Right to Know Advisory Committee
Public Records Exceptions Subcommittee
November 2, 2021 (Zoom)
Meeting Summary

Convened 3:00 p.m. all remote on Zoom, Public access on Legislature's audio webpage and YouTube https://www.youtube.com/watch?v=JnqDHXru404

Present remotely:
Chris Parr, Subcommittee Chair
Jonathan Bolton
Lynda Clancy
Julie Finn
Kevin Martin
Eric Stout

Staff:
Rachel Olson
Colleen McCarthy Reid
Peggy Reinsch

Subcommittee Chair Chris Parr opened the meeting and the members introduced themselves.

Review of existing public records exceptions

The Right to Know Advisory Committee is required to finish the review of existing public records exceptions found in Titles 8 – 12 that were tabled in 2020, and the existing public records exceptions in Titles 13 – 22.

Before the meeting, subcommittee members reviewed the agency responses to the questionnaire for the exceptions being reviewed through Title 12. The subcommittee members had available a chart listing all the exceptions, the agency that is responsible for each exception and each agency's recommendation for retention, amendment or repeal of the provision, with links to the applicable statutory language. The members were able to agree quickly that all but a few of the exceptions under review were appropriate and did not need to be changed, and voted to accept the agencies' recommendations of no change. The subcommittee discussed the specifics of the following sections:

2020-4	8 MRSA §1006, sub-§1, ¶A	Title 8, section 1006, subsection 1, paragraph A, relating to information or records required by the Gambling Control Board for licensure: trade secrets and proprietary information	Department of Public Safety, Gambling Control Board
2020-11	8 MRSA §1006, sub-§1, ¶H	Title 8, section 1006, subsection 1, paragraph H, relating to information or records required by the Gambling Control Board for licensure: specific personal information, including Social Security number, of any individual	Department of Public Safety, Gambling Control Board
2020-44	12 MRSA §6072, sub-§10	Title 12, section 6072, subsection 10, relating to aquaculture lease seeding and harvesting reports	Department of Marine Resources
2020-46	12 MRSA §6077, sub-§4	Title 12, section 6077, subsection 4, relating to the aquaculture monitoring program	Department of Marine Resources
2020-53	12 MRSA §6455, sub-§1-B	Title 12, section 6455, subsection 1-B, relating to market studies and promotional plans of the Lobster Promotion Council	Department of Marine Resources

		Repealed effective October 1, 2021	
2020-54	12 MRSA §6749-S, sub-§1	Title 12, section 6749-S, subsection 1, relating to log book for sea urchin buyers and processors	Department of Marine Resources

- 2020-4: This provision designates as confidential "proprietary information that if released could be competitively harmful to the submitter of the information" in an application for licensure by the Gambling Control Board. Chair Parr suggested tabling this exception until the subcommittee discusses the topic of including broader categories of records or information in 1 §402, sub-§3 as not public records. (One of the suggested categories for such treatment is "proprietary information.")
  The subcommittee voted to table reference 2020-4.
- 2020-11: This provision designates certain personal information as confidential when included in an application for licensure by the Gambling Control Board. Chair Parr suggested tabling this exception until the subcommittee can discuss an over-arching exception for personally identifiable information.
  The subcommittee voted to table reference 2020-11.
- 2020-44: This provision designates aquaculture seeding and harvesting reports as confidential, but does authorize the Department of Marine Resources to share the reports with the municipalities in which to the aquaculture leases are located or in the municipalities adjacent to the leases. Chair Parr noted that the statute does not specify whether the reports retain their confidential status in the hands of the municipalities. The members thought such treatment would be appropriate.
  The subcommittee voted to table reference 2020-44 to allow staff time to check with the DMR about the reports remaining confidential, and to draft language that carries out the subcommittee's suggestion.
- 2020-46: This provision provides for a process to keep confidential proprietary information submitted to the Department of Marine Resources in the monitoring of finfish aquaculture facilities. It was initially set aside because of the protection for proprietary information, which the subcommittee will discuss as a broad category. The subcommittee voted to accept the "no change" recommendation of the Department.
- 2020-53: Staff clarified that not action is necessary because reference 2020-53 was repealed by its own subsection 9 on October 1, 2021. The Legislature enacted a bill during the First Special Session (LD 338, PL 2021, c. 58) which proposed to extend the sunset of the section creating the Maine Lobster Marketing Collaborative to October 1, 2026, but the non-emergency bill didn't take effect until October 18, 2021, after the repeal had taken place. If the Legislature reenacts the section in the Second Regular Session, the public records exception language should be subject to review by the Judiciary Committee. (The exception pertains to proprietary information provided to the collaborative.)
- 2020-54. This provision designates as confidential data that is collected by the Department of Marine Resources from sea urchin buyers and processers. The DMR recommends repealing the "section" because 12 §6173 already provides confidentiality for that type of information. Ms. Clancy suggested that more analysis should be done about whether the provision is needed, as well as clarifying whether the Department's suggestion was actually to repeal just the sentence as opposed to the whole section of law. Staff will follow up.
  The subcommittee voted to table reference 2020-54.

Archives statute: 75-year limit on confidentiality

State Archivist Kate McBrien joined the subcommittee to discuss the application of Title 5, section 95-C, subsection 1, paragraph C:

> Restrictions or limitations imposed by law on the examination and use of records transferred to the archives under subsection 2, paragraph A, subparagraph (3) remain in effect until the records have been in existence for 75 years unless removed or relaxed by the State Archivist with the concurrence in writing of the head of the agency from which the records were transferred or the successor in function, if any.

Archivist McBrien explained that she, the Archives staff and the Archives Advisory Board work with agencies to determine what records are "archival" and should be permanently retained. Once records are transferred to the Archives, they become the records of the Archives, and are no longer the agency's records. Confusion has arisen when the agency expected the confidential records to be kept confidential forever, but §95-C supersedes that expectation. Archivist McBrien thinks it is important for it to be clear to everyone that Maine law does not provide for permanent and forever confidentiality; the default treatment of everything in the Archives' possession is to be accessible to the public after it has been in existence for 75 years. (The 75-year period begins to run when the file is completed or closed.)

The subcommittee discussed the 75-year limit and whether the Freedom of Access Act (FOAA) should be amended to call attention to the fact that a record designated as confidential will not remain so into eternity if it is retained permanently in the Archives. Other states have similar statutes. Archivist McBrien noted it would be hard to apply and enforce if there were different time triggers for different type of records. The subcommittee's discussion touched on digital records, and how space considerations sometimes affect how long it is reasonable to retain paper records.

The members discussed whether it makes sense to amend §402, sub-§2 to say that, notwithstanding any other state law, the confidential records become open in 75 years. Mr. Stout and Mr. Martin both suggested including a question about or reference to the 75-year trigger when reviewing existing public records exceptions (RTKAC) or proposed public records exceptions (Judiciary Committee of the Legislature). Ms. Finn thought that maybe the amount time – 75 years – is a legislative policy questions that should be left to the Legislature. The solution might be more of an educational approach rather than a statutory change. Mr. Bolton mentioned that the there has been some discussion among the assistant attorneys general, and that there is widespread agreement that the 75 years trumps everything. Maybe relocating the provision to its own paragraph would make it more obvious to anyone reading the Archives statutes. He also cautioned about inserting language into just ¶A of subsection 3 – all the records under ¶¶B-V will also become public in 75 years.

The subcommittee members agreed that more thought and discussion are necessary before making a recommendation. The subcommittee tabled the issue.

Standardized language for public records exceptions

The subcommittee briefly talked about the report submitted by OPLA suggesting standardized language for public records exceptions based on whether the record can be shared with specific persons or for identified purposes. Two specific issues were raised: Should there be a difference in treatment for a record describe as "not a public record" as compared to a record designated "confidential"? And does a court always have authority to require at least limited disclosure of a record designated confidential if the statute is silent with regard to compulsory process?

Staff will create a separate document from the report that contains just the examples of standardized language.

The subcommittee tabled the issue.

Broad categories of exceptions

The subcommittee is charged with exploring whether it makes sense to identify broad types of information that the statutes uniformly designate as confidential. The two categories most often mentioned are "proprietary information" and some description of "personally identifying information." Eric Stout shared his experiences working with the federal Privacy Act and suggested a general category of information excluded from public records, tracking the language used in the personal contact of public employees' exception; "If it's personal, it's not public."

Chair Parr asked the members to think about what terms they run into, and make suggestions for words and phrases that should at least have a uniform definition that applies across the statutes.

The subcommittee agreed to table the issue.

Staff will survey the subcommittee for dates and times for the next subcommittee meeting.
Staff will send out the questionnaire responses for the remaining public records exceptions.

The subcommittee adjourned at 5:12 p.m.

G:\STUDIES\STUDIES 2021\RTKAC\Meeting summaries\November 2 - draft Public Records Subc summary.docx (11/10/2021 4:13:00 PM)