPENDIX A

Authorizing Legislation: 1 MRSA §411

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and

M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

A. Except as provided in paragraph B, members are appointed for terms of 3 years.

B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to

contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the 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 regional 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 and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review 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; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the

matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

APPENDIX B

Membership List

Right to Know Advisory Committee
Membership List

Appointments by the Governor

Richard P. Flewelling
Maine Municipal Association
60 Community Drive
Augusta, ME 04330

Representing municipal interests

Christopher Parr
Department of Public Safety
104 State House Station
Augusta, ME 04333

Representing state government interests

Harry R. Pringle
Drummond, Woodsum & MacMahon
245 Commercial Street, P.O. Box 9781
Portland, ME 04104-9781

Representing school interests

Appointments by the President of the Senate

Senator Linda M. Valentino
P.O. Box 1049
Saco, ME 04072

Senate member of the Judiciary Committee

Perry B. Antone Sr.
Chief, Brewer Police Department
151 Parkway South
Brewer, ME 04412

Representing law enforcement interests

Percy L. Brown Jr.
County Commissioner, Hancock County
97 Sunset Road
Deer Isle, ME 04627

Representing county or regional interests

Frederick Hastings
Downeast Coastal
2413 Cutler Road
Cutler, ME 04626

Representing newspaper and other press interests

Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Representing broadcasting interests

Luke Rossignol
Bemis & Rossingol
1019 State Road
Mapleton, ME 04757

Representing the public

Right to Know Advisory Committee
Membership List

Appointments by the Speaker of the House

Representative Kimberly Monaghan
6 Russet Lane
Cape Elizabeth, ME 04107

House member of the Judiciary Committee

Suzanne Goucher
Maine Association of Broadcasters
69 Sewall Street, Suite 2
Augusta, ME 04330

Representing broadcasting interests

William P. Logan
Irwin, Tardy & Morris
6 S. Chestnut Street
Augusta, ME 04330

Representing the public

Judy Meyer
Lewiston Sun Journal
104 Park Street
Lewiston, ME 04243-4400

Representing newspaper publishers

Kelly Morgan
90 Loggin Road
Cape Neddick, ME 04072

Representing a statewide coalition of advocates of freedom of access

Attorney General's Designee

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333-0006

Designee of the Attorney General

Chief Justice of the Supreme Judicial Court's Designee

Mary Ann Lynch
Government and Media Counsel
Administrative Office of the Courts
Maine Judicial Branch
P.O. Box 4820
Portland, ME 04112-4820

Member of the Judicial Branch designated by the Chief Justice

APPENDIX C

Recommended Draft Legislation: Add an IT professional to the membership of the Right to Know Advisory Committee

Right to Know Advisory Committee
Draft: Add information technology expert to Advisory Committee membership

Sec. 1. 1 MRSA §411, sub-§2 is amended to read:

2. Membership. The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; ~~and~~

M. The Attorney General or the Attorney General's designee.; and

N. One member with broad experience and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including audio and web

conferencing; databases for records management and reporting; and information technology system, development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

SUMMARY

This draft adds one additional member to the Right to Know Advisory Committee, to be appointed by the Governor. The new position will bring information technology expertise to the Advisory Committee.

APPENDIX D

Recommended Draft Legislation: Align annual reporting date for Public Access Ombudsman with annual reporting date for Right to Know Advisory Committee

Right to Know Advisory Committee
Draft: Change reporting date for Public Access Ombudsman

Sec. 1. 5 MRSA §200-I, sub-§5 is amended to read:

5. Report. The ombudsman shall submit a report not later than ~~March~~ January 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

A. The total number of inquiries and complaints received;

B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;

C. The number of complaints received concerning respectively public records and public meetings;

D. The number of complaints received concerning respectively:

(1) State agencies;
(2) County agencies;
(3) Regional agencies;
(4) Municipal agencies;
(5) School administrative units; and
(6) Other public entities;

E. The number of inquiries and complaints that were resolved;

F. The total number of written advisory opinions issued and pending; and

G. Recommendations concerning ways to improve public access to public records and proceedings.

SUMMARY

Current law requires the Public Access Ombudsman to submit an annual report to the Right to Know Advisory Committee and the Legislature by March 15th of each year. This draft changes the reporting date to January 15th of each year, which is the same date by which the Right to Know Advisory Committee is required to submit its annual report.

APPENDIX E

Recommended Draft Legislation: Enact statutory changes to public records exceptions

Sec. 1. 22 MRSA c. 271, sub-c. 2 (§1696-A to §1696-F) is repealed.

Sec. 2. 26 MRSA §3 is repealed and the following enacted in its place:

§3. Confidentiality of records

1. Confidential records. Except as provided in subsections 2 and 3, all information and reports received by the director or the director's authorized agents under this Title are confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

2. Exceptions. Reports of final bureau action taken under the authority of this Title are public records for the purposes of Title 1, chapter 13, subchapter 1.

3. Authorized disclosure. The director shall make or authorize any disclosure of information of the following types or under the following circumstances with the understanding that the confidentiality of the information will be maintained:

A. Information and reports to other government agencies if the director believes that the information will serve to further the protection of the public or assist in the enforcement of local, state and federal laws; and

B. Information and records pertaining to the work force, employment patterns, wage rates, poverty and low-income patterns, economically distressed communities and regions and other similar information and data to the Department of Economic and Community Development and to the Governor's Office of Policy and Management for the purposes of analysis and evaluation, measuring and monitoring poverty and economic and social conditions throughout the State and to promote economic development.

Sec. 3. 26 MRSA §934 is amended to read:

§934. Conciliation; notification of dispute; proceedings in settlement; report

Whenever it appears to the employer or employees concerned in a labor dispute, or when a strike or lockout is threatened, or actually occurs, he or they may request the services of the board.

If, when the request or notification is received, it appears that a substantial number of employees in the department, section or division of the business of the employer are involved, the board shall endeavor, by conciliation, to obtain an amicable settlement. If the board is unable to obtain an amicable settlement it shall endeavor to persuade the employer and employees to submit the matter to arbitration.

The board shall, upon notification, as soon as practicable, visit the place where the controversy exists or arrange a meeting of the interested parties at a convenient place, and shall make careful inquiry into the cause of the dispute or controversy, and the board may, with the consent of the Governor, conduct the inquiry beyond the limits of the State.

The board shall hear all interested persons who come before it, advise the respective parties what ought to be done by either or both to adjust the controversy, and shall make a confidential written report to the Governor and the Executive Director of the Maine Labor Relations Board. The Governor or executive director ~~may~~ shall make the report public if, after 15 days from the date of its receipt, the parties have not resolved the controversy and the public interest would be served by publication. In addition, either the Governor or the executive director may refer the report and recommendations of the board to the Attorney General or other department for appropriate action when it appears that any of the laws of this State may have been violated.

Sec. 4. 29-A MRSA §152, sub-§3 is amended to read:

3. Central computer system. Notwithstanding any other provisions of law, purchase and maintain a central computer system for purposes of administering this Title and conducting departmental operations. All other uses must be approved by the Secretary of State. ~~The Secretary of State shall adopt rules regarding the maintenance and use of data processing information files required to be kept confidential and shall distinguish those files from files available to the public~~;

Sec. 5. 29-A MRSA §257 is repealed.

Sec. 6. 29-A MRSA §517, sub-§4 is amended to read:

4. Unmarked law enforcement vehicles. An unmarked motor vehicle used primarily for law enforcement purposes, when authorized by the Secretary of State and upon approval from the appropriate requesting authority, is exempt from displaying a special registration plate. Records for all unmarked vehicle registrations are confidential.

~~Upon receipt of a written request by an appropriate criminal justice official showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.~~

Sec. 7. 35-A MRSA §8703, sub-§5 is amended to read:

5. Confidentiality. ~~Relay service communications must be~~ The providers of telecommunications relay services must keep relay service communications confidential.

Sec. 8. 38 MRSA §414, sub-§6 is amended to read:

6. Confidentiality of records. Any records, reports or information obtained under this subchapter is available to the public, except that upon a showing satisfactory to the department by any person that any records, reports or information, or particular part of any record, report or information, other than the names and addresses of applicants, license applications, licenses and effluent data, to which the department has access under this subchapter would, if made public, divulge methods or processes that are entitled to protection as trade secrets as defined in Title 10, section 1542, subsection 4, these records, reports or information must be confidential and not available for public inspection or examination. Any records, reports or information may be disclosed to employees or authorized representatives of the State or the United States concerned with carrying out this subchapter or any applicable federal law, and to any party to a hearing held under this section on terms the commissioner may prescribe in order to protect these confidential records, reports and information, as long as this disclosure is material and relevant to any issue under consideration by the department.

Sec. 9. 38 MRSA §585-B, sub-§6 is amended to read:

6. Mercury reduction plans. An air emission source emitting mercury in excess of 10 pounds per year after January 1, 2007 must develop a mercury reduction plan. Except as provided in subsection 7, the mercury reduction plan must be submitted to the department no later than September 1, 2008. The mercury reduction plan must contain:

A. Identification, characterization and accounting of the mercury used or released at the emission source; and

B. Identification, analysis and evaluation of any appropriate technologies, procedures, processes, equipment or production changes that may be utilized by the emission source to reduce the amount of mercury used or released by that emission source, including a financial analysis of the costs and benefits of reducing the amount of mercury used or released.

~~The department may keep information submitted to the department under this subsection confidential as provided under section 1310-B.~~

The department shall submit a report to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than March 1, 2009 summarizing the mercury emissions and mercury reduction potential from those emission sources subject to this subsection. In addition, the department shall include an evaluation of the appropriateness of the 25-pound mercury standard established in subsection 5. The evaluation must address, but is not limited to, the technological feasibility, cost and schedule of achieving the standards established in subsection 5. The department shall submit an updated report to the committee by March 1, 2013. The joint standing committee of the Legislature having jurisdiction over natural resources matters is

authorized to report out to the 126th Legislature a bill relating to the evaluation and the updated report.

Sec. 10. 38 MRSA §585-C, sub-§2, ¶D is repealed.

Sec. 11. 38 MRSA §1310-B, sub-§2 is amended to read:

2. Hazardous waste information and information on mercury-added products and electronic devices and mercury reduction plans; chemicals. Information relating to hazardous waste submitted to the department under this subchapter, information relating to mercury-added products submitted to the department under chapter 16-B, information relating to electronic devices submitted to the department under section 1610, subsection 6-A, ~~information relating to mercury reduction plans submitted to the department under section 585-B, subsection 6,~~ information related to priority toxic chemicals submitted to the department under chapter 27 or information related to products that contain the "deca" mixture of polybrominated diphenyl ethers submitted to the department under section 1609 may be designated by the person submitting it as being only for the confidential use of the department, its agents and employees, the Department of Agriculture, Conservation and Forestry and the Department of Health and Human Services and their agents and employees, other agencies of State Government, as authorized by the Governor, employees of the United States Environmental Protection Agency and the Attorney General and, for waste information, employees of the municipality in which the waste is located. The designation must be clearly indicated on each page or other portion of information. The commissioner shall establish procedures to ensure that information so designated is segregated from public records of the department. The department's public records must include the indication that information so designated has been submitted to the department, giving the name of the person submitting the information and the general nature of the information. Upon a request for information, the scope of which includes information so designated, the commissioner shall notify the submittor. Within 15 days after receipt of the notice, the submittor shall demonstrate to the satisfaction of the department that the designated information should not be disclosed because the information is a trade secret or production, commercial or financial information, the disclosure of which would impair the competitive position of the submittor and would make available information not otherwise publicly available. Unless such a demonstration is made, the information must be disclosed and becomes a public record. The department may grant or deny disclosure for the whole or any part of the designated information requested and within 15 days shall give written notice of the decision to the submittor and the person requesting the designated information. A person aggrieved by a decision of the department may appeal only to the Superior Court in accordance with the provisions of section 346. All information provided by the department to the municipality under this subsection is confidential and not a public record under Title 1, chapter 13. In the event a request for such information is submitted to the municipality,

the municipality shall submit that request to the commissioner to be processed by the department as provided in this subsection.

SUMMARY

This draft implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Title 22 and Titles 26 to 39-A. The legislation does the following.

Section 1 repeals the Community Right to Know Act, a program within the Department of Health and Human Services intended to provide disclosure of information about hazardous substances in the community that has never been implemented.

Section 2 makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

Section 3 relates to reports of the State Board of Arbitration and Conciliation in a labor dispute. The amendment makes clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

Section 4 repeals language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

Section 5 repeals a provision relating to the Secretary of State's motor vehicle information technology system because the confidentiality of the system is already addressed in another provision of law.

Section 6 removes language that is redundant with another section of law.

Section 7 clarifies that it is the responsibility of the providers of telecommunications relay services to keep relay services communications confidential.

Section 8 adds a cross-reference to the definition of "trade secret".

Section 9 repeals language making mercury reduction plans for air emission source emitting mercury confidential.

Section 10 repeals language making hazardous air pollutant emissions inventory reports confidential.

Section 11 removes language cross-referencing language repealed by Section 9 of this draft relating to the confidentiality of mercury reduction plans for air emission sources emitting mercury.

APPENDIX F

Recommended Draft Legislation: Establish a process for continuing the review of public records exceptions

Right to Know Advisory Committee
Draft: New schedule for review of existing public records exceptions

Sec. 1. 1 MRSA §433, sub-§2 is repealed and the following enacted in its place:

2-A. Scheduling guidelines. The advisory committee shall use the following list as a guideline for scheduling reviews of public records exceptions and reporting its recommendations to the review committee:

A. Exceptions enacted after 2004 and before 2013 are scheduled to be reviewed by the review committee no later than 2017.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2019:

(1) Title 1;
(2) Title 2;
(3) Title 3;
(4) Title 4;
(5) Title 5;
(6) Title 6;
(7) Title 7; and
(8) Title 7-A.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2021:

(1) Title 8;
(2) Title 9-A;
(3) Title 9-B;
(4) Title 10;
(5) Title 11; and
(6) Title 12.

C. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2023:

(1) Title 13;
(2) Title 13-B;
(3) Title 13-C;
(4) Title 14;
(5) Title 15;
(6) Title 16;
(7) Title 17;
(8) Title 17-A;
(9) Title 18-A;
(10) Title 18-B;
(11) Title 19-A;
(12) Title 20-A; and
(13) Title 21-A.

D. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2025:

(1) Title 22;
(2) Title 22-A;
(3) Title 23;
(4) Title 24; and
(5) Title 24-A.

E. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2027:

(1) Title 25;
(2) Title 26;
(3) Title 27;
(4) Title 28-A;
(5) Title 29-A;
(6) Title 30;
(7) Title 30-A;
(8) Title 31; and
(9) Title 32.

F. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2029:

(1) Title 33;
(2) Title 34-A;
(3) Title 34-B;
(4) Title 35-A;
(5) Title 36;
(6) Title 37-B;
(7) Title 38; and
(8) Title 39-A.

Sec. 2. 1 MRSA §433, sub-§3 is amended to read:

3. Scheduling changes. The advisory committee may make adjustments to the scheduling guidelines provided in subsection ~~2~~ 2-A as it determines appropriate and shall notify the review committee of such adjustments.

SUMMARY

This draft repeals the public records exceptions review schedule that was completed in 2014 and replaces it with a new review schedule. The advisory committee will review public records exceptions enacted after 2004 but before 2013 and report its recommendations to the review committee over the course of 2 years, with the final review by the review committee completed no later than 2017. The advisory committee

will then begin to review all the public records exceptions codified in the statutes over a 12-year period. The review committee will conduct its review of the advisory committee's recommendations in 2019, 2021, 2023, 2025, 2027 and 2029. The "advisory committee" is the Right to Know Advisory Committee and the "review committee" is the joint standing committee of the Legislature having jurisdiction over judiciary matters.

APPENDIX G

Recommended Draft Legislation: Enact statutory changes concerning deadlines and appeals

Right to Know Advisory Committee
Draft: Deadlines and appeals

Sec. 1. 1 MRSA §408-A, sub-§4 is amended to read:

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial or the expectation that the request will be denied in full or in part following a review, within 5 working days of the receipt of the request for inspection or copying. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

Sec. 2. 1 MRSA §409, sub-§1 is amended to read:

1. Records. Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to ~~any~~ the Superior Court ~~within the State~~ for the county where the person resides or the agency has its principal office ~~a trial de novo~~. The agency or official shall file ~~an answer~~ a statement of position explaining the basis for denial within 14 calendar days of service of the appeal. If a court, after a ~~trial~~ de novo review, with taking of testimony and other evidence as determined necessary, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

Sec. 3. 1 MRSA §413, sub-§1 is amended to read:

1. Designation; responsibility. Each agency, county, municipality, school administrative unit and regional or other political subdivision shall designate an existing employee as its public access officer to serve as the contact person for that agency, county, municipality, school administrative unit and regional or other political subdivision with regard to requests for public records under this subchapter. The public access officer is responsible for ensuring that each public record request is acknowledged within ~~a reasonable period of time~~ 5 working days of receiving the request and that a good faith estimate of when the response to the request will be complete is provided according to section 408-A. The public access officer shall serve as a resource within the agency, county, municipality, school administrative unit and regional or other political subdivision concerning freedom of access questions and compliance.

SUMMARY

This draft amends the Freedom of Access Act to make clear that an agency's or official's written notice of denial in response to a request to copy or inspect records may be a statement that the agency or official expects to deny the request in full or in part, but that decision can be made only after reviewing the records subject to the request. The

agency or official shall provide the written response within 5 days of the receipt of the request.

This draft clarifies the procedures for an appeal from a denial of a request to inspect or copy public records. Current law allows the appeal to be filed in any Superior Court; this draft requires the appeal to be filed in the Superior Court for the county in which either the requestor lives or in which the agency has its principal office. Instead of filing an answer to the complaint, the agency or official may file a more informal statement of position explaining the basis for denial with 14 days of the service of the appeal. This draft eliminates the need for a de novo trial, and instead requires the Superior Court to conduct a review de novo, taking whatever testimony or other evidence the Court determines necessary. The basis for the decision – whether the refusal, denial or failure was not for just and proper cause – is not changed from current law.

This draft also amends the laws governing public access officers by specifically requiring that a request for public records be acknowledged within 5 working days of the receipt of the request. This is consistent with the current acknowledgement deadline in the Maine Revised Statutes, Title 1, section 408-A, subsection 3.

APPENDIX H

Recommended Draft Legislation: Clarify the date of receipt of a request for public records

Right to Know Advisory Committee
Draft: Clarify the date of receipt of a request for public records

Sec. 1. 1 MRSA §408-A, sub-§3 is amended to read:

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is not maintained by the office shall forward the request to the office of the agency or official that maintains the record, without willful delay.

SUMMARY

This draft amends the Freedom of Access Act to clarify that the date of receipt of a request to copy or inspect a public record is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is not maintained by that office must forward the request to the appropriate office without willful delay.

APPENDIX I

Recommended Draft Legislation: Provide mechanism for government relief from unduly burdensome or oppressive public records requests

Right to Know Advisory Committee
Draft: Government relief from unduly burdensome or oppressive public records requests

Sec. 1. 1 MRSA §408-A, sub-§4 is amended to read:

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. A request for inspection or copying may be denied, in whole or in part, on the basis that the request is unduly burdensome or oppressive provided that the procedures established in subsection 4-A are followed. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

Sec. 2. 1 MRSA §408-A, sub-§4-A is enacted to read:

4-A. Action for protection. An agency or official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 30 days of receipt of the request.

A. The following information must be included in the complaint if available or provided to the parties and filed with the court no more than 14 days from the filing of the complaint or such other period as the court may order:

(1) The terms of the request and any modifications agreed to by the requesting party;

(2) A statement of the facts that demonstrate the burdensome or oppressive nature of the request, with a good faith estimate of the time required to search for, retrieve, redact if necessary and compile the records responsive to the request and the resulting costs calculated in accordance with subsection 8; and

(3) A description of the efforts made by the agency or official to inform the requesting party of the good faith estimate of costs and to discuss possible modifications of the request that would reduce the burden of production.

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated herewith.

C. An action for protection may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require upon the request of any party.

D. If the court finds that the agency or official has demonstrated good cause to limit or deny the request, it shall enter an order making such findings and establishing the terms upon which production, if any, shall be made. If the court finds that the agency or

official has not demonstrated good cause to limit or deny the request, it shall establish a date by which the records must be provided to the requesting party.

SUMMARY

This draft amends the Freedom of Access Act to authorize an agency or official to deny a request for inspection or copying of public records, in whole or in part, on the basis that the request is unduly burdensome or oppressive. The draft requires that that agency or official seek protection from an unduly burdensome or oppressive request by filing an action in Superior Court within 30 days of receipt of the request. This draft adopts a good cause standard to be utilized by the court in determining whether the request may be limited or denied as unduly burdensome or oppressive.

APPENDIX J

Additional Materials: Veto letters for LDs 1809 and 1821; Copies of LDs 258 and 1809; Judiciary Committee Amendment to LD 1809 (Majority Report)

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

22 April 2014

The 126th Legislature of the State of Maine
State House
Augusta, ME

Dear Honorable Members of the 126th Legislature:

Under the authority vested in me by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing LD 1809, "An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi-municipal Corporations and Districts That Provide Water, Sewer and Sanitary Services."

This legislation purports to allow certain quasi-municipal entities to use audio and video technology to conduct meetings. Unfortunately, this legislation is unnecessary and may actually have the impact of reducing the use of technology by governmental entities.

I support increased use of technology to conduct government business. In a rural state like Maine, technology has the potential to create significant efficiencies in the way we govern. It reduces costs and allows entities to recruit better qualified (but often busier) individuals who want to serve, but travel, work and the demands of life may limit the number of meetings these individuals may attend in person. In Maine's island communities, the use of video and teleconferencing to conduct business is not just a convenience, but an absolute necessity.

Many public entities use modern means to conduct a portion of their business. Entities doing this must meet the requirements of Maine statute governing public proceedings. Meetings must be noticed, conducted in public, and records must be kept. A meeting is legal based on whether or not these requirements are met, not on the use of technology.

It is currently legal to conduct a remote meeting as long as it complies with the other requirements of law. Island communities and others do so regularly. This law would call that practice into question. By specifically prescribing and authorizing the use of technology for this very limited sub-set of entities, it implies that other entities can no longer do so. At best, this ambiguous situation creates uncertainty and could have the effect of discouraging the use of common-sense means to conduct government business.

For these reasons, I return LD 1809 unsigned and vetoed. I strongly urge the Legislature to sustain it.

Sincerely,

Paul R. LePage
Governor

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

22 April 2014

The 126th Legislature of the State of Maine
State House
Augusta, ME

Dear Honorable Members of the 126th Legislature:

Under the authority vested in me by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing LD 1821, "An Act To Implement Recommendations of the Right To Know Advisory Committee."

I am committed to a transparent government that allows the citizens of Maine to easily access information pertinent to their lives. Indeed, my Administration has taken significant steps to increase the average citizen's access to information. We launched a new financial transparency website to provide Maine citizens with access to basic, easy-to-understand information regarding state finances and government spending. We have responded to thousands of Freedom to Access Act (FOAA) requests, producing millions of documents. I pushed state government to be more customer friendly – ensuring that everyday requests for information from citizens are responded to daily without the formality of a FOAA request.

This bill would make minor changes to the FOAA recommended by the Right to Know Advisory Committee. The purpose of the Advisory Committee is to "serve as a resource for ensuring compliance ... and upholding the integrity of the purposes underlying [this law] as it applies to all public entities in the conduct of the public's business." Unfortunately, these recommendations just nibble around the edges of the law without addressing real flaws in it. The recommendations do not address the use of FOAA by special interest groups to harass the Executive Branch. They do not address practical concerns that make compliance virtually impossible for many Executive Branch agencies. They do not address real inequities in the application of the law to different branches of government as contained in the Advisory Committee's mandate to advise on applying the law to "all" public entities.

The FOAA law, meant to allow access to government, is instead being used as a weapon to hinder effective and efficient state government. My office has received many overly broad requests from special interests groups. They request years of all communications between my office and certain commissioners, my personal grocery bills and other fishing expeditions that are not about a transparent government. Instead, they are about trying to cripple the operations of my office with thousands of hours of staff time and creating a distraction from conducting the people's business.

The Maine State Police testified that they cannot comply with portions of the law dealing with timing of when a document is received for purposes of the law. If the top law enforcement agency in the State cannot comply with the law, that is a serious problem that must be addressed. Yet the Advisory Committee and the Judiciary Committee both declined to make a reasonable fix to the law.

Most troubling, the FOAA law is inequitable. The Legislature has given itself a "working papers" exception, yet refuses to extend the same courtesy to the Executive Branch. We should either give the Executive Branch a similar exception or strip the Legislature of theirs. Either way, this inequity should not stand. Until it is righted, the Legislature cannot claim its own operations are transparent.

Until these major problems with the law are fixed, I cannot support this legislation. For these reasons, I return LD 1821 unsigned and vetoed. I strongly urge the Legislature to sustain it.

Sincerely,

Paul R. LePage

Paul R. LePage
Governor

126th MAINE LEGISLATURE

FIRST REGULAR SESSION-2013

Legislative Document **No. 258**

H.P. 195 House of Representatives, February 5, 2013

An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies

Reported by Representative PRIEST of Brunswick for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Millicent M. MacFarland

MILLICENT M. MacFARLAND
Clerk

Printed on recycled paper

Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 1 MRSA §403-A is enacted to read:

§403-A. Public proceedings through other means of communication

This section governs public proceedings, including executive sessions, during which public or governmental business is discussed or transacted through telephonic, video, electronic or other similar means of communication.

1. Requirements. A body subject to this subchapter may conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or governmental business through telephonic, video, electronic or other similar means of communication only if the following requirements are met:

A. The body has adopted a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other similar means of communication in accordance with this section. The policy may establish circumstances under which a member may participate when not physically present;

B. Notice of the public proceeding has been given in accordance with section 406;

C. Except as provided in subsection 3, a quorum of the body is assembled physically at the location identified in the notice required by section 406;

D. Each member of the body participating in the public proceeding is able to hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations;

E. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication identifies the persons present at the location from which the member is participating;

F. All votes taken during the public proceeding are taken by roll call vote; and

G. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.

2. Voting; judicial or quasi-judicial proceeding. A member of a body who is not physically present and who is participating in a judicial or quasi-judicial public proceeding through telephonic, video, electronic or other similar means of

communication may not vote on any issue concerning testimony or other evidence provided during the judicial or quasi-judicial public proceeding.

3. Exception to quorum requirement. A body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum under subsection 1, paragraph C if:

A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742;

B. The public proceeding is necessary to take action to address the emergency; and

C. The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency.

4. Annual meeting. If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other similar means of communication from a different location.

PART B

Sec. B-1. 10 MRSA §384, sub-§5 is enacted to read:

5. Meetings. The board shall have a physical location for each meeting. Notwithstanding Title 1, section 403-A, board members may participate in meetings by teleconference. Board members participating in the meeting by teleconference are not entitled to vote and are not considered present for the purposes of determining a quorum, except in cases in which the chair of the board determines that the counting of members participating by teleconference and the allowance of votes by those members is necessary to avoid undue hardship to an applicant for an investment.

Sec. B-2. 32 MRSA §88, sub-§1, ¶D, as amended by PL 2007, c. 274, §19, is further amended to read:

D. A majority of the members appointed and currently serving constitutes a quorum for all purposes and no decision of the board may be made without a quorum present. A majority vote of those present and voting is required for board action, except that for purposes of either granting a waiver of any of its rules or deciding to pursue the suspension or revocation of a license, the board may take action only if the proposed waiver, suspension or revocation receives a favorable vote from at least 2/3 of the members present and voting and from no less than a majority of the appointed and currently serving members. ~~The~~ Notwithstanding Title 1, section 403-A, the board may use video conferencing and other technologies to conduct its business ~~but is not exempt from Title 1, chapter 13, subchapter 1~~. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.

Sec. B-3. 39-A MRSA §151, sub-§5, as amended by PL 2003, c. 608, §9, is further amended to read:

5. Voting requirements; meetings. The board may take action only by majority vote of its membership. ~~The~~ Notwithstanding Title 1, section 403-A, the board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology. Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

SUMMARY

This bill implements the majority recommendation of the Right To Know Advisory Committee.

Part A authorizes the use of remote-access technology to conduct public proceedings. Subject to the following requirements, it authorizes a body to conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or government business through telephonic, video, electronic or other similar means of communication.

1. The body must adopt a policy that authorizes such participation and establishes the circumstances under which a member may participate when not physically present.

2. Notice of any proceeding must be provided in accordance with the Freedom of Access Act.

3. A quorum of the body must be physically present, except that under certain emergency circumstances, a body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum assembled physically at one location.

4. Members of the body must be able to hear and speak to each other during the proceeding.

5. A member who is participating remotely must identify the persons present in the location from which the member is participating.

6. All votes taken during the public proceeding must be taken by roll call vote.

7. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication must have received, prior to the proceeding, any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented.

8. A member of a body who is not physically present may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.

9. If a body conducts one or more public proceedings using remote-access technology, the body must also hold at least one public proceeding annually during which all members of the body in attendance are physically assembled at one location.

Under current law, the following state agencies are authorized to use remote-access technology to conduct meetings: the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Emergency Medical Services' Board and the Workers' Compensation Board. Part B provides a specific exemption from the new requirements for the Small Enterprise Growth Board, the Emergency Medical Services' Board and the Workers' Compensation Board.

126th MAINE LEGISLATURE

SECOND REGULAR SESSION-2014

Legislative Document **No. 1809**

H.P. 1300 House of Representatives, March 11, 2014

An Act Concerning Meetings of Public Bodies Using Communications Technology

Reported by Representative PRIEST of Brunswick for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Millicent M. MacFarland

MILLICENT M. MacFARLAND
Clerk

Printed on recycled paper

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §403-A is enacted to read:

§403-A. Public proceedings through communications technology

1. Elected membership; prohibition. A public body composed of elected members of a municipality, quasi-municipal entity or school administrative unit may not conduct a public proceeding in which a member participates in the discussion or transaction of public or governmental business when that member is not physically present at the location of the public proceeding.

2. Authorized participation. A public body, except a public body composed of elected members, of a municipality, quasi-municipal entity or school administrative unit may conduct a public proceeding during which one or more members of the body participate in the discussion or transaction of public or governmental business through telephonic, video, electronic or other similar means of communication only if all of the following requirements are met:

A. The body has adopted a written policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other similar means of communication in accordance with this section. The policy must establish criteria that must be met before a member may participate when not physically present. If the policy allows a member who is not physically present to participate in an executive session, the policy must specifically address the circumstances under which the executive session may be conducted to ensure privacy;

B. Notice of the public proceeding has been given in accordance with section 406;

C. Except as provided in subsection 4, a quorum of the body is assembled physically at the location identified in the notice required by section 406;

D. Each member of the body participating in the public proceeding is able to hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations. If documents or materials that include pictures, graphs, illustrations or other information presented in a visual format are part of the discussion, either the communications technology used must ensure that all members can see the documents and materials while the documents and materials are being discussed or the documents and materials must be provided to all members not physically present before or during the proceeding;

E. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication identifies the persons present at the location from which the member is participating;

F. All votes taken during the public proceeding are taken by roll call vote; and

G. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.

3. Voting; judicial or quasi-judicial proceeding. A member of a body who is not physically present and who is participating in a judicial or quasi-judicial public proceeding through telephonic, video, electronic or other similar means of communication may not vote on any issue concerning testimony or other evidence provided during the judicial or quasi-judicial public proceeding.

4. Exception to quorum requirement. A body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum under subsection 2, paragraph C if:

A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742 and:

(1) The public proceeding is necessary to take action to address the emergency; and

(2) The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency; or

B. The body is expressly authorized by its governing statute to convene a public proceeding by telephonic, video, electronic or other similar means of communication with less than a quorum of the body assembled physically at the location identified in the notice required by section 406.

5. Annual meeting. If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other similar means of communication from a different location.

SUMMARY

This bill prohibits the use of telephonic, video, electronic or other similar means of communication to conduct public proceedings of elected public bodies of municipalities, quasi-municipal entities and school administrative units. It allows nonelected public bodies of municipalities, quasi-municipalities and school administrative units to do so only if specific requirements are met. Subject to the listed requirements, a body may conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or governmental business through telephonic, video, electronic or other similar means of communication.

1. The body must adopt a policy that authorizes such participation and establishes the criteria that must be met under which a member may participate when not physically present. If the policy authorizes such participation in an executive session, the policy must spell out the circumstances for conducting the executive session that will ensure the required privacy.

2. Notice of any proceeding must be provided in accordance with the Freedom of Access Act.

3. A quorum of the body must be physically present, except that under certain circumstances a body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum assembled physically at one location. One such circumstance is if the body's governing statute authorizes a meeting using the remote-access technology with less than a quorum physically present in the location listed in the meeting notice.

4. Members of the body must be able to hear and speak to each other during the proceeding. If discussions are based on documents or materials that are in visual format, the technology used must also allow all members to see the materials unless the documents and materials are provided before or during the proceedings to all members not physically present.

5. A member who is participating remotely must identify the persons present in the location from which the member is participating.

6. All votes taken during the public proceeding must be taken by roll call vote.

7. Each member who is not physically present and who is participating through telephonic, video, electronic or other similar means of communication must have received, prior to the proceeding, any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented.

8. A member of a body who is not physically present may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.

9. If a body conducts one or more public proceedings using the remote-access technology, the body must also hold at least one public proceeding annually during which all members of the body in attendance are physically assembled at one location.

SMV ROBS

L.D. 1809

Date: 4/3/14 Majority (Filing No. H-798)

JUDICIARY

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE

HOUSE OF REPRESENTATIVES

126TH LEGISLATURE

SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1300, L.D. 1809, Bill, "An Act Concerning Meetings of Public Bodies Using Communications Technology"

Amend the bill by striking out the title and substituting the following:

'An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi-municipal Corporations and Districts That Provide Water, Sewer and Sanitary Services'

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'**Sec. 1. 1 MRSA §403-A** is enacted to read:

§403-A. Public proceedings using communications technology by governing bodies of quasi-municipal corporations and districts

1. Application. This section applies to public proceedings conducted by a governing body, including a board of trustees, of a quasi-municipal corporation or district, as defined in Title 30-A, section 2351, subsection 4, that provides water, sewer or sanitary services.

2. Authorized participation. A governing body may conduct a public proceeding during which one or more members of the governing body participate in the discussion or transaction of public or governmental business when not physically present only if all of the following requirements are met:

A. The governing body has adopted a written policy that authorizes a member of the governing body who is not physically present to participate in a public proceeding through combined audio and video means of communication in accordance with this section. The policy must establish criteria that must be met before a member may participate when not physically present. The policy may not allow a member who is not physically present to participate in an executive session;

B. Notice of the public proceeding has been given in accordance with section 406;

COMMITTEE AMENDMENT

C. Except as provided in subsection 4, a quorum of the governing body is assembled physically at the location identified in the notice required by section 406;

D. Each member of the governing body participating in the public proceeding is able to see and hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to see and hear all members participating from other locations. If documents or materials that include pictures, graphs, illustrations or other information presented in a visual format are part of the discussion, either the communications technology used must ensure that all members can see the documents and materials while the documents and materials are being discussed or the documents and materials must be provided to all members not physically present before or during the proceeding;

E. Each member who is not physically present and who is participating through combined audio and video means of communication identifies the persons present at the location from which the member is participating;

F. All votes taken during the public proceeding are taken by roll call vote; and

G. Each member who is not physically present and who is participating through combined audio and video means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a governing body in a public proceeding.

3. Voting; quasi-judicial proceeding. A member of a governing body who is not physically present and who is participating through combined audio and video means of communication may vote in all proceedings other than quasi-judicial proceedings. A member of a governing body who is not physically present may participate in a quasi-judicial proceeding through combined audio and video means of communication, but may not vote on any issue concerning testimony or other evidence provided during the quasi-judicial proceeding. For the purposes of this subsection, "quasi-judicial proceeding" means a proceeding in which the governing body is obligated to objectively determine facts and draw conclusions from the facts so as to provide the basis of an official action when that action may affect the legal rights, duties or privileges of specific persons.

4. Exception to quorum requirement. A governing body may convene a public proceeding by combined audio and video means of communication without a quorum under subsection 2, paragraph C if:

A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742 and:

(1) The public proceeding is necessary to take action to address the emergency; and

(2) The governing body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency; or

B. The governing body is expressly authorized by its governing statute to convene a public proceeding by combined audio and video means of communication with less than a quorum of the body assembled physically at the location identified in the notice required by section 406.

5. Annual meeting. If a governing body conducts one or more public proceedings pursuant to this section, it also shall hold at least one public proceeding annually during which members of the governing body in attendance are physically assembled at one location and at which no members of the governing body participate by combined audio and video means of communication from a different location.'

SUMMARY

This amendment is the majority report of the Joint Standing Committee on Judiciary.

This amendment limits the application of the bill to the governing bodies of quasi-municipal corporations and districts, as defined in the Maine Revised Statutes, Title 30-A, section 2351, subsection 4, that provide water, sewer or sanitary services if the governing bodies adopt policies that meet specified requirements.

This amendment limits the type of communication technology that may be used to participate remotely to combined audio and video means of communication that permit all the members of the governing body and the public that are in attendance to see and hear all the members that are participating.

This amendment prohibits a member who is not physically present from participating in an executive session.

This amendment clarifies that a member who is not physically present may participate and vote remotely, but a member who is not physically present may not vote in a quasi-judicial proceeding on any issue concerning testimony or other evidence provided during the quasi-judicial public proceeding. The amendment defines "quasi-judicial proceeding."