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Right to Know Advisory Committee  
July 30, 2008  
(Draft) Meeting Summary

Convened 12:10 p.m., Room 438, State House, Augusta

Present:

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

| Absent:

Sheriff Mark Dion  
Ted Glessner  
Maureen O'Brien

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

Sen. Barry Hobbins convened the Advisory Committee. Sen. Hobbins welcomed Eric Conrad, a new member of the Advisory Committee appointed to represent newspaper publishers. Sen. Hobbins outlined the agenda for the meeting and staff described the written materials provided as handouts.

**Legislative Subcommittee Report**

Chris Spruce, chair of the Legislative Subcommittee, reported on the subcommittee's activities.

Review of Public Records Exceptions. Mr. Spruce explained that the subcommittee is moving forward with its review of public records exceptions, which would begin immediately following adjournment of the advisory committee meeting. The subcommittee will use the same process as last year although Mr. Spruce noted that this year the process will be a year ahead of schedule.

Teacher Confidentiality Provisions. Mr. Spruce gave an update on the subcommittee's review of the teacher confidentiality provisions in Title 20-A. He explained that the Department of Education's policy regarding certification of teachers and other education personnel had been changed during the course of the subcommittee's initial inquiries. Copies of the written correspondence received from the Department of Education---the explanation of the written policy and the subsequent modification---were distributed to the Advisory Committee. Mr. Spruce indicated that the subcommittee may be interested in clarifying these issues for consistency, possibly by writing into statute the written policy developed by the Department of Education, but that discussions will continue at future meetings.

Title 23, section 63 Related to Certain Records of the Maine Turnpike Authority and Department of Transportation. Mr. Spruce reported that the subcommittee has had significant discussions with Rep. Dawn Hill, the Maine Turnpike Authority and the Department of Transportation about the provision. Since it appears MTA and DOT approach the provision differently, Mr. Spruce explained that the subcommittee has written to the Transportation Committee to ask for their input. The subcommittee will wait for a response from the Transportation Committee before moving forward.

Chris Parr's Proposals. Mr. Spruce reported on the subcommittee's review and recommendations on the proposals submitted by Chris Parr, Attorney for the Maine State Police, to amend the Freedom of Access laws. After some time, the subcommittee has finally worked through the proposal. Mr. Spruce expressed his appreciation and thanks to Mr. Parr for making a thoughtful and well-intentioned proposal. Mr. Spruce noted that most of the changes approved by the subcommittee are not substantive; he explained that the subcommittee did not want to make substantive changes to provisions that were wrestled with by the Advisory Committee and prior study committees and that they expected that those and other issues would have to be revisited in the future. Mr. Spruce distributed a draft of the recommended changes approved by the subcommittee and asked that the Advisory Committee review the draft and make suggestions or comments.

Robert Devlin asked whether the provision in Title 1, section 405, subsection 6, paragraph E requires that an attorney be physically present at the executive session or if executive session was permissible for the purpose of relaying legal advice or providing an update on litigation. Harry Pringle noted that one could interpret the law as implying that physical presence is required, but that his opinion was that one can relay the advice of legal counsel in executive session without the attorney being present.

Harry Pringle inquired about the draft suggestion from staff [not reviewed by the subcommittee] to make changes to the estimate provision in 1 MRSA § 408, sub-§ 4. Mr. Pringle expressed a concern about unintended consequences when changes are made to the Freedom of Access laws. Mr. Spruce stated his belief that the subcommittee recommended that the language should be left unchanged despite its "inelegant clarity." Mr. Pringle agreed that no change should be made.

Richard Flewelling asked about the reference in the draft to the issue of "copy medium" and its origin. Mr. Spruce replied that, although Mr. Parr had proposed specific changes related to requirements to provide copies of records in the medium requested and to the fees that may be charged by agencies and the subcommittee declined to adopt those suggestions since the law was recently amended in this area, the issue of fees and copy medium will be an ongoing one.

#### **Discussion of additional FOA issues**

Robert Devlin brought two issues to the Advisory Committee's attention: 1) the use of FOA to gain competitive commercial advantage; and 2) inmate requests for records related to correctional facility security plans and other records.

Mr. Devlin distributed a copy of a memo from a commercial postage company in France seeking copies of Kennebec County's contracts with Pitney Bowes for mail machines and other postal equipment. Although the information requested is a public record, Mr. Devlin raised concerns about the use of FOA to mine information about a business competitor for commercial gain. Mr. Pringle noted that the FOA laws make no distinction between commercial access and private citizen access to public records and said he would be reluctant to make any such distinction in the

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law. Judy Meyer agreed and expressed concern about the impact on public officials if they were required to determine the motivation behind a request for public records. Rep. Simpson remarked that the underlying purpose of FOA is to provide access to public records to the people, not commercial interests, and that individual rights may become more affected due to these practices. Suzanne Goucher mentioned discussion on the national Freedom of Access Coalition website related to a court decision that a State's FOA law does not require that someone be a resident to have access to public records. Ms. Goucher noted that there would be no harm to the taxpayers if FOA were used by bidders trying to gain government contracts. Sen. Hobbins suggested that the discussion of the issue be deferred to the next meeting.

Mr. Devlin also talked about requests received by Kennebec County from inmates seeking access to security plans and noted that the law appears to make no exception for public disclosure of this information. Mr. Devlin asked whether this should be permitted and suggested that the Advisory Committee may want to consider the issue. Rep. Simpson agreed that this is an issue the Advisory Committee should look at. Shenna Bellows said that she would like to consult with attorneys who work with the Maine Civil Liberties Union, but cautioned that access to prison policies and procedures for inmates and their attorneys is important to determine if the constitutional rights on inmates are being respected. Ms. Bellows spoke of the need to balance the security interest and the constitutional interests involved and suggested that the Legislative Subcommittee may want to consider the issue. Mr. Spruce felt that the subcommittee should not make independent decisions about the issues under review and said that the full Advisory Committee should consider requests such as these in writing before making any decision or referral to the subcommittee. Harry Pringle remarked that this issue, unlike the first issue raised by Mr. Devlin, may be worth consideration. Mr. Devlin agreed, especially given the recent hostage situation at the Maine State Prison. Linda Pistner asked whether Mr. Devlin had consulted with county attorneys and suggested that course of action. Sen. Hobbins echoed her suggestion and asked Mr. Devlin to make that contact before the next meeting. The Advisory Committee will continue the discussion of inmate access to security plans at the next meeting.

### **Training on Freedom of Access laws**

The Advisory Committee discussed the training law for elected officials that became effective July 1, 2008 and the public awareness of the law to date. Staff noted several calls and inquiries related to the law and Advisory Committee members reported on training sessions and other activities to educate elected officials about the law. The Advisory Committee also discussed activities to make legislative candidates aware of the new law. Staff will work with the Speaker of the House and President of the Senate to obtain contact information for candidates to make them aware of the law's requirements should those candidates win their elections. The Advisory Committee talked about training for elected Legislators and decided to request permission from the presiding officers to provide training as part of orientation for members of the 124<sup>th</sup> Legislature. Sen. Hobbins and Rep. Simpson suggested that the training coincide with mandatory ethics training provided for Legislators. Rep. Simpson and Suzanne Goucher also suggested that training be provided to committee chairs about the review process for proposed public records exceptions by the Judiciary Committee. Staff will contact the presiding officers and Executive Director of the Legislative Council to request time to be set aside for FOA training and report back at the September 10<sup>th</sup> meeting.

### **Moore v. Abbott Decision**

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The Advisory Committee discussed the recent Law Court decision; it was suggested as an agenda item by Mal Leary although he was not present at the beginning of the discussion. Staff distributed an outline of the 4-part test used by the Law Court to determine if a person is an “agency or public official” for purposes of FOA. Harry Pringle expressed his discomfort with being asked to overturn a Law Court decision; he felt the factors were reasonable as was the decision of the Law Court and should be respected. Mr. Pringle noted the case didn’t deal with access to public proceedings, but wondered about the unintended consequences of making changes. Mr. Pringle also reminded everyone that some of the litigants in the case were affiliated with members of the committee. Shenna Bellows asked what the Advisory Committee was being asked to do. Chris Spruce mentioned he thought that Mal Leary was interested in codifying the 4-part test to define an “agency or public official” in some way, but wasn’t sure what codifying the Court’s factors would accomplish. Richard Flewelling agreed with both Mr. Pringle and Mr. Spruce and said that he didn’t think writing the factors into the law would be beneficial. Linda Pistner explained that however one wanted the decision to turn out; the majority and minority used the same test but disagreed on its application. Ms. Bellows agreed and said she would need more convincing to change the law. Judy Meyer expressed concerns that the decision seems to allow public officials to parse out investigations to the private sector to avoid public access. Eric Conrad, who disclosed that he was a board member of the Maine Press Association which took a position on the “Detainee side” in the case, echoed Ms. Meyer’s remarks and said that he saw similarities at the federal law with the actions of the Attorney General here.

Rep. Simpson asked whether records would have been public if the Attorney General had done an internal investigation. Ms. Pistner replied that state agencies conduct internal reviews in different ways depending on whether a written report will be produced. Ms. Pistner noted that in most criminal cases certain investigative records are not public, but that the Legislature specifically made the Dechaine case file public. Sen. Hobbins said he was uncomfortable getting involved now given the public attention to this case. Ms. Bellows made it clear that she was disappointed with the result of the decision. Sen. Hobbins stated that the issue would be put on the agenda for next time to allow Mal Leary time to talk with the Advisory Committee.

[Mal Leary joined the meeting]. The Advisory Committee returned to discussion of the Abbott decision. Mal Leary explained that his concern was not with the underlying case but with the potential effect on the activities of public officials who may use the activities of advisory groups to maintain confidentiality and avoid public access. Mr. Leary stated that the law should be clarified so that advisory groups created by public officials are subject to the FOA law in the same manner as advisory groups created by the Governor. Mr. Leary argued that the process should be as open and as public as possible. Mr. Pringle stated the effect of Mr. Leary’s suggestion would be to overturn the Law Court and that he would not support that. Rep. Simpson said she believed the law should apply if quasi-government entities are created and that the Advisory Committee wouldn’t be overturning the decision in this case. Mr. Leary said that the Advisory Committee’s role is to help establish policy and that the policy should be that records of advisory groups, whoever creates them, are public unless one of the current exceptions applies. Ms. Pistner said that she saw this as circular since the 4-part test used by the Law Court would be used to determine whether an advisory group meets the definition. Ms. Bellows agreed that there appeared to be an absence in the law for advisory groups created by public officials other than the Governor or Legislature. Ms. Goucher suggested that staff provide a draft with proposed changes in the law as suggested by Mr. Leary. Mr. Pringle again reminded everyone that a change in the statute will change the test and, in effect, overturn the Law Court’s decision. Staff will provide a discussion draft for the September 10<sup>th</sup> meeting.

### **Potential Funding**

Sen. Hobbins asked staff for an update on the potential for grant funding to support the activities of the Advisory Committee. As requested by the Advisory Committee at the May 28<sup>th</sup> meeting, staff determined that funding from the Libra Foundation and the Stephen and Tabitha King Foundation is not permitted for organizations that are not 501(c)(3) organizations and noted the difficulties and issues that may be associated with providing private funding to state government entities. Mr. Spruce and Judy Meyer noted the possibility of partnering with a sponsoring 501(c)(3) organization to obtain grant funding. Sen. Hobbins also asked for suggestions about what particular activities should be funded. Suzanne Goucher acknowledged the reluctance of foundations to provide funds for the ombudsman position within state government, but suggested that funds for education or training or to hold public hearings may be more realistic. Staff reminded the Advisory Committee of earlier discussions about developing interactive training materials on the Internet or DVD.

The Advisory Committee agreed to provide suggestions to staff to identify certain activities in need of funding and to investigate partnerships with other groups; discussion will continue at the next meeting.

### **Public hearings outside of Augusta**

The Advisory Committee briefly discussed whether to hold public hearings, where to hold them and what would be the subject matter of the hearings. After discussion, the Advisory Committee agreed that, in order for the hearings to be successful, the topics would need to be relevant to the Advisory Committee's work and be those that would generate both public interest and public comment. Staff will solicit suggested topics for public hearings from Advisory Committee members and report back at the September 10<sup>th</sup> meeting. The deadline for suggestions will be September 3<sup>rd</sup>.

### **Future Meetings**

- ◆ Advisory Committee, September 10, 2008, 12:00 pm (bring your lunch)
- ◆ Legislative Subcommittee, September 10, 2008, immediately following Advisory Committee meeting

The meeting adjourned at 2:15 p.m.

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