

Legislative Subcommittee
Right to Know Advisory Committee
September 9, 2013
Draft Meeting Summary

Convened 10:02 a.m., Room 438, State House, Augusta

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|--------------------|---------|
| Present: | Absent: |
| Judy Meyer, Chair | none |
| Joe Brown | |
| Richard Flewelling | |
| Suzanne Goucher | |
| Mal Leary | |
| Bill Logan | |
| Chris Parr | |
| Harry Pringle | |
| Luke Rossignol | |

Staff:
Henry Fouts
Peggy Reinsch

Convening, Introductions

Judy Meyer, Legislative Subcommittee Chair, called the meeting to order and asked the members to introduce themselves. Staff provided a brief overview of the agenda.

Ms. Meyer recommended that the agenda items relating to Freedom of Access Act and the Public Access Ombudsman legislation be skipped until the other agenda items are discussed. (LD 258 [referred back to RTK AC], LD 104 [PL 2013, c. 339], LD 1216 [PL 2013, c. 350] and LD 1511 (PL 2013, c. 229))

Encryption of emergency communications

The subject of establishing a policy concerning the encryption of emergency radio communications among law enforcement and first responders was discussed in 2012. The Right to Know Advisory Committee wrote to the Board of Trustees of the Maine Criminal Justice Academy requesting that the Board consider creating a model encryption policy for consideration by local law enforcement agencies. The Chair of the Board of Trustees responded that the Board does not formulate model policies for law enforcement, although it does develop standards for law enforcement policies mandated by the Legislature.

After discussion, the Subcommittee agreed to explore options for pursuing the original proposal of a policy that maintains the current practice. The Subcommittee voted to table the issue while staff develops language and checks with stakeholders.

Appropriations Committee caucuses

The Right to Know Advisory Committee has discussed the openness of legislative party caucuses in the past; there is some interest in addressing it in the statute to make it clear whether caucuses are open to the public or closed. The Subcommittee discussed the current practices of the Appropriations and Financial Affairs Committee, in which negotiations done between the “chairs and leads” are open and anyone who knows about the meeting can attend, but general notice is not provided. The Legislature looks to its Joint Rules, adopted by each Legislature, to govern notice requirements rather than FOAA. This relies on the inherent power of the Legislature to govern its internal procedures.

The Subcommittee voted 7-2 (Mr. Brown and Mr. Parr dissenting) to ask Public Access Ombudsman Brenda Kielty to provide clarification regarding the public accessibility requirements under Maine law for party caucus meetings. Ms. Kielty agreed to try to provide guidance by the beginning of November.

Protection of “personal information” within the data breach statute

The Notice of Risk to Personal Data Act (10 MRSA Chapter 210-B) requires that an entity that holds personal data to provide notice when the entity is aware that the personal information has been subjected to a risk of disclosure. The Subcommittee agreed that, because the State has the same responsibility as private entities under the statute, no change and no further discussion are necessary.

Review of statutes to determine whether records should be protected from disclosure

The Subcommittee agreed that no discussion was necessary on the topic of requiring a regular review of records that are accessible to the public.

***McBurney v. Young*, 569 U.S. ____ (2013)**

The United States Supreme Court ruled that the Virginia Freedom of Information Act is constitutional even though it provides rights to public records to Virginia citizens and not to others from other states. The Subcommittee discussed whether it would be appropriate to limit the application of the Maine FOAA to Maine citizens, and quickly decided such a change would be setting up a barrier that would be easily crossed. Mr. Parr noted that it may be appropriate to give priority to in-state requests and therefore alleviate the stress on State agencies that are overwhelmed with public records requests. The Virginia statute was set up so Virginia citizens can find out what is going on with their Virginia government. Allowing access of records for other, such as commercial, purposes creates a resource issue. The Subcommittee voted 8-0 (Mr. Parr abstained) to take no action.

Permissive or mandatory

The Subcommittee discussed the question of whether the specific types of information listed as exceptions from the definition of “public record” (1 MRSA §403, sub-§3) must be redacted from records that are released to the public. Although there is some discomfort about the idea that a records custodian has discretion as to whether release records that are not “public records” but which have not been explicitly

designated as “confidential,” the Subcommittee agreed to take no action. The Public Records Exceptions Subcommittee reviews all public records exceptions and tries to use consistent language to designate as confidential records that should be kept from being disclosed.

Date of birth of public employees

The question of whether a public employee’s date of birth is public information was raised this summer. Mr. Parr and Ms. Kielty concluded that the fact that “age” is confidential information in a public employee’s personnel file is sufficient grounds to not release the employee’s date of birth. The Subcommittee discussed whether the statutes should be amended to include “date of birth” – either instead of “age” or in addition to “age.” The Subcommittee agreed to table the discussion until the next meeting, at which point the members can review all the statutes that address the confidentiality of “age” and “date of birth” of public employees.

Formal, standardized policy governing the storage, retention, and disposition of government emails

Ms. Kielty noted that records retention and email go hand in hand with FOAA; one can’t access email if it has not been retained. So far, she has focused on email at the State level. This is an ongoing discussion at all levels of government and in all jurisdictions. Ms. Kielty recommended hearing from Maine’s OIT experts and Tammy Marks from Archives, at least with regard to State agencies. A State policy is being developed. The Subcommittee asked for a written update on the policy, and tabled the question for the next meeting.

Government records containing personal information about private citizens

The Subcommittee agreed to work with the Bulk Records (now Public Policy) Subcommittee to explore the question of whether and how to protect personal information about private citizens that is contained in public records.

LD 549 as amended by the Judiciary Committee (bill carried over in Appropriations Committee): An Act To Provide for Special Restrictions on Dissemination and Use of Criminal History Record Information for Class E Crimes Committed by an Adult under 21 Years of Age

The Subcommittee discussed the proposal to “seal” the criminal history records relating to a single conviction of Class E theft when committed by a person under 21 years of age. Why just Class E theft, which covers shoplifting, when there are other Class E crimes that are even less serious? Convictions are always in the public realm, even if sealed in the SBI’s records. The Subcommittee voted 9-0 to take no action.

Post all FOAA requests

Ms. Kielty had received a request that all FOAA requests be posted online. This could serve three purposes: First, a person whose records were the subject of the request would know that his or her information was requested and released; Second, the posting would further transparency of government activities; and Third, abuses of FOAA would

be more apparent. The Subcommittee discussed whether any jurisdictions do this now, and Ms. Kielty indicated that the federal government does make at least some of this information available online. Ms. Meyer said that Connecticut does so, and Mr. Leary noted that requests under the Connecticut freedom of access laws are required to be made formally, citing the specific statutory reference for the information. The Subcommittee agreed to ask the Bulk Records Subcommittee to add this issue in its discussions.

Right to Know Advisory Committee and the Ombudsman

Ms. Goucher reminded the Subcommittee that some of the duties originally proposed for the Public Access Ombudsman were shifted to the Advisory Committee when it became clear that no funding was available for the Ombudsman. The Subcommittee agreed to ask Staff and Ms. Kielty to review the original proposals and report back to the Subcommittee at the next meeting.

Future Meetings

The Legislative Subcommittee will meet at **9:00 a.m. on Thursday, October 3rd**, and will meet jointly with the Public Policy Subcommittee (fka the Bulk Records Subcommittee) at 10:00 a.m. on Thursday, October 3rd.

The Advisory Committee will meet at 1:00 pm, Room 438, State House on Thursday, October 3, 2013.

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,
Peggy Reinsch and Henry Fouts