Right to Know Advisory Committee
June 22, 2016
Meeting Summary

Convened 10:07 a.m., Room 438, Maine State House, Augusta

Present:	Absent:
Sen. David Burns	Mary Ann Lynch
Rep. Kim Monaghan	Luke Rossignol
Suzanne Goucher	
A. J. Higgins	
Richard LaHaye	
Judy Meyer	
Kelly Morgan	
Chris Parr	
Linda Pistner	
Harry Pringle	
Helen Rankin	
William Shorey	
Eric Stout	

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves, including two newly appointed members: Eric Stout, representing information technology expertise, and A.J. Higgins, representing broadcast interests.

Summary of the Right To Know Advisory Committee duties and powers

Staff reviewed the Advisory Committee's duties as set forth in Maine's Freedom of Access Act (FOAA) at 1 MRSA §411, sub-§6.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA: RTKAC recommendations

Staff began the discussion by reviewing the legislative outcome of the recommendations included in the Advisory Committee's January 2016 report. The 2016 report included proposed legislation regarding remote participation by members of public bodies; in response to Advisory Committee's recommendation, the Judiciary Committee created LD 1586, "An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceedings." A majority of the Judiciary Committee voted "Ought Not to Pass" on LD 1586, however a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by

members that also describes how the policy meets the principles of FOAA. The bill and the amendment were not passed by the Legislature.

The Judiciary Committee considered another remote participation bill, LD 1241, "An Act To Increase Government Efficiency," which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine Municipal Bond Bank) to conduct public proceedings with members participating via remote access technology in certain circumstances (i.e., the member is needed for a quorum, illness of the member, weather that makes driving hazardous, or unexpected traffic delays or vehicle breakdowns when the commissioner is traveling to the meeting). LD 1241 was finally enacted as Public Law 2016, chapter 449.

Mr. Parr asked what should be inferred from this legislation regarding what authority is needed in law before a body may allow remote participation by its members at public proceedings. Staff noted that there still seem to be two approaches clarifying remote participation in public meetings: 1) specifying broad authority for remote participation in FOAA itself, and 2) providing specific authority for a governmental entity in its statutes. Staff also noted the Governor's position that remote participation is already permitted under FOAA as long as all FOAA requirements are otherwise met, as stated in the veto message to 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"; that veto was not overridden by the 126th Legislature.

Ms. Goucher stated that she would like to see the Advisory Committee attempt another recommendation in this area, because the issue is not going away until there is some guidance and clarity given. The Advisory Committee did not take a formal action on this request.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA: Proposed public records exceptions reviewed by Judiciary Committee

Staff summarized the proposed public records exceptions referred from policy committees to the Judiciary Committee for review in the Second Regular Session. As required by FOAA at 1 MRSA §434, when a majority of a joint standing policy committee of the Legislature supports proposed legislation that contains a new public records exception, the legislation is referred to the Judiciary Committee for review according to the criteria laid out in statute. The following legislation was reviewed:

- LD 466, "An Act To Increase Competition and Ensure a Robust Information and Telecommunications Market," which was referred by the Energy, Utilities and Technology Committee, contained a provision making confidential any competitive information about an area's telecommunications companies gathered by the Public Utilities Commission when considering whether to relieve FairPoint Communications from "provider of last resort" duties for a community. A new requirement for quarterly service quality reports from FairPoint Communications also provided that those reports

would be confidential unless the company failed to meet service quality requirements. The Judiciary Committee recommended no changes, and the bill was enacted.

- LD 1467, "An Act Regarding Maine Spirits," which was referred by the Veterans and Legal Affairs Committee, contained a provision making new sales data records collected by the Bureau of Alcoholic Beverages and Lottery Operations public records and provided that the bureau must release the information in a way that would not specifically identify the business to which it pertains. The Judiciary Committee determined that no review was necessary because this new provision creates an exception to the blanket confidentiality that would have otherwise applied to these records, thereby making more information public. The bill was enacted.
- LD 1498, "An Act To Clarify Medicaid Managed Care Ombudsman Services," which was referred by the Health and Human Services Committee, contained a confidentiality provision for records contained by a newly established ombudsman program for Medicaid services offered by the State. The Judiciary Committee recommended no changes, and the bill was enacted.
- LD 1499, "An Act To Increase the Safety of Social Workers" was heard in the Judiciary Committee; the bill proposed to make confidential the home address of licensed social workers. The Judiciary Committee amended the bill to also make licensee's and license applicants' telephone numbers confidential. In connection with this bill, the Judiciary Committee requested by letter that the Advisory Committee consider the broader issue of licensee confidentiality (discussed further below).
- LD 1578, "An Act To Update Maine's Solid Waste Management Laws," which was referred by the Environment and Natural Resources Committee, contained a confidentiality provision affecting certain proprietary information submitted to the Department of Environmental Protection in connection with a proposed battery stewardship program. The Judiciary Committee recommended no changes, but the bill failed to pass in both Houses of the Legislature.

Review of public records exceptions enacted from 2005- 2012 pursuant to 1 MRSA §433

Staff reviewed the status of the Advisory Committee's review of existing public records exceptions, which the Advisory Committee began last year and is due by 2017. The Public Records Exceptions Review Subcommittee reviewed a number of exceptions after the Advisory Committee's last meeting in 2015 that will be presented for final action by the full committee in 2016. Next year, the Advisory Committee will begin reviewing all existing public records exceptions found in Titles 1 through 7-A. That review will be due by 2019.

Staff provided an update on a potential issue identified in 2015 involving the Department of Education's ability to share teacher disciplinary information with other states because of the breadth of confidentiality provided at 20-A MRSA §13004, sub-§2-A. In 2015 the Subcommittee recommended to the full Advisory Committee that it draft legislation, with direction from the Department of Education, to address the issue. The Advisory Committee decided not to recommend a change to the statute, and instead notified the Education and Cultural Affairs Committee about this issue and the issue of teacher discipline confidentiality more generally. The Education and Cultural Affairs Committee determined that the Department does not seek to share confidential disciplinary information with other states. It seems this issue is resolved for

both the Right to Know Advisory Committee and the Education Committee. Ms. Pistner asked if this provision would come back to the Public Records Exceptions Review Subcommittee, as she recalled there may be other issues with the language. Staff answered that there was no expectation from the Education and Cultural Affairs Committee that the Advisory Committee would take up the issue again. Ms. Pistner stated that she would like to double check with her office before setting the issue aside. Staff noted that this would be tentatively added to the next Subcommittee meeting agenda.

Potential topics and projects for 2016

- *Confidentiality of hazardous material transfer by railroads*

Staff related a request from the Judiciary Committee for the Advisory Committee to include in its public records exceptions review a provision enacted by LD 484 in 2015 and now codified at 1 MRSA §402(3)(U), which makes information held by the Department of Environmental Protection relating to the transfer of hazardous material by railroads confidential. Mr. Pringle moved for the Advisory Committee to take action on this item. The vote was unanimous of those present that the full Advisory Committee discuss the issue.

- *Confidentiality of personal contact information for professions and occupations regulated by the State*

Staff related a request from the Judiciary Committee for the Advisory Committee to develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State. In the Second Regular Session of the 127th Legislature, LD 1499 enacted a new confidentiality provision for social worker licensees' and license applicants' addresses and telephone numbers; in connection, the Judiciary Committee sought a uniform policy for all licensing information. Staff noted that some licensing boards do make certain licensee information confidential in statute already. The Advisory Committee discussed how a uniform policy would need to balance the safety interests of the public in having access to licensee information with the privacy interests of licensees and license applicants.

Commissioner Head of the Department of Professional and Financial Regulation addressed the Advisory Committee. She acknowledged this was a tough issue, and that it would be good for the Advisory Committee to take a look. Mr. Parr noted that, in his experience dealing with private investigator licensing and FOAA requests for this information, it is amazing how much information in these licensing records is public. He asked Commissioner Head about the amount of information in her department's licensing records. Her reply was that all information in licensing applications, including contact information but excluding social security numbers, is generally public. There may be medical information in a licensing complaint file, but this information is already confidential and protected by statute. In response to another question, she stated there was generally no differentiation in the licensing records between a licensee's home address and work address – the agency has whatever the licensee gives it. A notable exception is the Maine Board of Licensure in Medicine, which has designated personal licensee information confidential, but professional information public. A licensing application generally contains

demographic information, education and exam results. Applicants are notified that any information given to the agency (except for social security numbers) will be public information.

Ms. Goucher asked Commissioner Head whether any other licensees besides social workers have requested their information be confidential, to which Commissioner Head answered that they had not. Commissioner Head stated that the Commissioner of Public Safety had asked her to remove home addresses for every pharmacist from public view because of an increase in pharmacy robberies.

Mr. Stout asked whether the licensing records were paper or electronic. Commissioner Head answered that they are paper applications scanned into a digital database. Chief LaHaye asked whether State law enforcement also had access to the information in this database such as addresses. Commissioner Head noted that she is required to assist law enforcement in public safety matters. The issue, she said, is more about prohibiting the public from having access to this information, not law enforcement. She noted that in the recent bill there was a clause permitting the Department of Professional and Financial Regulation to disclose confidential social worker information as required by the normal course of business. Rep. Monaghan wondered if a differentiation could be made between categories of licensees with inherent safety issues (for example those working with domestic violence victims). Commissioner Head noted there may be those that would make similar safety arguments as the social workers, and stated her concern with a piecemeal approach to confidentiality.

After brief further conversation on the topic, Mr. Parr moved for the full Advisory Committee to take up this topic in its business this year. All present were in agreement except for Mr. Higgins and Ms. Goucher. Mr. Higgins stated that his reluctance was due to concern with how far this would go toward confidentiality, and concern with expanding confidentiality even when licensees are not requesting it. Ms. Goucher stated that her opposition to the vote was because we already have a uniform policy – that these records are public – and any deviation from that requires a group to come before the Legislature to make its case and seek and exception. Mr. Higgins noted that it seemed we are trying to turn current policy on its head. Sen. Burns stated that it would be good for the Judiciary Committee to have guidelines to help in its considerations of future confidentiality proposals in the licensing area. Rep. Monaghan agreed it is important to have a uniform policy as new requests for confidentiality are inevitable. Ms. Pistner stated there were obviously some competing concerns, but expressed that she thought a compromise could be reached (for example, if a personal phone number is to be confidential, the licensee would have to provide a work number that would be open to the public).

Staff offered to provide information detailing the occupations and professions licensed by the Department of Professional and Financial Regulation, as well as other licensing agencies. Staff could also provide the status of current law regarding confidential information in the various categories of licensing. Additionally, staff offered to look to see how some other states treat licensee information.

Mr. Stout noted that licensing was a prime example of when citizens need to provide personally identifiable information to the government, and the balancing that must go on between the needs of the agency to conduct its function versus the need to make that information public. Serious

concerns are raised with providing contact information, but this information can be tailored. Ms. Meyer stated that she and others use the professional licensing database for consumer information, and noted that there are thousands of licensed professions so staff may have a difficult time gathering information on all of them.

Sen. Burns reiterated that the Judiciary Committee was not looking to change policy, but wanted to establish factors to consider when making decisions about new confidential licensing provisions. He requested staff provide some written material before the next meeting regarding this licensee confidentiality topic.

- *FOAA assistance for indigent members of the public*

The Advisory Committee next considered the request of Ken Capron for the development of a mechanism to help provide funds for indigent complainants to bring forward FOAA cases and the possibility of developing a standard court form to help pro se indigent complainants. The Advisory Committee took no action on this topic.

- *FOAA agency time and cost estimates, fee waiver policies and remedies for requesters*

Jack Comart of Maine Equal Justice Partners emailed the group in April with 5 suggestions: 1) require agencies to provide an estimate of time and cost for each separate component of a request for information; 2) require agencies to publically post and make available their fee waiver policy; 3) require that agencies grant fee waiver requests based upon reasonable standards; 4) clarify when estimates of time and cost must be provided by the agency; and 5) provide some recourse for requesters of information for agency action that may be arbitrary or capricious.

Staff reviewed current agency FOAA response time requirements, and also noted that while FOAA allows an agency to waive fees under FOAA, there is no requirement that the agency have a fee waiver policy or publicly post such policy. The Advisory Committee took no action on this topic.

Discussion of any additional topics and projects for 2016

Sen. Burns gave the group notice that there would be an agenda item relating to a potential issue involving executive sessions for the Committee's consideration at the next meeting. The discussion was opened up to the group regarding any other items of concern for potential consideration this year.

- *Criminal History Record Information Act (CHRIA) and the Judicial Branch*

Ms. Meyer raised a possible topic for future Advisory Committee discussion regarding the Judicial Branch's recent reversal of an October decision to make case files for dismissed cases confidential within 30 days of judgement. The prior policy had been based on an interpretation of the Criminal History Record Information Act (CHRIA) and an administrative order, which the media challenged. There may be a need to clarify some statutory ambiguity. Ms. Meyer

suggested that this discussion should not happen without Ms. Lynch from the Court System being present.

Ms. Pistner noted that this is a complicated issue because the courts are not bound by FOAA. She suggested that the Advisory Committee hear an explanation from the Attorney General's Office and the Judicial Branch's interpretation. Sen. Burns agreed that this should appear on the next agenda for the purposes of gathering more information to decide whether further action was warranted from the Advisory Committee.

There was discussion about what records were being sealed; Ms. Meyer replied that this was the entire criminal record. Record of the arrest is public, but, if a case is dismissed, that dismissal is not public information and so there is no proof of the dismissal. This situation led to problems with the media not having verification to report on these dismissals after having already reported on the initial charges. Mr. Parr expressed some concern about police reports being made public in these files, which include sensitive information such as victim statements. Ms. Meyer countered that this is important information for the public to understand how a case unfolded.

Sen. Burns asked about the difference between sealed cases and expunged cases. Ms. Pistner explained that all that was involved in this issue is whether dismissed cases should be released to the public, and that it did not affect sealed records in general. Sen. Burns moved to include this item in the next agenda and it was agreed by unanimous consent.

- *Social Security Numbers in medical files held by the Dept. of Health and Human Services*

Ms. Morgan asked if former Rep. Bradley Moulton could address the group about a concern he had based on his dealings with the Department of Health and Human Services in his capacity as a private attorney; Sen. Burns welcomed Rep. Moulton to the microphone.

Rep. Moulton explained that those who bring complaints before the medical boards make their records public information. His client had to file FOAA requests with the Department of Health and Human Services to access her medical review records. His and his client's chief concern was that these records included his client's social security number, and that this sensitive information was being treated as a public record. The Advisory Committee took no action on this topic.

- *Warden's Service FOAA requests*

Rep. Monaghan asked to discuss the issue of the Warden's Service FOAA requests about which the Advisory Committee had been asked to hold a public meeting. Sen. Burns gave the Advisory Committee an update, stating that he, Rep. Monaghan, the Presiding Officers of the Legislature and a representative of the Attorney General's Office were to have a meeting later that day to discuss the best way to proceed. Mr. Higgins moved to include an agenda item for the next meeting to discuss the outcome of this meeting; it was agreed by unanimous consent.

Discussion of Subcommittees

There will be a Public Records Exceptions Review Subcommittee, with Sen. Burns, Rep. Monaghan, Ms. Pistner, Ms. Lynch as members, and with the addition of Mr. Stout and Mr. Parr this year. The Subcommittee will meet at 10:00 a.m., with the full Advisory Committee meeting at 1:00 p.m. on July 20, 2016.

Scheduling of future meetings

The Committee's second meeting is scheduled for Wednesday, July 20th at 1:00 p.m. The third meeting will be held on Wednesday, August 17th at 1:00 p.m., and the fourth and final meeting will be held on Wednesday, September 14th at 1:00 p.m. All meetings will be held in Room 438 of the State House.

The next meeting of the Public Records Exceptions Subcommittee will be at 10:00 a.m. on Wednesday, July 20th in Room 436 (Criminal Justice and Public Safety Committee Room) at the State House.

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

Right to Know Advisory Committee
July 20, 2016
Meeting Summary

Convened 1:09 p.m., Room 438, Maine State House, Augusta

Present:	Absent:
Sen. David Burns	A. J. Higgins
Rep. Kim Monaghan	Mary Ann Lynch
Suzanne Goucher	Luke Rossignol
Richard LaHaye	
Judy Meyer	
Kelly Morgan	
Chris Parr	
Linda Pistner	
Harry Pringle	
Helen Rankin	
William Shorey	
Eric Stout	

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

Hazardous material transported by railroads

Staff reviewed the request from the Legislature's Judiciary Committee to examine the public records exception to Maine's Freedom of Access Act (FOAA) recently enacted in LD 484 (Public Law 2015, chapter 161), relating to hazardous material transported by railroads. Staff reviewed the packet of documents provided to the Advisory Committee, including the statutory criteria for review of public records exceptions and information supplied by the Department of Environmental Protection regarding this public records exception in response to a survey questionnaire sent by staff.

Mr. Parr noted that the intent of the exception seems aimed at preventing acts of terrorism, but that there are already a number of other FOAA exceptions for sensitive information related to potential terrorist attacks. For example, 1 MRSA §402(3)(L) is an exception for records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, and Title 16 would seem to provide alternate means of protecting this kind of information as well. Mr. Parr asked staff if these exceptions were taken into account in the Judiciary Committee's deliberations on this exception.

Staff replied that the Committee was aware of the existing security plan exception. This new exception may go beyond that. Railroad companies were concerned that this preexisting security plan exception was not adequate to protect the records they were concerned with. It was noted that the Judiciary Committee never received any testimony on the bill with concerns about these records not being public.

Rep. Monaghan, who is also a member of the Judiciary Committee, did not recall if a side-by-side comparison of similar state laws had been provided during the Judiciary Committee's consideration of the bill. Staff replied that the only comparable state law provided to that committee was a Massachusetts law that was broad enough to cover hazardous material shipped by rail; this law is not specific to railroads, unlike the Maine law.

The Advisory Committee discussed whether the Judiciary Committee had reviewed the bill against the criteria in 1 MRSA §432(2) as the Judiciary Committee typically does, and whether there has been any change in circumstances relative to the criteria for this exception since that Committee's original review. Although members of the Judiciary Committee believed they had reviewed the proposed exception in light of the statutory criteria, the review had not been documented with a review checklist. Staff and Advisory Committee members noted that there does not appear to have been any changes in circumstances, for example in federal law, since the bill was passed, except for increased public interest likely generated by media reports.

Mr. Pringle noted that the current language of the exception is broad and causes the Department of Environmental Protection (DEP) to wonder to what extent the exception applies to their records. He also remarked that it seemed odd that Maine citizens should know nothing about hazardous material transported across the state and expressed concern with the sheer number of materials covered by this broad exception – the "hazardous material" definition comprises approximately 200 pages in federal regulations – and suggested that at least some of these materials probably don't need to be kept confidential.

The Advisory Committee discussed the issue of the broad "hazardous material" definition, and the best way to determine how to narrow it, if at all. There was doubt expressed about whether this may be an issue any more, since the DEP has recently resumed releasing summaries of rail shipments of crude oil, albeit after the date of shipment.

Ms. Pistner noted that there are several issues involved with this topic: how to address the public concern that has arisen since the bill's enactment; whether the problem is fixed now that the DEP is providing a summary list of railroad crude oil shipments; whether the scope of hazardous materials should be narrowed in the exception; and finally, if the summary DEP is currently releasing should be required by statute.

In response to the Advisory Committee's discussion, staff noted that related issues that may need to be resolved are whether the public have access to this information, whether there is a need to make more information public than DEP is currently releasing in its post-shipment summaries, and whether DEP has concerns with the current statutory language.

Mr. Parr introduced the idea of sending a letter to the Judiciary Committee recommending that it revisit this topic, potentially narrowing the scope of the exception and providing the public another opportunity to comment on the provision. Sen. Burns added that the letter should request that the Committee create a committee bill as a vehicle for this reconsideration.

Peggy Reinsch, nonpartisan staff for the Judiciary Committee and former staff for the Advisory Committee, addressed the committee at the chair's invitation. She offered that it would be helpful for the Judiciary Committee if the Advisory Committee's letter outlined exactly what the questions or issues are.

The Advisory Committee decided to go through the checklist of public records exception review criteria (1 MRSA §432(2)) to better focus its request to the Judiciary Committee. The group highlighted the areas of greatest concern, including: paragraph G – whether public disclosure jeopardizes the public and if so, whether that safety interest substantially outweighs the public interest in the disclosure of the records; paragraph H – whether the proposed exception is as narrowly tailored as possible; and paragraph E – whether the public disclosure puts a business at a competitive disadvantage and, if so, whether that interest substantially outweighs the public interest in the disclosure of records.

Advisory Committee members also voiced concern about whether the information should only be made available retrospectively, or whether the public should have a right to the information prospectively.

On Mr. Parr's motion, and Ms. Goucher's second, the group unanimously approved sending a letter to the Judiciary Committee on this issue. Staff agreed to draft the letter, outlining the issues raised by the Advisory Committee, for review at the next meeting.

Personal contact information for professions and occupations licensed by the State

Staff reviewed the background documents provided to the Advisory Committee, including the recently enacted bill providing a public records exception for the addresses and telephone numbers of licensees and license applicants in the possession of the State Board of Social Worker Licensure. Staff also reviewed a list of occupations and professions licensed in Maine. Staff informed the group that in terms of licensing information, generally the protected information is an individual's Social Security Number, unless a specific law is enacted to protect particular information for a particular licensing category.

Mr. Pringle mentioned the example of nurses, physicians and osteopaths, where there is a separation of personal private information on licensees from the public information, and wondered how well this has worked in practice. Staff replied they would need to reach out for further information, but shared a letter submitted by Planned Parenthood to the Advisory Committee stating that information about licensees that is supposed to be private was released to the public in response to at least one FOAA request.

The Chair invited Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England, to comment. Ms. Clegg related her organization's experience with FOAA requests to the State Board of Nursing. Ms. Clegg stated that although the Board's redaction of non-public, personal information has gotten better, there is still a significant amount of information released, including photographs of licensed nurses, in response to anonymous email requests for public records. The release of this information in this manner is distressing to employees of Planned Parenthood.

Mr. Parr noted that the Advisory Committee has previously discussed whether anonymous FOAA requests should be permitted. He noted that the purpose of FOAA is to provide the public information about what the government does. He asked Ms. Clegg whether she saw any value in sharing this amount of information to the public under FOAA. Ms. Clegg replied that she struggled to find a reason that the public should have a right to know this amount of information about a private citizen.

Ms. Pistner noted the tension between the safety and privacy of licensees with the public need to know who is actually licensed, and asked Ms. Clegg to clarify the scope of her request for increased privacy. Ms. Clegg acknowledged the public interest, but iterated that she didn't see the need for the public to have access to the entire license application file – the wealth of information available to the public is significant, even if the applicant's address is redacted.

Ms. Meyer mentioned recent legislation limiting the scope of the Maine Human Rights Commission's investigation records that would be subject to FOAA requests, noting that the compromise struck by this exception could be a useful model. Sen. Burns noted it would be helpful to have more information on this, to inform the group's efforts in finding the balance between public and private information.

Mr. LaHaye questioned the propriety of anonymous FOAA requests. Mr. Parr weighed in, noting his belief that when citizens are required to provide private personal information to government, the government has a duty to safeguard that information, except when release of the information furthers the underlying purpose of FOAA. Mr. Parr offered that an opt-in or opt-out system might be one model to look at in trying to strike the appropriate balance.

Mr. Stout shared his familiarity with the federal Privacy Act, which acts to counterbalance the federal Freedom of Information Act. Under the federal system, personally identifiable information (PII) is only permitted to be collected and used for certain purposes, and is not permitted to be publicly disclosed.

Ms. Clegg of Planned Parenthood noted that the Maine Gambling Control Board protections for PII are a good example. Mr. Pringle suggested using as a template the exceptions we already have, for example the protections around public employee personal information, and looking at what information the public really should know about a person licensed by the State.

Anne Head, Commissioner of the Department of Professional and Financial Regulation, was invited to address the group. Commissioner Head acknowledged that the Advisory Committee was faced with an interesting and tough decision involving personal privacy interests and public

oversight of agency actions. She reminded the Advisory Committee that licensees put their information on record with agencies in order to receive permission from the State to do certain things. However, she also recognized that while there is a need for public oversight over government decision making, there may be legitimate personal safety and privacy interests that can be served through some middle ground. She then encouraged the Committee to consider what they are trying to achieve with this potential change. Mr. Parr asked if the group could focus its work on protecting certain classes of personal information. Comm. Head answered in the affirmative and noted that there may be more information collected by boards and agencies than is necessary for licensing purposes: agencies have a responsibility not to over-collect.

Staff agreed to put together templates of examples of personal information that is currently protected.

Ms. Pistner noted that the public needs access to licensing information to make sure the Board acting appropriately. For example, access to this information allows the public to know the basis for the grant or denial of a license application. However, access to this information can also be abused, she noted.

Sen. Burns remarked that this was a balancing act, but the bottom line should be protecting people's safety. Just because one seeks a professional license does not mean the person needs to put his or her life in danger. He also voiced support for developing a uniform policy for the treatment of licensing information.

Mr. Parr made a motion, seconded by Mr. LaHaye, that the group look at existing examples of policies and law that focus on personal contact information to develop a uniform policy regarding personal information in licensing records.

Rep. Monaghan stated that before individuals provide their information for licensure, there should be a disclosure from the agency as to what portion of that information will be public and what will be kept private.

Ms. Meyer noted that the Planned Parenthood letter was disturbing, but the flip side is that making PII available to the public can protect the public in ways that are more beneficial than protecting a particular licensee. For example, having access to a plumber's home address can allow members of the public to determine if he or she is a registered sex offender. Mr. Shorey stated his view that too much licensing information is publicly available, that the availability of that information can cause harm, and that it is time the group tried to do something to protect some of that information, even if the proposed solution isn't right the first time. Ms. Goucher opined that with modern technology, and Google searches, the public already has access to an incredible amount of personal information – keeping government records confidential is only putting a finger in the dike. Sen. Burns agreed that private information was readily available with modern technology, but stated that people place a lot of trust in government and expect a certain level of prudence and accountability.

The group agreed to place this item on the next meeting agenda. The Committee asked Planned Parenthood to reach out to its national organization for additional policy guidance. Advisory

Committee staff agreed to search for examples from other states of protections for personal information in licensing records.

The committee voted unanimously in favor of this course of action.

Maine Warden Service FOAA requests; Advisory Committee request to Colin Woodard and Sigmund Schutz for input and suggestions for changes in policy or law

Staff reviewed correspondence provided to the Advisory Committee regarding the ongoing dispute between the Portland Press Herald/Maine Sunday Telegram and the Maine Warden Service over the agency's response to the paper's FOAA requests. This included a letter dated June 24th from Sen. Burns and Rep. Monaghan to Colin Woodard of the Portland Press Herald and the paper's attorney, Sigmund Schutz. The letter stated that despite recent requests for a public hearing regarding the issues between the paper and the agency, the Advisory Committee was not a fact-finder or arbitrator of disputes and was better suited to discussing and considering policy solutions to problems concerning access to public records. Accordingly, the letter invited input or suggestions for changes in policy or law based on the paper's recent experiences with the Maine Warden Service.

The Advisory Committee was copied on a July 1st letter from Mr. Schutz to the Warden Service and the Attorney General's Office summarizing the paper's dissatisfaction with the agency response as being untimely and incomplete, as well as conditioned on an unreasonable fee.

The Warden Service responded to Mr. Schutz's letter on July 15, and copied Advisory Committee staff. This letter disputes the characterization of the agency's response.

On July 18th, Mr. Schutz responded to the Sen. Burns and Rep. Monaghan request letter on behalf of the paper, declining to offer suggestions for changes in the law because the paper does not engage in legislative advocacy. The letter noted that if the Advisory Committee focuses only on changes in the law, it may overlook related issues of compliance with and enforcement of current law.

Sen. Burns recapped the meeting that he, Rep. Monaghan, the Presiding Officers of the Legislature and the Office of the Attorney General had after the last Advisory Committee's meeting, at which it was decided that Sen Burns and Rep. Monaghan would send the June 24th letter.

Rep. Monaghan suggested that the Advisory Committee should have a discussion about State agencies' compliance with FOAA to prevent similar disputes from arising again. Sen. Burns disagreed, noting that the law enables aggrieved parties to use the Superior Court to force compliance. Ms. Pistner pointed to the "10 Factors for Estimating Time" document Eric Stout had put together as a helpful development for understanding agencies' response time. Also, she pointed to upcoming training for agencies presented by Brenda Kielty, the Public Access Ombudsman.

Ms. Kielty was invited to address the group. She discussed an upcoming training she is providing for all Executive Branch agency public access officers. This will be the first time all agency public access officers will receive training at the same time. The format will be a round table discussion, focused on two topics: 1) providing a cost estimate for FOAA responses, and 2) conducting searches. Regarding the cost estimate, she noted that it is not an easy determination. She worked with Mr. Stout to develop standards to apply to the estimate process, and finds the rubric developed by Mr. Stout as a helpful way for agencies to approach the estimate process. Regarding the search topic, Ms. Kielty noted that FOAA doesn't tell an agency how to search for documents and there is currently no common methodology for searching electronic records, specifically emails. After the training, Ms. Kielty plans to continue dialogue with the public access officers. Ms. Kielty agreed to attend the next meeting and present a preliminary Public Access Ombudsman report as well as an update after the public access officer training.

Ms. Meyer raised the idea of the Advisory Committee having a public hearing, not to delve into the specifics of any dispute, but to look at the bigger picture of how FOAA is working for the public. She noted that the Advisory Committee has been around for 10 years and has not held a public hearing yet. The Advisory Committee discussed this notion of a public hearing, and how it might work. Members raised questions about what the Advisory Committee would seek to do with the information gained from the public hearing, how the meeting would be run in order to elicit the most useful testimony and concerns that the viewpoint of agencies may not be fairly represented. Ms. Kielty weighed in that the idea of the public providing input on FOAA in the larger sense is very timely. FOAA is a dynamic statue and this would be a valuable opportunity to hear how it is working. Ms. Kielty also offered the idea of a summit format, where specific parties would be invited to provide input to help the focus be more clearly on ways to improve the law and less on the details of individual cases. The Advisory Committee favored providing broader public input.

Sen. Burns offered that before the next meeting the chairs would seek input from the Attorney General's Office and the Director of the Office of Program Evaluation and Government Accountability, Beth Ashcroft, for additional ideas about organizing the public hearing. Discussion on a potential public hearing will be added to the next meeting's agenda. This discussion will be held after the feedback from Ms. Kielty on the results and agency perspectives from her public access officer training.

Review subcommittee recommendations relating to existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee from its December 2015 meeting. The Advisory Committee tentatively agreed to support the recommendations of the Subcommittee, but reserved the opportunity to raise any questions or concerns at the next meeting.

Potential topic for future discussion- Consider legislation requiring local boards and committees to record their executive sessions and to preserve these records so that they may be legally discoverable if there is a later dispute about either the content or propriety of the discussion held during these sessions

Mr. Pringle expressed doubt about taking up this topic given the amount of business already before the Advisory Committee and because this is an issue that largely arises in the municipal context but there is no municipal interest representative yet appointed to the Advisory Committee to provide that municipal perspective. The municipal interest member should be seated before the Advisory Committee takes up this issue. Mr. Pringle suggested checking on the status of this appointment.

Ms. Pistner pointed out that besides checking on the status of the municipal member of the Advisory Committee, the group should be sure to give adequate public notice to municipal interests so that they may attend and provide feedback.

The Advisory Committee decided that this topic would be tabled until the next meeting, at which staff will present information on the statutory requirements around meeting minutes and executive sessions. Sen. Burns will formally encourage the appointment of the municipal member of the Advisory Committee.

Review of 10 factors for estimating time to respond to a request under the Freedom of Access Act suggested by Eric Stout

Mr. Stout gave a brief presentation to the group on his document, "Freedom of Access Act (FOAA) Email Searches: 10 Factors for Estimating Time."

Mr. Stout began with a FOAA request metaphor: When one goes to the mechanic to get an estimate for repairs to a broken automobile, it is difficult for the mechanic without first lifting up the hood and taking a look at the engine.

Mr. Stout relayed his experience assisting agencies with searches, noting that requestors usually believe the search is going to be easier and cheaper than it ends up being. He also noted the amount of difficulty for agencies to put together a good faith estimate, owed largely to the agencies not knowing from the beginning what the volume of search results will be. At the current time, it is necessary to search each individual State employee's email account. In the future, the current email system may be replaced with an email system that has an "immutable archive" that can be searched centrally. A computer is fast, but a computer can't tell whether search are results returned are really relevant to a FOAA requestor's request – this takes staff time to search through the initially returned records. Mr. Stout emphasized the importance of establishing a relationship of trust between the agency and the requestor and maintaining a conversation between the parties to be sure that the agency is spending its time producing the records the requestor is truly seeking.

Maine Center for Disease Control and Prevention

Although not on the agenda, Ms. Meyer raised an issue about a recent Maine Center for Disease Control and Prevention rulemaking that would create new public records exceptions from FOAA, rendering information about disease outbreaks not public records unless they affected

more than 2,000 people. She wondered how this could be accomplished in rulemaking. Staff agreed to look further into the issue for the group.

Anonymous FOAA requests

A topic that briefly arose earlier in the meeting was revisited by Mr. Parr, who inquired whether there was any interest by the Advisory Committee in taking up the topic at its next meeting. This would include a discussion of the extent to which, if at all, an agency can ask for the purpose of a FOAA requestor's request. Staff will provide more information on this topic, and will provide documents by email prior to the group's next meeting.

Future meetings

The Advisory Committee's third meeting is scheduled for Wednesday, August 17th, at 1:00 p.m. A fourth meeting will be held on Wednesday, September 14th at 1:00 p.m. All meetings will be held in Room 438 of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, August 17th in Room 438 of the State House.

The meeting was adjourned at 4:57 p.m.

Right to Know Advisory Committee
August 17, 2016
Meeting Summary

Convened 1:12 p.m., Room 438, Maine State House, Augusta

Present:
Sen. David Burns
Rep. Kim Monaghan
Stephanie Grinnell
A. J. Higgins
Richard LaHaye
Mary Ann Lynch
Judy Meyer
Kelly Morgan
Chris Parr
Linda Pistner
Harry Pringle
Helen Rankin
William Shorey
Eric Stout

Absent:
Luke Rossignol
Suzanne Goucher

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

Hazardous material transported by railroads

Staff discussed a draft letter from the Advisory Committee to the Legislature's Judiciary Committee, in response to the Judiciary Committee's request for the committee to review the public records exception at 1 MRSA §402, sub-§3, ¶U, protecting as confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, fire department or other first responder.

The Advisory Committee's letter recommends that the Judiciary Committee consider submitting a committee bill to the Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation from stakeholders and other members of the public, and from state and local government entities. The letter iterates the Advisory Committee's interpretation of the current law, that it is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by

rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or accidental discharge of hazardous materials.

The Advisory Committee laid out a number of questions and concerns that may help guide the Judiciary Committee's formation of a committee bill, including whether disclosure of the information sufficiently jeopardizes public safety to outweigh the public interest in disclosure, whether disclosure disadvantages a business interest sufficiently to outweigh the public interest in disclosure and whether the language of the current exception is as narrowly tailored as possible.

After the summary, Mr. Pringle made a motion, seconded by Mr. Parr, to send the letter as written to the Judiciary Committee. Mr. Stout pointed out that the federal regulations cited in this public records exception for the definition of "hazardous materials" do not point directly to the 150-plus pages of materials in 49 Code of Federal Regulations § 172.101, which should be clarified. He also wanted mention of the extensive record keeping and retention requirements in Part 172 of the federal regulations. The motion was amended to include Mr. Stout's suggested change and was voted unanimously.

Personal contact information for professions and occupations licensed by the State

Staff summarized their research into examples of models that could guide the formation of policy recommendations for a more consistent approach to adding protections for the personal information of professional and occupation licensees and license applicants. Research was condensed into a chart distributed to the Advisory Committee, and Staff reviewed this document outlining examples of policy options. The examples drew from various public records exceptions from Maine law, e.g., those protecting the residential address and telephone numbers of emergency medical services, nursing, osteopathic and medicine licensees and applicants when professional contact information has been provided. Examples from other states were also included in the document, including personal information protections for licensees in California, Indiana, Missouri and North Dakota.

Staff provided information on LD 1171 from the 127th Legislature. At the last meeting, a member had pointed to the amended version of this bill as providing an example of a reasonable compromise between privacy interests of individuals and the public interest of the public. This bill dealt with the confidentiality of the investigative records of the Maine Human Rights Commission, and the majority amendment of the Judiciary Committee would have designated certain information confidential, including medical records, the identity of a minor, personnel records, personal telephone numbers and home addresses.

The Advisory Committee invited up Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England. Ms. Clegg, who had been asked by the Committee for more information at its prior meeting, distributed a number of handouts: a memo from Planned Parenthood, a report from the National Abortion Federation on violence and disruption against abortion providers, a statement filed in Superior Court in the State of Washington by the National Director for Affiliate Security at Planned Parenthood Federation of America outlining

the history of violence and harassment against abortion providers and abortion-providing facilities, and a copy of Maryland law (MD Code, General Provisions, §4-333) making all licensing records confidential except for certain specified categories of information.

Ms. Clegg reiterated that the only non-public information in Maine licensing records is an individual's Social Security Number. She pointed out that even a licensee's federal Drug Enforcement Administration (DEA) drug authorization card is released pursuant to public records request, creating a security risk in itself. She noted that sometimes home addresses are redacted.

Mr. Pringle expressed his view that it would be better to say what isn't public than to specify what is public. Otherwise, he noted, the Advisory Committee would have to look through entire licensing files deciding what was useful to the public and what should be confidential. He stated his belief that home address, home phone and fax numbers and personal cellphone numbers should be confidential. He opined that 1 MRSA §402(3)(O) should be used as a starting place for designating what should be designated confidential in licensing records. Mr. Parr suggested an opt-in type of system, where certain licensing information would be confidential unless the subject of the records affirmatively allowed public disclosure.

Ms. Pistner voiced concern that increased agency costs to redact new categories of information in licensing records would create a fiscal note, likely dooming any bill seeking this increased confidentiality. To reduce agency time and costs, Ms. Pistner suggested perhaps developing a certain document containing information most valuable to the public that did not include private information, and then making that document a public record while the rest of the licensing files would be confidential. Mr. Parr reminded the Committee that there were other categories of licenses regulated by other departments, including 3 by the Department of Public Safety.

Ms. Clegg from Planned Parenthood asked the Advisory Committee to consider a notification system that would notify licensees if their file was requested by a member of the public.

Ms. Meyer, Rep. Monaghan and other Committee members noted that the Committee should keep in mind that there are many categories of licenses other than those commonly subject to harassment as illustrated by Planned Parenthood, expressing hesitancy at applying the same level of confidentiality to all license categories. Mr. Higgins, Ms. Meyer and Ms. Morgan variously expressed the idea that in general, the more the public knows about licensees the better, except in certain circumstances of concern, and that it was important that the public be able to verify the address of a licensee. Several members voiced support for the earlier idea of a form that would be public that contained certain licensee contact information as a solution to the potential harassment issues facing certain licensees.

Mr. Parr asked staff to review what the original request from the Judiciary Committee was on this topic. Staff replied that the Advisory Committee had been asked to develop guidance to assist the Judiciary Committee when it considered proposed confidentiality provisions for licensing information. Sen. Burns stated that the clearer the guidelines, the better, and that the Advisory Committee should err on the side of transparency.

Ms. Clegg from Planned Parenthood suggested that photographs and DEA authorization cards be kept confidential. She noted that DEA cards contain the licensee's name, address, drugs that can be prescribed, date of card issue, expiration date and DEA number.

Ms. Lynch expressed interest in communicating to other license categories to see if there were other concerns with DEA authorization information being released as public records.

Mr. Parr made a motion, seconded by Mr. Pringle, that the Advisory Committee send a letter to the Judiciary Committee with guidance for considering proposed confidentiality provisions applicable to licensing records. The letter would support the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402(3)(O) for protecting public employee personal information, except for cases in which the licensee or license applicant has only provided a personal address and not a public business address. Licensees and license applicants must either be presented with an opt-in approach to personal contact information disclosure, or else the regulating body should have a form that would be public but would exclude non-public private information about the individual.

The Committee voted in favor of the motion, 11-2.

Public Access Ombudsman update & recap of Public Access Officer training

Brenda Kielty, Public Access Ombudsman, addressed the Advisory Committee, beginning with a summary of the preliminary report distributed to members. Ms. Kielty noted that the upward trend for number of contacts from the public since 2013 has continued. Of the contacts, most are inquiries about Maine's Freedom of Access Act (FOAA) as opposed to complaints. When she receives suggestions for FOAA improvements, which happens seldomly, she said that she refers these suggestions on to the Advisory Committee. Most contacts, she noted, are from private citizens as opposed to government officials.

Ms. Kielty suggested that issues of perceived delay in FOAA response time by public bodies is often due to the expectations of the public requestors not aligning with reality. Executive sessions seem to create the most FOAA inquiries and complaints. Another popular topic is what constitutes a public meeting, especially in the context of remote participation.

Mr. LaHaye asked if Ms. Kielty contacts an agency when a member of the public complains about the agency. She replied that her goal is conflict resolution, and her intervention all depends on the particular case. She may encourage the requestor to work with the agency, as her intervention may sometimes escalate a conflict.

Ms. Kielty next discussed the recent Public Access Officer training she had given. The focus of the training was on the process of searching for records. She noted that this is an area in which FOAA is silent, and that searches for electronic records are much different than searches for paper record. The procedure begins with proper record retention, actually searching the records, assembling the records, reviewing the records and finally providing access to the requestor. Ms. Kielty noted that Advisory Committee member Mr. Stout provided assistance with the email

search portion of the training, which will be offered to each State agency as a follow-on to the initial group meeting.

Ms. Meyer asked if this information was also being provided to the Maine Municipal Association and the Maine School Management Association, and Ms. Kielty replied that she does do outreach to those organizations and will continue to do so. The information from the training will need to be customized somewhat to better address the needs of the other public bodies which these organizations represent.

Sen. Burns asked about records retention training, to which Ms. Kielty replied that the Maine State Archives provides such training. She acknowledged that more can be done in the area of records retention, and must be done.

Right to Know Advisory Committee public hearing

Staff distributed and reviewed the draft public hearing notice for the potential upcoming Advisory Committee public hearing about how FOAA is working and how it might be improved. Staff pointed out that the notice specifically states that the hearing is not a forum for the resolution of specific complaints about meetings or records.

Mr. Higgins wondered if the Advisory Committee or specific members had received any requests from the public to hold a public hearing. Several members noted that they had. Ms. Lynch noted that government officials are feeling some FOAA requests are burdensome and she expect to hear from these officials who bear the burden of responding to FOAA requests as well as from members of the general public.

Ms. Lynch suggested that staff be ready to take up the Advisory Committee's normal business in case there is little testimony provided at the public hearing.

Mr. LaHaye made a motion, seconded by Ms. Lynch, that the public hearing be held, set for September 14th. Sen. Burns added that the public hearing should take place at 1:00 p.m. while the subcommittee could meet at 10:00 a.m. The vote was unanimous.

Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee, including recommendations from its December 2015 meeting and its July 20th meeting. The Committee approved of the Subcommittee's recommendations in all instances, except for the following.

With respect to the public records exception at 1 MRSA §402(3)(R) (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, the Advisory Committee moved to set aside the item until further information could be gathered

from the Secretary of State's Office by staff regarding why this public records exception was needed given that paragraph N of the same statute already exempts all Social Security Numbers from the definition of public records under FOAA.

Regarding 22 MRSA §1711-C(20) (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee hesitated to take the recommendation of the subcommittee to repeal the provision. Staff provided an explanation of Maine's statewide health information exchange, which serves as a hub for connecting healthcare providers with electronic patient medical records from participating healthcare providers. HealthInfoNet is the state-designated organization managing this exchange. Staff relayed that through contacts with this organization they had expressed the belief that this public records exception had no effect because they were not a public body that falls within the requirements of FOAA. Additionally, HealthInfoNet communicated that it had never received a request for information from the public and saw no value in maintaining this public records exception. Staff offered that according to the criteria currently used by the Maine Supreme Court to determine whether an organization is a public body subject to FOAA, HealthInfoNet would very likely not be considered subject to FOAA. This organization is a private non-profit company established independently from any State action, the organization does not receive State funding and the State have any involvement or control over the exchange besides imposing certain security and confidentiality provisions. Staff offered that HealthInfoNet as a health information exchange is covered by two federal confidentiality laws, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act.

Mr. Pringle expressed his concern about repealing this provision, citing the law of unintended consequences. Other members echoed this concern over unintended consequences and being uncomfortable with repealing the provision unless it was certain that this information could never be released under FOAA. Several members were of a contrary position, taking the view that if the public records exception was not needed then it should be eliminated. The Advisory Committee voted to table this item and staff agreed to gather further information.

With respect to the public records exception found at 29-A MRSA §1301 (Advisory Committee reference number 55), relating to the social security number of an applicant for a driver's license or nondriver identification card, this provision is similar to the other tabled item relating to Social Security Numbers in the possession of the Secretary of State. The Advisory Committee voted to also table this item in order for staff to get further information from the Secretary of State's Office.

Proposal to require local boards and committees to record and retain the recordings of executive sessions

Staff reviewed current Maine law regarding open meetings and executive sessions, 1 MRSA §§403, 405, 407. Staff pointed out additionally that the Maine Supreme Court has held that when the propriety of an executive session is challenged, the burden is on the public body to establish that the executive session was proper.

The Advisory Committee invited Rep. Hubbell to explain his proposal. Rep. Hubbell's described his proposal, which is to require local boards and committees to record executive sessions and preserve those records so that they may be legally discoverable in case of a dispute about the content or propriety of the discussion held during these executive sessions. Rep. Hubbell then suggested the Advisory Committee hear from his constituent, Robert Garland, former Town Councilor for Bar Harbor, who had brought the issue to his attention. The Advisory Committee then invited up Mr. Garland, who explained his experience with executive sessions and a personnel matter in Bar Harbor. During litigation involving the matter, Mr. Garland noted that what had transpired during the executive sessions was recalled much differently than how he had remembered it.

Mr. Higgins asked if an attorney can be present during an executive session and whether they can request that a transcript be made. Mr. Pringle addressed the question, stating that an individual who is the subject of an executive session has the right to request to be present, have their attorney present and can request that the meeting be public. This also includes the right to have a court reporter be present to take a transcript of the proceeding, he said. Mr. Higgins asked if the transcript would then be considered a public record, to which Mr. Pringle replied that it would not be, as it would be in the possession of that person and their attorney, though it could always be released at the prerogative of that individual.

Mr. Pringle acknowledged the concern prompting the proposal, but stated that he would be extremely reluctant to have executive sessions recorded. He stated that in his view, coming from his experience in the school board context, the administrative burden of recording and indefinitely keeping these recordings and ensuring their confidentiality into perpetuity outweighed the potential for abuse of executive sessions. He reiterated that the courts place the burden on the agency or public body holding an executive session to justify the proprietary of that executive session if there is a legal challenge. A judge would make the determination regarding truthfulness and reliability of participants' recollections.

The Advisory Committee invited up a representative from the Maine Municipal Association, Garett Corbin, to provide a municipal perspective on the issue. Mr. Corbin posited that it is important to balance the law so that the public interest does not outweigh privacy interests. This proposal, he noted, would discriminate against municipalities and local government in a way that is not done elsewhere in FOAA. He referred to the portion of the executive session statute that details what constitutes proper subject matter for an executive session, 1 MRSA §405(6-A)(1), noting that an executive session is only held if an individual's right to privacy or potential damage to reputation is involved. Mr. Corbin stated that making and keeping records of these executive sessions increases the likelihood of inadvertent disclosure of this sensitive information. He added that the law as it currently stands provides a remedy through the court system.

Ms. Lynch noted that executive sessions involve much more than just personnel matters, which seems to be the focus of the discussion. She asked Mr. Corbin whether, in these other contexts, were executive sessions to be recorded and legally discoverable, would that chill the candor of these municipal discussions? Mr. Corbin agreed that it would, relating feedback from some

municipal representatives that had told him they would not hold executive sessions if this proposal went through.

After a bit more discussion, Mr. Higgins made a motion, seconded by Mr. Pringle, that the Advisory Committee not move forward to recommend any changes to the current law around executive sessions. The vote was unanimous.

The Criminal History Record Information Act (CHRIA) and the Judicial Branch

The Advisory Committee opened up discussion on a topic raised at earlier meetings, regarding the Criminal History Record Information Act (CHRIA) and the Judicial Branch's recent reversal of its policy of making confidential case files for dismissed cases. Ms. Meyer stated that she was satisfied with the Judiciary's current policy. There was no interest by members in having any further discussion.

Anonymous FOAA requests

In response to the Advisory Committee's request at its prior meeting for more information on the extent to which, if any, an agency may ask for the purpose of a FOAA requestor's request, staff began by reviewing current Maine law. Staff related that 1 MRSA §408-A provides the general principle that "a person has the right to inspect and copy any public record", and subsection 3 of that section provides that an agency or official "may request clarification concerning which public record or public records are being requested." Staff continued that an individual may be required to clarify their public records request by an agency, and that while nothing in FOAA prohibits an agency or public body from asking additional questions to a requestor, the requestor is not obligated to provide any other information to the agency and the agency may not discriminate in its response to the request regardless. Staff then directed the Advisory Committee to a handout with a comparison of other states' public records laws in regard to how they handle requestor identity and purpose.

Mr. Stout noted that often in the context of email requests, a requestor is anonymous by sheer virtue of their obscure email address and not by any intention of anonymity by the requestor. Mr. Pringle offered his opinion that a requestor should not be required to give their name or purpose when making a request for public records. Sen. Burns wondered if members thought a change should be made to FOAA to prohibit agencies from asking a requestor's name or purpose, with several members disagreeing that this was needed. Mr. LaHaye posed to the group whether there should be a distinction between commercial and non-commercial purposes of requestors. Mr. Higgins shared his view that if a record is open, it should be allowed to be used for whatever purpose the requestor wants. Mr. Pringle shared that the Advisory Committee has wrestled with the commercial/non-commercial distinction in the past, and could never work out how to precisely define the difference between the two. Mr. Parr noted that as a practical matter, even if there were a distinction made, a person can have someone else request a public record for them, in order to get around the restriction. He also wondered what the State's policy would be for what to do with requestor information if collected.

The Advisory Committee voted unanimously to take no action on this topic. Rep. Monaghan noted that if there were major concerns regarding anonymous FOAA requests, such as voiced by Planned Parenthood, then those parties could raise this with their legislators to bring legislation forward in the next legislative session.

Future meetings

The Advisory Committee's fourth meeting is scheduled for Wednesday, September 14th at 1:00 p.m. in Room 228 (Appropriations Committee Room) of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, September 14th in Room 438 (Judiciary Committee Room) of the State House.

The meeting was adjourned at 4:57 p.m.

Right to Know Advisory Committee
September 14, 2016
Meeting Summary

Convened 1:07 p.m., Room 228, Maine State House, Augusta

Present:	Absent:
Sen. David Burns	Kelly Morgan
Rep. Kim Monaghan	Judy Meyer
Suzanne Goucher	Luke Rossignol
Stephanie Grinnell	
A. J. Higgins	
Richard LaHaye	
Mary Ann Lynch	
Paul Nicklas	
Chris Parr	
Linda Pistner	
Harry Pringle	
Helen Rankin	
William Shorey	
Eric Stout	

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves. Mr. Nicklas participated in the meeting but did not vote, as his appointment was not official until September 15th.

Public Hearing – Maine's Freedom of Access Act

Sen. Burns opened the Advisory Committee's public hearing to gather public input on how Maine's Freedom of Access Act (FOAA) is working, inviting testimony from any interested parties that wished to address the group.

Dr. Dwight Hines came up to the podium and introduced himself. Dr. Hines stated that there were no incentives for a public agency to keep an information inventory, resulting in unreasonable delays in providing information in response to public records requests that should be reasonably anticipated and to which the agency should be able to easily respond.

Dr. Hines also stated his view that it is a problem that the court system is not covered by FOAA. He testified that public officials were too often turning FOAA requests over to attorneys, causing delays and making it more difficult for the requestor to communicate about the request. He

noted that meetings that should be public are not being properly noticed, and that at noticed meetings it is apparent that the public body has already privately had their discussion and made their decision. He opined that the value of the open records law is to get people involved in their government and that he has noticed that community cohesiveness has become a problem in recent decades. After 1975, he noted, there was a decline in community engagement with town government and town councils not acting openly and not creating an inclusive atmosphere. Dr. Hines noted that he has observed public bodies causing unnecessary delays in court proceedings in which a requestor is challenging the public body's response to a public records request under FOAA, with these delays having the effect of running up legal costs for the requestor mounting the challenge. He stated his desire that the medical examiner share data. He stated that the State's administrative courts are a dark place regarding governmental transparency. Dr. Hines stated that the public is not currently getting the "sunlight," i.e. government transparency, it deserves. He noted that civilian review boards of police departments are a positive thing, although they are expensive. Dr. Hines stated that nothing in FOAA requires quality of information. He noted that there was not a spirit of open government, even on the Advisory Committee.

Sen. Burns thanked Dr. Hines for his comments and asked if he would mind providing written comments, to which Dr. Hines agreed. Mr. Stout asked Dr. Hines about agency delays in responding to FOAA requests and their use of technology; Dr. Hines stated that agencies appeared to be afraid of providing information, so they delay, and wondered why it would take so long for agencies to access a database. Dr. Hines cited a "computer mendacity."

Sen. Burns asked if Dr. Hines thought there may be a problem with agency access to technology, to which Dr. Hines replied there was not and that agencies seemed to currently have more than they can actually use. Dr. Hines lamented that there were not incentives to use modern technology such as email, due to public officials' fear of FOAA.

Rep. Monaghan and Sen. Burns acknowledged this concern, each noting that given modern technology and how easy it is to communicate via emails and text messages, it is unfortunate that fear of FOAA is putting some in the position of not being able to efficiently use this technology.

Sen. Burns then asked staff to provide information from the two pieces of written testimony, submitted prior to the public hearing. Staff first related comments received from Lt. Gerald Congdon of the Wells Police Department, who expressed frustration with the difficulty in navigating what can be released in a FOAA request. Lt. Congdon recommended a flowchart be created to provide an easy to follow reference for public officials in responding to FOAA requests. Staff next related the comments received from Robin Hadlock Seeley of Pembroke. Ms. Seeley suggested that the law provide guidelines for a reasonable response time for agencies and other public bodies responding to FOAA requests. She also expressed concern that town officials, both elected an unelected, are unfamiliar with FOAA, including understanding which records are public and what notice is required before a public meeting.

Rep. Monaghan inquired from Ms. Kielty whether or not there is an existing flowchart type of summary of FOAA obligations of public officials and bodies. Brenda Kielty, Public Access Ombudsman, replied that there was not one currently, but that she would produce one and

distribute it. Sen. Burns asked Ms. Kielty if she had any recommendations regarding FOAA and possible improvements to the law. Ms. Kielty stated that FOAA is a balancing statute, and thus needs to be evolving and dynamic. She agreed to provide written comments for the Advisory Committee's consideration.

Mr. Pringle stated that he was in favor of having a flowchart developed, but noted the problem with this type of summary is that it will inevitably vary depending on the type of specific information being sought. Ms. Kielty acknowledged this concern and stated that she would follow up with Lt. Congdon to determine his needs.

Garrett Corbin of the Maine Municipal Association (MMA) next addressed the group. With respect to the flowchart, Mr. Corbin noted that this suggestion came about due to outreach efforts by MMA. Having discussed with attorneys in the legal department at MMA, who regularly provide information to municipal members in response to legal questions that include FOAA questions, Mr. Corbin relayed concerns with the fee amount that can be charged by the municipality or other public body for responding to FOAA requests. The current $15 per hour rate that can be charged for time spent past the first hour of responding to a FOAA request is very low, especially given that responding to such requests often requires paying for the services of attorneys. Mr. Corbin recommended a fee standard that permitted actual costs to be assessed to a requestor, perhaps with some sort of balancing mechanism.

Sen. Burns asked about issues with timeliness of FOAA responses, and Mr. Corbin replied that no concerns had been relayed to him. Rep. Monaghan asked if Mr. Corbin could provide written testimony for the Advisory Committee, to which he agreed. She then asked him what he thought of the issue raised by Ms. Seeley in her testimony, regarding inadequate FOAA training for municipal officials. Mr. Corbin replied that FOAA places responsibility for training on the municipalities. MMA tries to help, he stated, but it is ultimately up to the municipality. He expressed doubt about how widespread the issue is. Mr. Stout asked Mr. Corbin about his thoughts and perspective on electronic data retrieval by municipalities in the FOAA context. Mr. Corbin stated that he was unsure, but noted that municipalities face pressures with available staff time due to the tightening of municipal funding. Mr. Parr asked what Mr. Corbin took, if anything, from the low turnout at the public hearing, to which Mr. Corbin speculated that FOAA issues tend to be small and discrete, except for certain issues that get large press coverage, and perhaps there was a lack of media coverage about the public hearing. Mr. Parr noted his surprise that more input was not being provided from the public on how FOAA might work better, given the large media interest in FOAA issues this summer.

Sen. Burns suggested that one shouldn't read too much into the low attendance at the public hearing. He stated his desire for an additional meeting for the Advisory Committee, in order to complete unfinished business and to see if there may be a consensus with regard to taking action in response to comments received. There were no objections, and the next meeting of the Advisory Committee was scheduled for October 5th.

Hazardous material transported by railroads

Staff provided copies of the final draft letter from the Advisory Committee to the Legislature's Judiciary Committee regarding the public records exception at 1 MRSA §402, sub-§3, ¶U, which makes confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, fire department or other first responder. The Advisory Committee approved the letter, which staff will send to the Judiciary Committee and which will also be included in the Advisory Committee's annual report.

Personal contact information for professions and occupations licensed by the State

Staff reviewed another draft letter from the Advisory Committee to the Judiciary Committee, this one regarding public access to personal contact information for individuals licensed or applying for licensure with the State. The letter reflected the recommendations made by the Advisory Committee on this issue at its August 17th meeting. There was a minor change made from a draft of the letter circulated to Advisory Committee members prior to the meeting, based on recommendations from Sen. Burns and Mr. Parr, so that the letter references the need to balance the privacy interests of the licensees against the "consumer interests" of the public, as opposed to the "public safety interests" of the public. The Advisory Committee approved the letter, which staff will send out to the Judiciary Committee and which will also be included in the Advisory Committee's annual report.

Annual Report – preliminary draft

Staff reviewed a preliminary draft of the annual report with the Advisory Committee. A more complete draft will be presented for review at the next meeting.

Public Records Exceptions Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

After an introduction by Rep. Monaghan, staff presented the recommendations of the Public Records Exceptions Review Subcommittee. For most of the reviewed public records exceptions, after staff described the exception and the Subcommittee's recommendation, the Advisory Committee adopted the Subcommittee's recommendation of continuing the exception with no modification. The Advisory Committee recommends no modification to the following exceptions, identified by reference number as listed on the chart prepared by staff: 6, 13, 36, 37, 39, 40, 41, 42, 51, 54, 56, 59, 60, 61, 62, 64, 65, 67. The following items resulted in notable discussion or disagreement with the Subcommittee's recommendation.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 (Advisory Committee reference number 2), relating to certain personal information contained in communications between an elected official and a constituent, staff reviewed proposed legislation based on the recommendation of the Subcommittee that the exception apply to the entire record of the communication, as opposed to certain types of information found within the

record of the communication. The legislation would provide, however, that such records must be public if the specified categories of information contained within the communication can be easily redacted, and that such redaction must occur before release of the records.

Mr. Pringle stated that this legislation would turn the presumption that a record is public on its head. He noted that the public seeking information about a communication between an elected official and constituent would either receive a redacted copy or not receive anything. He also pointed out that the "significant effort" standard by which the record would be determined to be public is unclear and would constitute a new judicial standard.

Mr. Parr acknowledged Mr. Pringle's points, but noted that one could approach this from another perspective. The problem with the current statute, he noted, is that public records are defined in law but FOAA is often focused on information within records, as opposed to the records themselves. Mr. Parr explained that this creates a burden on the agency to identify information excepted from FOAA and to redact if appropriate. He noted that it can be very challenging for a public official to make the determination whether or not certain information falls within a public records exception, and that this puts a lot of responsibility and risk on the public officials who need to decide whether or not to redact. Mr. Parr also stated that this burdensome process can lead to perceived delay in providing records pursuant to FOAA request. Mr. Parr agreed with Mr. Pringle's point about the judicial standard in the language, and suggested that perhaps "unduly burdensome" would be a better test because it would be more familiar in the context of FOAA.

Mr. Stout echoed that non-public information embedded in records that are otherwise public is an example of why responding to FOAA requests can be a lengthy process. He noted that in the context of constituent communications, communication is easy via email and sensitive information may be easily shared. He also noted that technology makes the expectations around producing records and information to requestors an ever-changing challenge.

Rep. Monaghan stated that she tries to not let constituents provide too much personal information in their emails, and that the public needs to understand what information in a communication with an elected official will be considered public. Mr. Burns shared her concerns, stating that there should be a disclaimer and a link to the FOAA law on every legislator's email. He also noted, however, that quite often constituents send very personal information before they would have a chance to see a disclaimer on the legislator's email.

Mr. Pringle acknowledged that there is a struggle associated with redacting, but that this is the price the government must pay to ensure openness. He also noted that the Advisory Committee has tried to accommodate agencies in this regard by recommending legislation allowing them to charge the requestor a fee.

Ms. Pistner expressed her discomfort with the reference to redacting in the proposed legislation, noting this would be a unique reference in FOAA and wondering what this would tell the courts about when redaction is or is not required. Ms. Lynch suggested that this should go back to the Subcommittee for review, because Subcommittee members had not seen this draft since making their original recommendation. Mr. Parr suggested that language be added to have a standard

disclaimer regarding FOAA and constituent emails for elected officials and perhaps getting rid of the exception altogether. Mr. Burns expressed interest in Mr. Parr's suggestion about the email disclaimer, and wondered if perhaps this could be accomplished with a policy of the Legislature instead of a statute.

Mr. Parr made a motion, seconded by Mr. Stout, to send this issue back to the Subcommittee for further discussion.

Mr. Stout stated that redaction is becoming more and more of an issue that agencies are faced with when dealing with electronic records, particularly emails. Mr. Parr echoed Ms. Pistner's concern about using the term redaction, but noted that it was also used in FOAA at 1 MRSA §408-A. Mr. Parr closed the conversation noting that this issue was also representative of his broader frustrations with FOAA – when you make specific information confidential it will require redaction.

The Advisory Committee approved the motion by a unanimous vote of those present.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶R, (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, staff related the information gathered from the Secretary of State's Office and Bureau of Motor Vehicles (BMV) in response to the Advisory Committee's questions about this exception at its September meeting. The agencies did not object to the repeal of the exception, given the broader exception for Social Security Numbers in paragraph N of the same subsection of the statute. A representative of the BMV, Robert O'Connell, appeared before the Subcommittee earlier in the day to discuss this item as well as item number 55, discussed below.

Regarding the confidentiality provision at 29-A MRSA §1301 (Advisory Committee reference number 55), staff related that the BMV had shared draft legislation with the Subcommittee that would amend this confidentiality provision by eliminating the discretionary sharing of Social Security Numbers as permitted by federal law and instead allowing the sharing of this information only as required by federal law, specifically 18 United States Code, Section 2721(b). Mr. O'Connell had notified the Subcommittee that the Secretary of State would be submitting a bill to accomplish this to the next Legislature. Staff passed along the Subcommittee's recommendation that the Advisory Committee indicate endorsement of this change but not recommend legislation because the Secretary of State will submit the bill. Mr. Parr made a motion, seconded by Ms. Lynch, that the Advisory Committee endorse the Secretary of State's proposal but not recommend any modification to this confidentiality provision. The motion passed with a unanimous vote of those present.

With respect to 12 M.R.S. §10110 (Advisory Committee reference number 38), relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license, staff reviewed a draft letter from the Advisory Committee to Chandler Woodcock, Commissioner of Inland Fisheries and Wildlife, based on the recommendations of the Subcommittee. Staff explained that in response to inquiries on this exception, the Department of Inland Fisheries and Wildlife had proposed an amendment that would expand the exception to make the email addresses of individuals applying for permits and registrations as well as hunting

licenses confidential. Under the proposal, the commissioner would also be permitted to allow a member of the public to clearly indicate that the individual's email address not be kept confidential. The proposal included additional exceptions to confidentiality to allow the department to disclose email addresses to a contractor or state agency for marketing or wildlife management purposes. The draft letter expresses that while the group is supportive of a default confidentiality of this information, it does not have sufficient information or understanding of the scope of the proposed exception to recommend the legislation, and encourages the Commissioner to submit the Department's proposal as a bill to the next Legislature. The Advisory Committee approved of the letter unanimously.

With respect to 22 MRSA §1711-C, sub-§20 (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee had tabled this item at its last meeting after several members hesitated to endorse the recommendation of the Subcommittee to repeal this provision as unnecessary. At the Advisory Committee's August meeting, Mr. Parr had asked staff whether the confidentiality protections of the federal Health Insurance Portability and Accountability Act (HIPAA) applied to these records. Staff discussed the public records exception in FOAA at 1 MRSA §402, sub-§3, ¶A that excludes from the definition of public records any records designated confidential by another statute, noting that though the courts in the State of Washington had interpreted a nearly identical provision as including the statutes of other states and the Federal Government, it was unclear what breadth the Maine courts would attribute to this provision of FOAA. Staff advised that regardless, the confidentiality provisions under HIPAA and its associated regulations very likely apply to Maine HealthInfo Net as a "business associate" of a "covered entity," and indeed HealthInfoNet considers itself bound by HIPAA. Staff stated that HIPAA explicitly preempts state law that is less protective of private health information and therefore would apply as a minimum regardless of any conflicting provisions of State law. Staff counseled that their analysis was based on the organization of the current state-designated statewide health information exchange in Maine, and that it was possible that changes to the health information exchange system or provider could change the analysis. The Advisory Committee voted to continue the current confidentiality provision without any modification.

With respect to the public records exception at 35-A MRSA §10106 (Advisory Committee reference number 69), relating to records of the Efficiency Maine Trust and its board, staff related the Subcommittee's recommendation of proposed legislation provided by the Executive Director of the Efficiency Maine Trust, Michael Stoddard. Staff reviewed the proposed amendment, which would move the authority to determine whether records of the trust were business sensitive, and therefore confidential, from the board to the director. It also gives authority to the director, as opposed to the board, in making the determination of what information that would be otherwise confidential may be released. Additionally, the amendment would replace an "and" with an "or," so that any of the criteria for confidential trust records may be present instead of all criteria needing to be met in order for the records to be determined confidential.

Ms. Lynch stated that although she had voted in favor of this amendment at the Subcommittee meeting, after re-reading it she had concerns about the language, particularly the implications of

the new "or" with the application to entire "records," which would broaden the current confidentiality provision more than originally intended. Ms. Lynch made a motion, seconded by Mr. LaHaye, to refer this item back to the Subcommittee for additional review. The motion passed with a unanimous vote of those present.

Other issues or questions

At the invitation of the Sen. Burns to Advisory Committee members for additional issues for discussion, Mr. Parr raised an issue posed by a recent court holding that under FOAA an agency cannot require payment of a fee from a requestor before providing documents pursuant to a FOAA request once the agency's work of searching and compiling documents has already been completed. Mr. Parr asked that the next meeting agenda include an item to discuss modifying the advance payment provision of FOAA at 1 MRSA §408-A. Additionally, Mr. Parr wanted the group to discuss whether FOAA should allow for litigation over records that have previously already been provided to an individual. Ms. Lynch noted that she would be abstaining from any discussion on this topic. By consensus, the group agreed to place this item on the next agenda.

Mr. Stout made a motion, seconded by Mr. Parr, for an item to be added to the next meeting agenda to discuss the Advisory Committee forming a subcommittee on technology. The motion passed with a unanimous vote of all present.

Future meetings

The Advisory Committee's fifth and final meeting of the year is scheduled for Wednesday, October 5th at 1:00 p.m. in Room 438 (Judiciary Committee Room) of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, October 5th in Room 438 (Judiciary Committee Room) of the State House.

The meeting was adjourned at 4:09 p.m.

Right to Know Advisory Committee
October 5, 2016
Meeting Summary

Convened 1:13 p.m., Room 438, Maine State House, Augusta

Present:	Absent:
Sen. David Burns	Suzanne Goucher
Rep. Kim Monaghan	Mary Ann Lynch
Stephanie Grinnell	Linda Pistner
A. J. Higgins	Luke Rossignol
Richard LaHaye	
Kelly Morgan	
Judy Meyer	
Paul Nicklas	
Chris Parr	
Harry Pringle	
Helen Rankin	
William Shorey	
Eric Stout	

Staff:
Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

Discussion regarding the September 14th public hearing on Maine's Freedom of Access Act

Sen. Burns opened the Advisory Committee's discussion regarding the September 14th public hearing to gather public input on how Maine's Freedom of Access Act (FOAA) is working by inviting Brenda Kielty, Public Access Ombudsman, to address the group.

Ms. Kielty recounted that at the last meeting the Advisory Committee had asked her to come back and discuss the strengths and weaknesses of FOAA. Ms. Kielty stated that she was not providing a list of strengths and weaknesses because she did not think it would be particularly helpful. Ms. Kielty said that while she was not going to directly answer the question, given how broad it is, she wanted to give the Advisory Committee a framework for evaluating the statute before it considers making any changes. Changing one aspect of the Act, she noted, can have consequences for other aspects of the Act as well.

Ms. Kielty described her view of the best kind of statute, that it be simple yet elaborated, that is, not too complex yet not so simple as to create ambiguity. Whenever FOAA is made more complex, she

pointed out, it makes the administration of the law more complex for every public body in the State. She noted that FOAA is a very practical statute.

A proper analysis of FOAA should entail dissecting each section, interpreting it and deciding based on policy whether it is good or bad, Ms. Kielty stated. She offered to look at any particular portion of FOAA that the Advisory Committee was willing to ask her to. Sen. Burns thanked Ms. Kielty for her perspective.

Mr. Stout asked Ms. Kielty if the training requirements in FOAA may be expanded or better defined in FOAA than they are currently. Ms. Kielty acknowledged that putting a training requirement for officials into FOAA was a very important step. Putting something pertaining to FOAA training for all State employees, she noted, may be better accomplished through policies than by statute.

Staff noted that there were no comments or written testimony received since the public hearing. Staff had followed up with the Maine Municipal Association, which noted that it had nothing further to offer other than the written testimony it received from an official in Wells and already provided to the Advisory Committee.

Sen. Burns stated that, in summary, the Advisory Committee held a public hearing to see if it needed to consider changes to FOAA to recommend to the Legislature, and for whatever reason, had not received a lot of responses. Sen. Burns agreed with Ms. Kielty that education and training is very important, and suggested that technology issues need to be addressed in order to make sure that the statute is working as it was intended.

Review of proposed Department of Health and Human Services, Maine Center for Disease Control and Prevention: Data Release Rule, 10-144 CMR, Ch. 175

Staff reviewed the recent Department of Health and Human Services, Maine Center for Disease Control and Prevention (CDC) rulemaking establishing a Data Release Rule covering the agency's policies for the release of health-related data.

Staff began by reviewing the Rulemaking Fact Sheet and then proceeding to the actual proposed text of the rule. Staff summarized the rule and reviewed the statutory language upon which authority the agency based its rulemaking, starting with Title 22, section 42, subsection 5. This provision provides confidentiality for Department of Health and Human Services records that contain personally identifying medical information that are created or obtained in connection with public health activities or programs. Among the exceptions to this confidentiality provision is one for disclosures that are specifically provided for by statute or by department rule. Staff also reviewed the confidentiality provision found at Title 22, section 824, which makes confidential the names and other information that may be used to identify an individual having or suspected of having a disease or condition. Under the statute, information that does not name or otherwise identify the individual may be released at the discretion of the Department of Health and Human Services.

Ms. Meyer pointed to the "indirect identification" definition in the rule as being of most concern. Ms. Meyer stated that this provision adds an equation for determining whether a population size is so small as to constitute indirect identification, triggering the confidentiality requirements in statute. Ms. Meyer stated that a massive amount of disease outbreaks would be required before the CDC would be permitted to release information under this new rule. She gave the recent example of two

children being sickened by E. coli bacteria after contact with farm animals during a fair, stating that under this new rule CDC could not release that outbreak information, even though in her view this is something to which the public should be alerted.

Sen. Burns asked which may be the appropriate body to address this concern if the Advisory Committee wished to weigh in on the issue. Staff offered that the Legislature's Health and Human Services Committee or Judiciary Committee could be appropriate bodies to suggest action from. For example, staff explained, the Legislature could adjust the rulemaking authority of the Department of Health and Human Services so that it was no longer authorized to adopt the rule, or could otherwise limit the scope of the rule. Staff stated the principle that the Legislature has delegated authority to the agency by giving it this rulemaking authority and that, if the Legislature wishes, it can withdraw or adjust this authority.

Mr. Pringle inquired as to the effective date of this rule, and staff replied that there was a 150 day review period by the Attorney General's Office before the rule could become final and in effect.

Mr. Parr stated that there is a purpose for this rule, and that it flows out of very broad authority delegated to the department. He stated further that, given the broad authority under statute, the department could have arguably effected this change through its policies, without having to engage in formal rulemaking. He also noted that this rule has progressed past the stage of public comment on the policy, and suggested that the Advisory Committee be careful about wading into the substance of this rule. Mr. Parr offered that one potential legislative change would be to designate this category of rule a major substantive rule, requiring approval from the Legislature before enactment, though it did not seem like the Advisory Committee was contemplating this type of action.

Ms. Meyer stated that this rule felt like a new FOAA exception being enacted through rulemaking. Sen. Burns noted he shared the same concerns, and also cited concerns with information about Lyme disease. He wondered whether the public was really aware of this proposed rule. Ms. Meyer noted that there was a lot of feedback provided at the rulemaking hearing, but that the public doesn't necessarily follow these issues until they become an issue and it is too late. Ms. Morgan stated her view that this rule is very arcane and outside of the public's awareness, and that the public will have concerns with this if an outbreak happens. Mr. Nicklas asked whether exceptions exist to allow this information to be released, to which staff answered that they would double check the statutes.

Mr. Higgins suggested that perhaps the Advisory Committee should lay out its concerns to the chairs of the next Health and Human Services Committee of the Legislature, and leave the matter to their discretion. Sen. Burns expressed support for this idea. Mr. Parr noted that, as someone who occasionally does agency rulemaking, he appreciates that the Maine Administrative Procedure Act is a multistep process which involves notifying both the legislative committee of jurisdiction and the public of the proposed rulemaking, and that it falls to citizens to educate themselves about important issues. Sen Burns agreed with this, but noted that he still thought the issue deserved a second look by the policy committee.

Mr. Parr made a motion, seconded by Mr. LaHaye, to send a letter to the Legislature's Health and Human Services Committee explaining the Advisory Committee's concerns with the new CDC rule and leaving follow up on the matter to that committee's discretion. The motion carried by a vote of 13-0.

Staff asked for clarification about the letter, and after brief discussion it was clarified that the letter would ask the Health and Human Services Committee to: (1) take another look at the new CDC rule and get its own understanding of what is happening; (2) look to see whether the confidentiality provision at 22 MRSA §824 should be modified to address any concerns the proposed rule raises; and (3) look at whether the personal privacy interest protected by the rule outweigh the public interest in public health issues, given the general policy of openness under FOAA.

***Flanders v. State et. al.*, as it relates to (1) requiring advance payment for FOAA requests; and, (2) repeated requests for records that have lawfully been withheld by a government entity**

Staff reviewed the basic facts and holding of the recent Superior Court decision, *Flanders v. State, et. al*, BELSC-CV-15-12 (Me. Super. Ct., Waldo Cty., Aug. 12, 2016), with attention to the issues raised for discussion at the Advisory Committee's September meeting. Those issues were (1) requiring advance payment for FOAA requests; and, (2) repeated requests for records that have lawfully been withheld by a government entity. The Superior Court held that the Maine State Police could not require payment of the costs of copying records before providing them to the requestor; the Court also held that repeated requests for the same documents are not prohibited by FOAA, but that FOAA does provide procedures for an agency or official to deny a request when compliance would be unduly burdensome or oppressive.

Regarding the issue of repeated requests, Mr. Parr explained that this may not be an issue in practice because normal rules of review and precedent would likely allow agencies facing identical requests to deny the records without extended litigation. Mr. Nicklas added that any proposal to address this concern would need to account for the fact that some records may be confidential at one time, but become public at another time.

Regarding the issue of requiring payment for records in advance, Sen. Burns welcomed discussion from Ms. Kielty. Ms. Kielty shared her view that the Superior Court Justice wrongly applied the law regarding payment in advance because Title 1, section 408-A, sub-§8 allows an agency or official having custody of a public record to charge fees for the costs of compliance, and because sub-§10, which specifies when payment in advance may be required, only applies when the estimate of the cost of compliance exceeds $100. Ms. Kielty noted that it is common practice for agencies to ask for advance payment. She further stated that she did not believe that the statute needed to be amended. Members of the Advisory Committee both agreed that the statute may have been wrongly applied and expressed concern that other courts would interpret the law similarly.

Mr. Pringle suggested adding a new paragraph F to Title 1, section 408-A, subsection 8, with the following text: "Payment of all costs may be required before the public record is provided to the requestor."

Rep. Monaghan stated that she was hesitant to make changes because of all the work in the Legislature to put the fee provisions of FOAA as they are. Mr. Pringle offered that one option would be for the Advisory Committee to do nothing and have the ombudsman address the issues in the FOAA website's frequently asked questions. Ms. Morgan expressed support for that suggestion, and asked for clarification on the concern with having to mail documents before receiving payment.

Mr. Parr stated that if agencies are put in the position of not receiving fees before they release public records, there is no incentive for requestors to pay. He noted that he would defer to the court case

before he would defer to the website FAQ. Mr. Parr stated that the law should be made clear that once the work of preparing the public record for release is finished, an agency can require the requestor pay the fee before releasing the records.

Sen. Burns stated that if people did not like the court opinion, then either it should be appealed or there should be a change in statute, opining that it was not wise to ignore a Superior Court opinion.

Chris Parr made a motion, seconded by Bill Shorey, to amend FOAA as suggested by Mr. Pringle. The motion carried by a vote of 10-3.

Public Records Exceptions Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 (Advisory Committee reference number 2), relating to certain personal information contained in communications between an elected official and a constituent, staff distributed proposed legislation based on a recommendation of the Subcommittee that the Advisory Committee had reviewed at its prior meeting and the Subcommittee had reviewed again during its meeting earlier in the day.

Mr. Parr explained the Subcommittee's revised recommendation on this exception. The Subcommittee recommended keeping the existing public records exception as is, but also recommended adding a new public records exception to make confidential the same categories of personal information contained in communications between the public and a "public official." He also explained the Subcommittee decision to recommend adding as a topic of discussion for next year's Right to Know Advisory Committee Mr. Stout's recommended new public records exception for personally identifiable information generally.

Sen. Burns asked staff if Ms. Pistner's concerns about enacting broad public records exceptions that do not account for the more specific limits on disclosure contained in the subject-specific statutes, which she expressed by an email sent to the entire group and distributed and discussed at the morning's Subcommittee meeting, would also apply to this proposed new public records exception. Staff replied that her comments were not directly in response to this proposal, but that there may be a similar concern with the breadth of the proposed new exception. Staff explained that the proposal would except information in a "communication" with a public official, and that the term could be interpreted broadly to include practically any information supplied by the public to a public agency, including, for example, licensing application information. Staff offered that amending the proposal to apply to "correspondence" may help limit the scope of the exception more in line with the proponents' intention. Mr. Parr expressed support for the idea of this clarification. Mr. Pringle stated that it seemed the group was trying to solve a problem that didn't exist because the existing exception would apply to any constituent communication regardless of whether it was in the hands of a public agency or the elected official. He suggested leaving the current exception as is, without expanding it. Mr. Parr agreed with Mr. Pringle's assessment in regards to communications between a constituent and elected official that later end up in the hands of a public agency, but that the issue the proposal is trying to address is the case in which the same information is sent by the member of the public directly to an agency. Mr. Parr continued that an agency has no ability to redact this information unless there is a specific public records exception applicable. Mr. Pringle acknowledged

the concern and noted that he sensed reluctance from the Advisory Committee in enacting a broad exception applicable to all state government. Mr. Pringle also expressed support for the Advisory Committee looking into at some future date the issue of whether broader exceptions from FOAA for personally identifiable information should be put in place.

Mr. Pringle made a motion, seconded by Mr. Stout, to recommend no modification to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 and that the broader question of whether to create a new exception for information in communications between the public and any public official be addressed by the Advisory Committee in a future meeting. The motion carried by a vote of 13-0.

Mr. Parr then made a motion, seconded by Mr. Stout, that the Advisory Committee at its next full meeting next year discuss the idea of enacting a universal definition and public records exception in FOAA for personally identifiable information, and to also to look at creating a general disclaimer to put the public on notice that its communications with elected and other public officials may become public records under FOAA. The motion carried by a vote of 13-0.

The Advisory Committee voted 12-0 in agreement with the Subcommittee recommendations of no modification with respect to the public records exception at 29-A MRSA §2117-A (Advisory Committee reference number 57), relating to relating to data collected or retained through the use of an automated license plate recognition system, 32 MRSA §91-B, sub-§1 (Advisory Committee reference number 58), relating to quality assurance activities of an emergency medical services quality assurance committee and 32 MRSA §91-B, sub-§1, ¶ D (Advisory Committee reference number 62), relating to examination questions used for credentialing by Emergency Medical Services Board.

With respect to the public records exception at 34-B MRSA §1931, sub-§6 (Advisory Committee reference number 66), relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board, the Advisory Committee voted in line with the Subcommittee recommendations for no modification of the current exception and for the Advisory Committee to send a letter to the Legislature's Health and Human Services Committee notifying it that the board has not been meeting and to consider whether the statute should be repealed.

With respect to the public records exception at 35-A MRSA §10106 (Advisory Committee reference number 69), relating to certain records of the Efficiency Maine Trust and its board, the Advisory Committee staff explained the amendment offered by Michael Stoddard, Executive Director of the Efficiency Maine Trust and recommended by the Subcommittee. The Advisory Committee had reviewed this exception and the proposed legislation at its last full meeting and had sent it back to the Subcommittee for additional review. Staff reviewed the revised proposal, which differed from the prior draft by merging subparagraphs 1 and 2. The more substantive change explained by staff was eliminating the confidentiality of entire records containing the social security number, address, telephone number or e-mail address of a customer that has or may participate in a program of the trust and instead making just this specific information found in otherwise public records confidential. Mr. Parr moved, seconded by Mr. Stout, to adopt the recommendation of the Subcommittee and recommend legislation to amend this public records exception. The motion carried by a vote of 12-0.

Discussion regarding potential formation of a subcommittee of the Right to Know Advisory Committee in 2017 to focus on technology issues

Mr. Stout addressed the group, sharing his observation that the number of technical issues that have arisen in prior years with the Advisory Committee led to the creation of a new seat on the Committee for a member with expertise in information technology. Mr. Stout recommended that a subcommittee be formed that would wrestle with these issues involving technology in more detail and bring its recommendations to the full Advisory Committee for consideration. Mr. Parr made a motion, seconded by Mr. Pringle, to create such a subcommittee next year.

Rep. Monaghan expressed her support for the idea, stating that she was confident new issues around technology and FOAA would arise in the upcoming legislative session. Sen. Burns asked for members interested in joining the subcommittee, to which Mr. Stout and Mr. Parr volunteered. Sen. Burns recommended the subcommittee get together and start talking about issues prior to the Advisory Committee's next meeting next year. Rep. Monaghan noted that when presenting the Advisory Committee's annual report to the Judiciary Committee she would discuss this technology subcommittee and suggest that the Judiciary Committee refer any technology related FOAA issues to this subcommittee. Sen. Burns expressed support for the subcommittee meeting with the newly appointed legislative members of the Advisory Committee, noting that such meetings would be publicly noticed. Mr. Stout stated his interest in the subcommittee taking a proactive role, taking a fresh look at issues that the Legislature is or should be wrestling with.

The motion carried by a vote of 13-0.

Review Annual Report – preliminary draft

Staff presented the latest draft annual report for the Advisory Committee, and then discussed the process for reviewing the report before submission and submitting any recommendations for revision. The report will be distributed via e-mail. Minor technical suggestions and edits may be made over email, but if there are any substantive concerns or concerns that the report does not reflect the Advisory Committee's recommendations, such discussions would have to be held in a public meeting.

The meeting was adjourned at 3:52 p.m.