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Right to Know Advisory Committee November 17, 2008 (Draft) Meeting Summary

Convened 12:06 p.m., Room 438, State House, Augusta

Present:	Absent:
Sen. Barry Hobbins, Chair	Shenna Bellows
Rep. Deborah Simpson	Robert Devlin
Karla Black	Sheriff Mark Dion
Eric Conrad	Ted Glessner
Richard Flewelling	Suzanne Goucher
Mal Leary	Linda Pistner
Judy Meyer	
Maureen O'Brien	
Harry Pringle	
Chris Spruce	
Phyllis Gardiner, attending for Linda Pistner	

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Sen. Barry Hobbins convened the Advisory Committee, and asked the members to introduce themselves. Sen. Hobbins outlined the agenda for the meeting.

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 had tackled the 93 exceptions slated for review this biennium. A color-coded chart indicating the subcommittee's recommendation for each section of law reviewed was distributed. Final results:

- ✓ 68 statutes: Unanimous vote to not change
- ✓ 4 statutes: Minority of one member opposed no change on the principal that language was overbroad, but did not provide a specific cure
- ✓ 6 statutes: Recommend amendments (5 amendments included in draft on pink paper)
- ✓ 9 statutes: held for further Subcommittee work, including 2 that are part of the Criminal History Record Information Act
- ✓ 3 statutes: Teacher confidentiality. Subcommittee recommendation, but discussion needed
- ✓ 3 statutes: Recommend that the Judiciary Committee explore whether the circumstances of the industry (marine resources fisheries landings) require revision of the language to appropriately balance the public interest in the industry's information with the goal of avoiding release of information that identifies a particular licensee or vessel.

Mr. Spruce indicated that the Legislative Subcommittee supported changes to the Marine Resources laws, as well as amendments to statutes concerning the International Trade Center and the Finance Authority of Maine. The subcommittee and the International Trade Center had not reviewed the draft prepared to carry out the subcommittee's recommendations, and the language to address FAME's concerns is still in progress. However, the language proposed to amend the

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Marine Resources laws was approved by both the subcommittee and the Department of Marine Resources. All the draft language prepared so far was distributed on pink paper.

Teacher confidentiality laws. Mr. Spruce described the subcommittee's work with the teacher confidentiality questions, originally raised by Mal Leary. Staff explained the pieces of the packet and the draft legislation recommended by the subcommittee. The draft is intended to clearly codify the Department of Education's policy with regard to actions on credentials of those who are certified, approved or authorized by the Department to work in the State's education system. The draft explicitly designates as public certain information concerning individuals whose certifications (intended to cover all credentials by the Department) are denied, revoked, suspended or surrendered. The subcommittee reserved the issue of whether the grounds for those actions taken by the Commissioner are public. Shawn Keenan, Maine Education Association, explained the Association's position on releasing that information: it is consistent with current law on public officials in general, but lesser forms of discipline should not be released. Arthur Keenan, Department of Education, explained that the current DOE policy is based on legislative history and past statutes. The draft contains authorization for the Department to release the grounds for the Commissioner's actions to the national clearinghouse on teacher credentials. Mr. A. Keenan indicated that the Department has not been releasing that information to the clearinghouse, as is true for several other states.

Harry Pringle noted that the Maine School Management Association is not taking a position on whether or not the grounds for the Commissioner's action should be public. There is good cooperation between school boards and the Department now. He pointed out that the actions taken by a school board - not as far-reaching as action by the Commissioner - are public, as are the reasons those actions are taken.

Mal Leary referred to the staff study recently completed by the Office of Policy and Legal Analysis. He cited the study as placing Maine at the bottom of all the states in making appropriate information public. He believes the incoming Obama administration will make much more information available on the national level. Mr. Leary supports the draft, but would like to see more information available to the public - their kids, their schools, their money.

Mr. A. Keenan explained that the Department has been wrestling with how to deal with information that is included in the national criminal record information. He is concerned about releasing grounds if the grounds are based on information received through the national check. He has reached the point where he is satisfied that he can protect nation criminal history record information against public disclosure by relying on local criminal history record information such as court and police records. Mr. A. Keenan believes he can comply with the federal regulations and whatever the Legislature adopts.

Judy Meyer expressed her concerns about changing the law in ways that limit the State's ability to obtain the information it needs to protect children. On the other hand, when police officers are disciplined, all the related information is released, and teachers hold no less an important position in the community. Ms. Meyer asked why teachers get a special shield. Mr. Leary noted that the OPLA staff study compared the treatment of disciplinary records of other public employees with those of teachers.

Mr. Spruce said that, after reading the report, he is more inclined to find a compromise that errs on the side of more access. Eric Conrad wondered if more information should be provided before termination, to help assure the public that action taken is not too weak. Ms. Meyer mentioned

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that the Advisory Committee should be careful not to limit thinking to only criminal conduct; there could be other inappropriate conduct that results in discipline, such as violating school policy. Mr. A. Keenan reminded the Advisory Committee that the Commissioner's authority does not go beyond acting on the certification itself; action taken that is other than revoking, denying or suspending certification is not within the Commissioner's power. Mr. Pringle clarified that on the school district level, any final action that is taken by a school committee, no matter what it is, is public. On the other hand, a note that the principal places in a teacher's file, such as a reprimand, is not public.

Sen. Hobbins suggested a middle ground - recommend the draft prepared by the Legislative Subcommittee (which does not address grounds for credentialing actions), and make it clear that the Advisory Committee is not closing the door on additional language that would release information about the reasons for discipline in certification actions. Mr. Leary favors more than the draft includes, but agreed to go along with the language if it has the unanimous support of the Advisory Committee, and then include unallocated language encouraging further work. Mr. Spruce moved to accept Mr. Leary's suggestion as the action of the Advisor Committee, Richard Flewelling seconded the motion, and the vote was unanimous in favor.

Title 23, section 63 (MTA/DOT confidentiality). Mr. Spruce explained that the draft distributed on gold paper was prepared to clarify current law, drawing a clear distinction between 1) records and correspondence of the right-of-way divisions relating to negotiations for and appraisals of property; and 2) records and data relating to engineering estimates of costs on projects to be put out to bid. The Legislative Subcommittee did not make a decision as to whether the law should be amended. The Department of Transportation expressed concern about the release of methodology, which could give large contractors an advantage, or allow contractors to unfairly rig the system, requiring higher contract costs for the State. Rep. Hill was not able to attend the last subcommittee meeting, and the members chose not to make a recommendation, know that Title 23 is scheduled for review in the next cycle of public record exceptions reviews. Mr. Pringle commented that this is the correct approach; there is skepticism that engineering estimates should remain confidential, but the subcommittee would need much more information and more discussion to make a decision to change the law.

Minutes. Mr. Spruce briefly discussed the issued raised by Ms. Meyer, that is the taking and keeping of minutes and other records of public proceedings. The Legislative Subcommittee believes that the issue is important and can be key to the public's satisfaction with governmental openness and accountability. The subcommittee recommends that data-gathering and analysis related to this issue be part of the work of the Law School extern during the 2009 semester.

Mr. Spruce took the opportunity to thank the Legislative Subcommittee, emphasizing that it is successful because all the members do their homework and come to meetings prepared for discussion.

The Advisory Committee voted unanimously to accept the report of the Legislative Subcommittee.

Update on training for legislators elected in November 2008

Ms. Meyer explained that the Legislative Council has already done much of the planning for the training for the 124th Legislature, which convenes on December 3, 2008. The Pre-Legislative

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Conference, which begins on December 1st, always includes mandatory training on Ethics, which is provided by the Attorney General. The Legislative Council, in consultation with Attorney General Steve Rowe, has established a draft agenda for the conference, which includes the Attorney General providing the Freedom of Access training for all legislators. Completion certificates will be available for legislators who participate in the Freedom of Access training provided that day. Binders containing all the information for the Pre-Legislative Conference have been prepared, with a separate section for the Freedom of Access laws and the training requirements.

Training for Committee Chairs and Republican Leads for each joint standing committee will be scheduled for January. That training will provide more detail on open meetings, and the public record exceptions review process.

Sen. Hobbins mentioned his experience in providing, along with rep. Bonnie Gould, training for elected officials in York County. Dick Brown organized the event, and 77 public officials attended the session, which lasted 2 ½ hours. Sen. Hobbins said the training program was well-received.

The Advisory Committee unanimously accepted the report of the Education and Training Subcommittee.

Agriculture proposal

Department of Agriculture Deputy Commissioner Ned Porter brought before the Advisory Committee a proposed confidentiality provision relating to food safety and meat inspections. The federal Food and Drug Administration (FDA), with regard to food safety, and the United States Department of Agriculture (USDA), with regard to meat inspections, share certain information with state jurisdictions only if the recipient state can protect federally-confidential information from release. Current Maine law does not provide an exception from public records requirements for the information that would be shared by the FDA or the USDA. The Maine Department of Agriculture is concerned that the State may not be able to properly notify and protect the public without access to such information. The Department will be proposing a new public record exception to cover this issue. The proposal is similar to the language worked out on the confidentiality of pesticide information. Mr. Porter brought this proposal before the Advisory Committee simply to make the members aware that such legislation will be proposed in the upcoming legislative session. Mr. Porter expects the Judiciary Committee to review the proposal as required under Title 1, section 434. Mr. Leary queried whether the language must say “shall” or would “may” be acceptable to the Department. Mr. Porter will raise that question with the Department and the assistant attorney general who works with Department.

Criminal History Record Information Act

Former Assistant Attorney General and now Special Assistant Charles Leadbetter provided the Advisory Committee with the history and a summary of the Criminal History record Information Act, originally effective in 1976, and amended several times since then. Mr. Leadbetter reviewed the definitions contained in the law, and the distinctions between conviction data and nonconviction data, and how the law requires different treatment for information that falls into each category. In 1979, a new category of information - intelligence and investigative

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information - was added into the Act, although such information does not include conviction data. In 1994, the Criminal History Record Information Act was amended to include, going forward, the Attorney General's intelligence and investigative information. It also covered other law enforcement agencies and their intelligence and investigative records. Also, the law was expanded to cover certain information about civil violations and civil actions. The law has created confusion, and the Attorney General's Office recommends a revision to address several aspects:

- A separate act for intelligence and investigative information
- Clarify whether the law applies to Maine records, records from other jurisdictions or both; also determine whether tribal court information should be included
- Clarify that juvenile records are not included, but address juveniles who are tried as adults
- Make clear that CHRIA does not apply in any way to civil violations or traffic infractions
- Revise disclosure limitations on nonconviction data
- Revise definition of conviction data - some pre-conviction data is currently included
- Clarify definitions
- Can delete §623, concerning costs
- Make gender neutral
- Nothing in current law that allows us to explain to the public that conviction data has turned into nonconviction data (such as when the Grand Jury does not indict)

Staff and the Attorney General's Office have sought input from criminal justice agencies and other players in the criminal justice system about possible changes to the Criminal History Record Information Act. A working group will be convened and will report to the Legislative Subcommittee in 2009.

Internal/external audit records

In following up on the discussion the Advisory Committee had about the issues raised in the Moore v. Abbott decision, Linda Pistner prepared draft language to designate as public the records of an individual or group that is charged to conduct a review of an agency's conduct. The Advisory Committee referred the issue to the Legislative Subcommittee, finding that the proposed language is a start, but many more questions need to be addressed.

Holding public meetings using technology

Sen. Peggy Rotundo requested that the Advisory Committee examine the possibilities of conducting public proceedings using different forms of technology, rather than requiring that all members of a board, committee or other body be present in the same room. The Advisory Committee agreed to send the issue to the Education and Technology Subcommittee. Ms. Meyer suggested that gathering information about this topic would be a good project for the Law School extern.

Commission to Protect the Lives and Health of Members of the Maine National Guard

Barbara Damon-Day, Chair of the Commission to Protect the Lives and Health of Members of the Maine National Guard, and Peter Ogdin, Director of Veterans' Affairs, addressed the Advisory Committee about gaps they believe exist in the law concerning the collection and analysis of information about service members' health and their deaths. Ms. Damon-Day

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explained that the Commission offers a place for family members to talk to someone about the death of their loved ones, especially if there are issues in the autopsy report that need explaining or further review. The Commission has created a review process to help identify cracks in the system in a no-fault way, and try to close the cracks. The Commission does not want to have to make public the private information the family members have shared in the review process. Mr. Ogden explained that his office needs to collect information. Discharges from the service are confidential for 75 years, so he is not concerned about that specific information being made public. But he is worried about information Dr. Greenwald, the Chief Medical Examiner, may provide in reviewing autopsy information about the deaths of service members. Certain information needs to be shared in order to meet the needs the office serves, but that information should not be released to the public. Mr. Ogden can share information with the Veterans' Administration. They provide information in the aggregate, but he does not want to provide information that identifies any particular person. Is information they collect in surveys protected? Ms. Damon-Day indicated that they might be able to identify clusters of data that would be useful.

Mr. Pringle agreed that personally identifiable information should be private, but aggregate data should be available. No one wants to release personally identifiable medical information. Mr. Leary asked whether the Commission or its subcommittee wants to hold an executive session to go over confidential information. Ms. Damon-Day said that the Commission is not interested in keeping the records, but would like to make sure that a panel can review the records and give them back to the family without making the information public. Mr. Leary suggested that the Advisory Committee could help them the most by reviewing a draft that carries out the purposes that Ms. Damon-Day and Mr. Ogden identified. Staff will serve as a resource if necessary.

Draft annual report

Staff distributed a copy of a draft report. It is complete, except for the Advisory Committee's recommendations. Staff will insert information about the decisions made at this meeting and distribute the draft report. Comments can be returned to the staff via e-mail. Any substantive changes will have to be approved in a meeting of the Advisory Committee.

Law School extern/intern

Staff will be interviewing three law school students who expressed interest in the externship with the Right to Know Advisory Committee for spring 2009. Ms. Pistner will be primary contact for the extern. She will supervise the work and provide an evaluation. The Attorney General's Office will provide workspace, phone line, computer and e-mail access.

Schedule

The next meeting of the Advisory Committee has not been scheduled.

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