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Right to Know Advisory Committee  
Legislative Subcommittee  
July 16, 2008  
(Draft) Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:

Chris Spruce, Chair  
Karla Black  
Suzanne Goucher  
Mal Leary  
Linda Pistner  
Harry Pringle  
Rep. Deborah Simpson

| Absent:

Shenna Bellows

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

Subcommittee Chair Chris Spruce convened the Legislative Subcommittee and welcomed everyone.

**Title 23, section 63**

Right to Know Advisory Committee staff prepared a packet of information including the legislative history and Law Court cases pertaining to Title 23, section 63. The packet included a suggested redraft of the section to clarify the language without changing what was indicated to be the interpretation of the current law. Also included were copies of the current State purchasing law, providing that the records are open once the contract is awarded, and additional contract and confidentiality laws for the Department of Transportation and the Maine Turnpike Authority. Representative Dawn Hill, who had requested that the Advisory Committee expedite the review of Title 23, section 63, explained that her concerns about the statute were raised in the York tollbooth relocation process. Rep. Hill is concerned that the MTA operates without sufficient oversight. She provided a copy of the contract between the MTA and HNTB, an engineering company that has a long-term relationship with the MTA. Rep. Hill believes that HNTB, a private company, has significant influence in how the MTA carries out its responsibilities, including when and how improvements are to be made, and toll levels. She stated that she is not suggesting that anything is wrong, but that there is not any way to tell. Although bids are available on the MTA's website, Rep. Hill is interested in the engineering estimates, including how the engineering estimates are arrived at; how is the need for improvements and changes determined? How is the design determined? Rep. Hill said, that although obtaining the engineering estimates before the bid is settled would be nice, she understands that such timing may not be practical. She believes that such information should be available after the bid is awarded or at least when the project is complete.

Conrad Welzel, representing the Maine Turnpike Authority, stated that the information is available after the project is completed. The actual bids are made available to the public as of the Board's meeting when the contract is awarded. Mr. Welzel said that the engineering information

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identified by Rep. Hill is available to the public and, although it is not provided in writing, it would be upon request. No one has asked for the information so far.

Theresa Savoy, representing the Department of Transportation, reminded the Subcommittee that the DOT does business differently. Rather than one contractor, the DOT deals with many contractors. There is concern that some contractors would figure out DOT's process and gain an advantage in the bid process. The DOT release costs, but costs change over time. DOT has a specific bidding process that needs to be followed, and it doesn't change from one project to the next when the projects are similar. How the DOT arrives at the estimates is what DOT is concerned about being released. Suzanne Goucher asked why it is so important that the process be protected: if all the information is available to all people all the time, why isn't that a level playing field? Ms. Savoy responded that the contractors with larger staff can benefit from the information more quickly. DOT believes that the playing field is level if the scientific piece, the engineering piece, is NOT released. Rep. Deborah Simpson and Chris Spruce agreed that the legislative committee of jurisdiction, the Transportation Committee, needs to look at the issues.

Mal Leary raised the question of why there is a nine month delay in releasing some information. Ms. Savoy was not sure why that has always been a part of the law, and will try to collect more information. She did raise a concern about neighbors obtaining copies of appraisals.

At the request of Rep. Simpson and with the agreement of the subcommittee, Mr. Spruce will work with staff to write a letter to the Legislature's Transportation Committee to look into the issues raised and discussed in the Subcommittee. Mr. Welzel asked that the MTA and the DOT be included in the drafting process should any legislation be proposed. Rep. Simpson indicated that the letter should request the Transportation Committee to justify the existing statute or draft changes.

*Follow up:* Mr. Spruce and staff will draft letter to the Transportation Committee. TRA response will be on the next available agenda.

### **Title 20-A, section 13004**

Department of Education Commissioner Susan Gendron, along with Arthur Keenan, the Department's legal consultant working with credentialing, addressed the Subcommittee and presented a revision in the policy proposed in the June 20th letter to the Subcommittee concerning confidentiality of information relating to persons, other than teachers, credentialed by the Department. The new policy, to take effect on July 18, 2008, provides that the action on a person's credentials - denial, revocation or suspension - will be public, along with the person's name. The reasons for the denial, revocation or suspension, as well as all the information leading up to that action, will remain confidential. Also accessible will be the name of the person, the relevant dates of the action, the type of certificates and endorsements held, including relevant dates. Still under consideration is whether the schools where the person is or was employed will be made public.

Commissioner Gendron stated that she personally had no problem with reporting in the aggregate the reasons for licensing actions, but is opposed to releasing that information for each individual. The Department shares helpful information with school districts in that the district cannot hire a person the Commissioner does not license. Mr. Leary questioned why the Department will not provide information that is public (criminal conviction and court information). Commissioner

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Gendron replied that the State Police is the keeper of the criminal information, and there is a vehicle for obtaining that information that can be used by anyone. The DOE is not the appropriate entity to provide criminal and court information.

Harry Pringle inquired whether the Commissioner would be comfortable with rewriting the statute to clearly reflect the new policy. Commissioner Gendron agreed, and indicated that the new policy is in response to the law authorizing sharing of information with the clearinghouse.

Mr. Pringle and Commissioner Gendron discussed what is “a final written decision.” The DOE sends a letter to the person when the credential is denied, suspended, revoked, surrendered or reinstated (although a reinstatement may be completed by issuance of the credential, which would then be the final written decision). The reasons for the action are not included in the letter. School boards, on the other hand, must make public the “written record of a decision involving disciplinary action taken with respect to an employee.” (20-A MRSA §6101, sub-§2, ¶C.) The reason the disciplinary action is taken is generally included in the record of the local school board’s action. Mr. Pringle wondered whether it would make sense to make the law governing the DOE records consistent with the local school district records. Mr. A. Keenan described the problem with the current law (§13004, sub-§2-A) which says “any other information or materials” that may result in disciplinary action are confidential; does “any” include the action itself? The history of the section indicates that it was intended to mirror the local practices, which led DOE to conclude that some information should be provided.

Shawn Keenan, representing the Maine Education Association, pointed out that §6101 makes public the record of disciplinary action taken by the governing body (i.e., the school board), rather than all administrative action. School boards have a narrow range of actions which they can take. He pointed out that §13004 provides for the release of the complaint filed by the Attorney General, but that is a very narrow exception. What remains is that the fact of denial is public, but the reasons for the denial are confidential. Reasons for denial can run the gamut - intemperate behavior, or failure to complete enough continuing education credits.

The Subcommittee tabled the discussion for future meetings.

*Follow up:* Staff will prepare for review and discussion draft legislation that implements the proposed DOE policy.

### **Comprehensive FOA revisions submitted by Christopher Parr, Attorney for State Police**

Chris Parr, Attorney for the State Police, submitted suggested changes to the Freedom of Access laws last year. The members of the Subcommittee had agreed to review the proposals in preparation for discussion. Mr. Parr was present and participated in the discussion.

Mr. Pringle expressed his admiration for Mr. Parr and the elegant way he chose to address some of the issues in the Freedom of Access laws. With that said, Mr. Pringle found very few changes to accept, expressing concern about the unintended consequences, and the thought that most of the changes are not necessary. Mr. Parr commented that he saw his draft as a starting point for discussion.

Mr. Leary agreed that adopting definitions of “agency” and “official” may be helpful in some contexts, but may unintentionally leave out entities that should be covered. Mr. Pringle

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mentioned that adopting the proposed definition of “official” would overturn the Abbott decision. Ms. Goucher compared the definition of “agency” with the application of the Administrative Procedures Act, which does not include informal or advisory-only boards. Mr. Spruce shared the concerns about defining terms, and noted that the Subcommittee does not have time to look at all the cases to determine if the changes would affect the established outcomes, for better or worse. He was concerned that defining those terms puts parentheses around the Freedom of Access laws, and isolates the chapter rather than leaving it to open interpretation. The Subcommittee decided to not make the changes concerning agency, body and official that were proposed throughout the draft.

The Subcommittee agreed to the change proposed in §403, which is consistent with the Portland School Committee Law Court decision.

The Subcommittee agreed to the clarification changes in §405, but not the potentially substantive changes.

The Subcommittee discussed the proposal concerning the medium (paper, magnetic, electronic) of the response to a request. This is an issue that will need to be dealt with eventually. How does an agency deal with requests for a database that may include confidential information? The Subcommittee decided it is not ready to fashion a solution, and will come back to this issue.

The Subcommittee discussed the proposal on the charging for costs of responding contained in §408. Previous study committees and the Legislature have spent a considerable amount of time on this issue. Although there are legitimate questions about the burden on agencies to respond to requests, there is the overarching concept that the records belong to the public. Mr. Spruce noted that some of the clarifications seem like creation of barriers, which is not what the Advisory Committee wants to do. Mr. Leary agreed, and mentioned that there will always be a cost to government. Mr. Parr agreed, and reminded the Subcommittee that for the State Police in particular, there are confidential data in the files, which must not be released. Sorting out what can and cannot be made public is often a time-consuming task. There was agreement that the current law concerning providing an estimate of the costs is awkwardly worded and can be difficult to comply with. Karla Black noted that she often doesn’t know what the costs will be until the documents are produced. No change was agreed to, however. Mr. Parr noted that there has to be some reasonableness about payment. Sometimes the response to a request is sent out and the person never pays the fee. It doesn’t happen all the time; people are usually very good. Mr. Leary asked if there is feedback from any other agencies that this is a problem, and Ms. Black indicated that she had not heard it raised as an issue. The Subcommittee finally agreed to not make changes, to collect more data, and to revisit the whole fee issue in the future.

The Subcommittee agreed to leave §409 as is. Mr. Spruce noted that although he understood Mr. Parr’s concerns, he prefers not to tinker with the statute in this way.

Mr. Parr thanked the Subcommittee for working through his suggestions and taking seriously the issues raised by his draft.

*Follow up:* Staff will prepare a draft of the changes proposed by Mr. Parr that were accepted by the Subcommittee.

### **Other matters**

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- The Subcommittee agreed to discuss the minutes/records issue at the next Subcommittee meeting.
- The Subcommittee suggested that a discussion of the Abbott factors be added to the Advisory Committee agenda for July 30th.
- The Subcommittee agreed to take up review of the existing public records exceptions at the next Subcommittee meeting.

*Follow up:* Staff will send out any new public records exceptions responses electronically and in paper form to be included in binders. All subcommittee members will review survey results related to existing public records exceptions. The goal is to identify those public records exceptions that don't need much discussion because they clearly fall within appropriate areas to be protected. Also, each member should indicate those exceptions that are particularly difficult and for which more information is needed.

The meeting adjourned at 3:50 p.m.

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The next Legislative Subcommittee meeting is scheduled for

- **Wednesday, July 30th, immediately after Advisory Committee meeting.**

The Advisory Committee meetings are to be held on:

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

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

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