

## **RIGHT TO KNOW ADVISORY COMMITTEE**

### **MEETING AGENDA**

November 17, 2014

9:00 a.m.

Room 438, State House, Augusta

#### **Convene**

1. Welcome and introductions
2. Public Access Ombudsman update
3. Remedies for abusive/burdensome public records requests – discussion
4. Deadlines and appeals for public records requests– discussion
5. Review draft legislative recommendations approved at Nov. 6<sup>th</sup> meeting
  - a. Public records exceptions
  - b. RTKAC membership – IT expertise
  - c. Reporting date for Public Access Ombudsman
  - d. New existing public records review schedule
6. Remote participation by members of public bodies – discussion
7. Review draft report
8. Other?

#### **Adjourn**



**Right to Know Advisory Committee**

Linda Pistner: recommendations re unduly burdensome or oppressive requests

**DRAFT PROPOSAL TO ADDRESS UNDULY BURDENSOME OR OPPRESSIVE FOAA  
REQUESTS**

Amend 1 MRS Sec. 408-A(4):

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. A request for inspection or copying may be denied, in whole or in part, on the basis that the request is unduly burdensome or oppressive provided that the procedures established in subsection 4-A are followed. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

[following para. all underlined, new language]

4-A. Action for protection. An agency or official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 14 days of receipt of the request.

**A. The following information shall be included in the complaint if available or provided to the parties and filed with the court no more than fourteen days from the filing of the complaint or such other period as the court may order:**

1. The terms of the request and any modifications agreed to by the requesting party;
2. A statement of the facts that demonstrate the burdensome or oppressive nature of the request, with a good faith estimate of the time required to search for, retrieve, redact if necessary and compile the records responsive to the request and the resulting costs calculated in accordance with subsection 8; and
3. A description of the efforts made by the agency or official to inform the requesting party of the good faith estimate of costs and to discuss possible modifications of the request that would reduce the burden of production.

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated herewith.

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C. An action for protection may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require upon the request of any party.

D. If the court finds, after hearing, that the agency or official has demonstrated good cause to limit or deny the request, it shall enter an order making such findings and establishing the terms upon which production, if any, shall be made. If the court finds that the agency or official has not demonstrated good cause to limit or deny the request, it shall establish a date by which the records shall be provided to the requesting party.

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Using the relevant parts of bill section D-1 (copied below) from LD 1821 of last Session, I have indicated in **bold blue font** the changes to 1 M.R.S.A. § 408-A, sub-§§ 3 and 4 that DPS wants to have included in any draft bill text re: section 408-A that the RTKAC considers at its next meeting.

These changes are needed to ensure that MSP (and, presumably, other similarly-situated State, County, and Municipal government agencies) would no longer be perpetually out of compliance with those subsections.

**§ 408-A. Public records available for inspection and copying**



**3. Acknowledgment; clarification; time estimate; cost**

**estimate.** The body, agency or official having custody or control of a public record shall acknowledge receipt of a request made

according to this section within ~~5 working days of a reasonable~~

**period of time after** receiving the request and . The body, agency or official may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the body, agency or official shall provide a good faith, nonbinding estimate of the time within which the body, agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The body, agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public

record is received by the body, agency or official at the office

responsible for maintaining the public record. An office of a

body, agency or official that receives a request for a public

record that is not maintained by the office shall forward the

request to the office of the body, agency or official that

maintains the record, without willful delay.

**4. Refusals; denials.** If a body ~~or an~~ , agency or official having custody or control of any public record refuses permission to inspect or copy ~~or abstract~~ a public record, the ~~body or~~ , agency or official shall provide written notice of the denial, stating the reason for the

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denial, within ~~5 working days of a reasonable period of time after~~ the receipt of the request for inspection or copying. Failure to comply with provide the notice required by this subsection within 10 working days of a reasonable period of time after the receipt of the request is considered failure a denial to allow inspection or copying and is subject to appeal as provided in section 409.

**§ 408-A. Public records available for inspection and copying**

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

**1. Inspect.** A person may inspect any public record during reasonable office hours. An agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the agency or official may charge a fee as provided in subsection 8.

**2. Copy.** A person may copy a public record in the office of the agency or official having custody of the public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. The agency or official may charge a fee for copies as provided in subsection 8.

- A. A request need not be made in person or in writing.
- B. The agency or official shall mail the copy upon request.

**3. Acknowledgment; clarification; time estimate; cost estimate.** The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time.

**4. Refusals; denials.** If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

**5. Schedule.** Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public record requested. If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if an office exists.

**6. No requirement to create new record.** An agency or official is not required to create a record that does not exist.

**7. Electronically stored public records.** An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

**8. Payment of costs.** Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees for public records as follows.

A. The agency or official may charge a reasonable fee to cover the cost of copying.

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than \$15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or

aural comprehension or into a usable format.

D. An agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.

E. The agency or official may charge for the actual mailing costs to mail a copy of a record.

**9. Estimate.** The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than \$30, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

**10. Payment in advance.** The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the public record if:

A. The estimated total cost exceeds \$100; or

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

**11. Waivers.** The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or

B. The agency or official considers release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

#### §409. Appeals

**1. Records.** Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to any Superior Court within the State as a trial de novo. The agency or official shall file an answer within 14 calendar days. If a court, after a trial de novo, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

**2. Actions.** If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

**3. Proceedings not exclusive.** The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

**4. Attorney's fees.** In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

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Mark Grover, Cumberland County

Ladies and Gentlemen:

Thank you for asking for my personal views on this topic.

Regarding extending public meetings to include electronic participation by members of a body, I believe that it is essential that the public be able to hear and see any comment or other input from each member to the same extent as other members of the body. For example, if a member of a body participates by telephone, then members of the public who are in attendance at the meeting must also be able to hear that member equally. Extending it further, if the public has the ability to record a public meeting, that recording should also be able to include the participation of each member equally. Finally, I believe that any electronic recording for transmission or rebroadcast should include the input of all members of the body.

I further believe that public notice of any "emergency" meetings must be provided to the media (which includes social media) and general public as expeditiously and completely as technically possible under the emergency circumstances, by all electronic means available. I also believe that public bodies should maintain email lists of any interested citizens who wish to receive public notices, including for emergency meetings.

Thank you for considering my views.

=MDG=

**Mark D. Grover, County Commissioner**  
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Fri 11/7/2014 8:58 PM

Ken Capron

Hi Peggy,

I have a lot of comments I'd like to make about the FOAA work that has gone on. Suffice it to say it has become terribly more difficult to use – extremely more confusing.

That said, the objective of allowing someone to attend a meeting by remote is to come as close as possible to them seeming to be present. I would hope that budget restraints are kept in mind because eventually people will ask for reimbursement for phone

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charges. I would like to recommend a FREE Internet service I use with a couple of groups in the U.S.. It is <https://www.zoom.us/> and allows video+voice+sharing of documents live real-time. I also believe it has a recording function. It allows up to 25 people to communicate at once. It has been 100% reliable for us.

If the remote person is in attendance in every way except physically, then their contribution to a meeting can be treated as if they were in actual attendance. The audio from zoom could be piped into a microphone plug-in so it would be picked up in the Internet Stream from the meeting.

If I can add one more comment – you need a new ombudsperson. The current one is NOT very helpful – she almost seems to be working against the FOAA rather than for ‘the people.’ Sorry.

Ken Capron  
Kaycen [kaycen@maine.rr.com](mailto:kaycen@maine.rr.com)  
Sat 11/8/2014 1:00 AM

Vicki Wallack, Maine School Management Association

Hello,

We support the original position of the Right to Know Advisory Committee i.e. the one you sent out dated Dec. 13, 2013. I have pasted below some of the reasons we support it, quoting our testimony against LD 1809. Hope this helps. Vicki

“In today’s world, when we are looking for people who not only have a passion about public education, but also understand how to read a budget spreadsheet, do contract negotiations, hire personnel, oversee evaluation systems, and approve a curriculum – to name just a few of the school board member’s responsibilities – we welcome people who have professional experience.

Those same people often travel for business and this law would prohibit their participation in a board meeting when they are out of town.

It also would exclude participation of a board member who is temporarily housebound and make it more difficult to get a quorum in some of our districts that encompass significant geography, particularly in winter.

Rather than prohibit the use of electronic communications to conduct public proceedings, we suggest instead that this practice be allowed with certain parameters. Electronic communications should be used to encourage participation by all board members, for example, not to shut out the public.

Our association would advise boards to adopt policies around electronic communication to make sure technology is used to support open communication and not be an impediment to it. Prohibiting the use of electronic communication altogether, however,

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ignores the benefits technology can bring to produce better and more inclusive governance. “

Vicki Wallack [VWallack@msmaweb.com](mailto:VWallack@msmaweb.com)  
MSMA position on remote participation  
Mon 11/10/2014 2:26 PM

Garrett Corbin, Maine Municipal Association

Hello Senator Valentino,

It is my understanding that the Right to Know Advisory Committee may be interested in advancing another proposal to implement some level of “remote access” opportunity within Maine’s open meeting law, and you were interested in hearing about approaches that the Maine Municipal Association, as well as other affected interest groups, could support.

MMA’s Legislative Policy Committee supported the original remote access legislation developed by the Right to Know Advisory Committee (submitted in 2013 as LD 258, attached). There is a provision in that original version that MMA would like to see slightly amended, but we are generally supportive of the LD 258 approach. I think it is fair to say the current Legislative Policy Committee would be likely to continue to support that legislation even if no amendments were allowed.

I happened to attend a conference of northeastern municipal leagues last week, with representatives from all the New England municipal associations as well as New York’s. At that conference I learned that Massachusetts, New Hampshire, New York and Vermont all allow some level of remote access to public meetings by board members with various limitations similar to what is being proposed in LD 258. I have included a compilation of the pertinent remote access laws from those other states for your information.

I hope this information is helpful to you and the Committee.

Best,  
Garrett

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Mon 11/10/2014 3:35 PM

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**Massachusetts**

*Title 30A §20*

*(d) The attorney general may by regulation or letter ruling, authorize remote participation by members of a public body not present at the meeting location; provided, however, that the absent members and all persons present at the meeting location are clearly audible to each other; and provided, further, that a quorum of the body, including the chair, are present at the meeting location. Such authorized members may vote and shall not be deemed absent for the purposes of section 23D of chapter 39.*

*940 CMR 29.10*

*(1) Preamble. Remote participation may be permitted subject to the following procedures and restrictions. However, the Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible. By promulgating these regulations, the Attorney General hopes to promote greater participation in government. Members of public bodies have a responsibility to ensure that remote participation in meetings is not used in a way that would defeat the purposes of the Open Meeting Law, namely promoting transparency with regard to deliberations and decisions on which public policy is based.*

*(2) Adoption of Remote Participation. Remote participation in meetings of public bodies is not permitted unless the practice has been adopted as follows:*

*(a) Local Public Bodies. The Chief Executive Officer, as defined in M.G.L. c. 4, sec. 7, must authorize or, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that authorization or vote applying to all subsequent meetings of all local public bodies in that municipality.*

*(b) Regional or District Public Bodies. The regional or district public body must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of that public body and its committees.*

*(c) Regional School Districts. The regional school district committee must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of that public body and its committees.*

*(d) County Public Bodies. The county commissioners must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of all county public bodies in that county.*

*(e) State Public Bodies. The state public body must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of that public body and its committees.*

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*(f) Retirement Boards. A retirement board created pursuant to M.G.L. c. 32, sec. 20 or M.G.L. c. 34B, § 19 must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of that public body and its committees.*

*(3) Revocation of Remote Participation. Any person or entity with the authority to adopt remote participation pursuant to 940 CMR 29.10(2) may revoke that adoption in the same manner.*

*(4) Minimum Requirements for Remote Participation.*

*(a) Members of a public body who participate remotely and all persons present at the meeting location shall be clearly audible to each other;*

*(b) A quorum of the body, including the chair or, in the chair's absence, the person authorized to chair the meeting, shall be physically present at the meeting location, as required by M.G.L. c. 30A, sec 20(d);*

*(c) Members of public bodies who participate remotely may vote and shall not be deemed absent for the purposes of M.G.L. c. 39, sec. 23D.*

*(5) Permissible Reasons for Remote Participation. If remote participation has been adopted in accordance with 940 CMR 29.10(2), a member of a public body shall be permitted to participate remotely in a meeting, in accordance with the procedures described in 940 CMR 29.10(7), if the chair or, in the chair's absence, the person chairing the meeting, determines that one or more of the following factors makes the member's physical attendance unreasonably difficult:*

*(a) Personal illness;*

*(b) Personal disability;*

*(c) Emergency;*

*(d) Military service; or*

*(e) Geographic distance.*

*(6) Technology.*

*(a) The following media are acceptable methods for remote participation. Remote participation by any other means is not permitted. Accommodations shall be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.*

*(i) telephone, internet, or satellite enabled audio or video conferencing;*

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*(ii) any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another.*

*(b) When video technology is in use, the remote participant shall be clearly visible to all persons present in the meeting location.*

*(c) The public body shall determine which of the acceptable methods may be used by its members.*

*(d) The chair or, in the chair's absence, the person chairing the meeting, may decide how to address technical difficulties that arise as a result of utilizing remote participation, but is encouraged, wherever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant's ability to hear or be heard clearly by all persons present at the meeting location. If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred shall be noted in the meeting minutes.*

*(e) The amount and source of payment for any costs associated with remote participation shall be determined by the applicable adopting entity identified in 940 CMR 29.10(2).*

**(7) Procedures for Remote Participation.**

*(a) Any member of a public body who wishes to participate remotely shall, as soon as reasonably possible prior to a meeting, notify the chair or, in the chair's absence, the person chairing the meeting, of his or her desire to do so and the reason for and facts supporting his or her request.*

*(b) At the start of the meeting, the chair shall announce the name of any member who will be participating remotely and the reason under 940 CMR 29.10(5) for his or her remote participation. This information shall also be recorded in the meeting minutes.*

*(c) All votes taken during any meeting in which a member participates remotely shall be by roll call vote.*

*(d) A member participating remotely may participate in an executive session, but shall state at the start of any such session that no other person is present and/or able to hear the discussion at the remote location, unless presence of that person is approved by a simple majority vote of the public body.*

*(e) When feasible, the chair or, in the chair's absence, the person chairing the meeting, shall distribute to remote participants, in advance of the meeting, copies of any documents or exhibits that he or she reasonably anticipates will be used during the meeting. If used during the meeting, such documents shall be part of the official record of the meeting, and shall be listed in the meeting minutes and retained in accordance with M.G.L. c. 30A, sec. 22.*

**(8) Further Restriction by Adopting Authority.** *These regulations do not prohibit any person or entity with the authority to adopt remote participation pursuant to 940 CMR 29.10(2) from*

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*enacting policies, laws, rules or regulations that prohibit or further restrict the use of remote participation by public bodies within that person or entity's jurisdiction, provided those policies, laws, rules or regulations do not violate state or federal law.*

*(9) Remedy for Violation. If the Attorney General determines, after investigation, that 940 CMR 29.10 has been violated, the Attorney General may resolve the investigation by ordering the public body to temporarily or permanently discontinue its use of remote participation.*

**New Hampshire**

**RSA 91-A (2)(III)**

*III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.*

*(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.*

*(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.*

*(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.*

*(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.*

*(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.*

**New York**

**Public Officers (PBO) Law Article 7 – Open Meetings Law**

*§ 103. Open meetings and executive sessions. (a) Every meeting of a public body shall be open to the general public, except that an*

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*executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article.*

*(b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.*

***(c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.***

*\* (d) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.*

*\* NB There are 2 sub (d)'s*

*\* (d) 1. Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term "broadcast" shall also include the transmission of signals by cable.*

*2. A public body may adopt rules, consistent with recommendations from the committee on open government, reasonably governing the location of equipment and personnel used to photograph, broadcast, webcast, or otherwise record a meeting so as to conduct its proceedings in an orderly manner. Such rules shall be conspicuously posted during meetings and written copies shall be provided upon request to those in attendance.*

*\* NB There are 2 sub (d)'s*

*(e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.*

**Rhode Island**

***§ 42-46-5 Purposes for which meeting may be closed – Use of electronic communications – Judicial proceedings – Disruptive conduct. – (a) A public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes:***

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*(1) Any discussions of the job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.*

*Failure to provide such notification shall render any action taken against the person or persons affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.*

*(2) Sessions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation.*

*(3) Discussion regarding the matter of security including, but not limited to, the deployment of security personnel or devices.*

*(4) Any investigative proceedings regarding allegations of misconduct, either civil or criminal.*

*(5) Any discussions or considerations related to the acquisition or lease of real property for public purposes, or of the disposition of publicly held property wherein advanced public information would be detrimental to the interest of the public.*

*(6) Any discussions related to or concerning a prospective business or industry locating in the state of Rhode Island when an open meeting would have a detrimental effect on the interest of the public.*

*(7) A matter related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest. Public funds shall include any investment plan or matter related thereto, including, but not limited to, state lottery plans for new promotions.*

*(8) Any executive sessions of a local school committee exclusively for the purposes: (i) of conducting student disciplinary hearings; or (ii) of reviewing other matters which relate to the privacy of students and their records, including all hearings of the various juvenile hearing boards of any municipality; provided, however, that any affected student shall have been notified in advance in writing and advised that he or she may require that the discussion be held in an open meeting.*

*Failure to provide such notification shall render any action taken against the student or students affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any students to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.*

*(9) Any hearings on, or discussions of, a grievance filed pursuant to a collective bargaining agreement.*

*(10) Any discussion of the personal finances of a prospective donor to a library.*

**Right to Know Advisory Committee**  
Comments and suggestions about remote participation

*(b) No meeting of members of a public body or use of electronic communication, including telephonic communication and telephone conferencing, shall be used to circumvent the spirit or requirements of this chapter; provided, however, these meetings and discussions are not prohibited.*

*(1) Provided, further however, that discussions of a public body via electronic communication, including telephonic communication and telephone conferencing, shall be permitted only to schedule a meeting.*

*(2) Provided, further however, that a member of a public body may participate by use of electronic communication or telephone communication while on active duty in the armed services of the United States.*

*(3) Provided, further however, that a member of that public body, who has a disability as defined in chapter 87 of title 42 and:*

*(i) Cannot attend meetings of that public body solely by reason of his or her disability; and*

*(ii) Cannot otherwise participate in the meeting without the use of electronic communication or telephone communication as reasonable accommodation, may participate by use of electronic communication or telephone communication in accordance with the process below.*

*(4) The governor's commission on disabilities is authorized and directed to:*

*(i) Establish rules and regulations for determining whether a member of a public body is not otherwise able to participate in meetings of that public body without the use of electronic communication or telephone communication as a reasonable accommodation due to that member's disability;*

*(ii) Grant a waiver that allows a member to participate by electronic communication or telephone communication only if the member's disability would prevent him/her from being physically present at the meeting location, and the use of such communication is the only reasonable accommodation; and*

*(iii) Any waiver decisions shall be a matter of public record.*

*(c) This chapter shall not apply to proceedings of the judicial branch of state government or probate court or municipal court proceedings in any city or town.*

*(d) This chapter shall not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised.*

*History of Section.*

*(G.L. 1956, § 42-46-5; P.L. 1976, ch. 330, § 2; P.L. 1982, ch. 352, § 1; P.L. 1988, ch. 659, § 1; P.L. 1995, ch. 265, § 1; P.L. 1998, ch. 379, § 1; P.L. 2000, ch. 330, § 1; P.L. 2000, ch. 463, § 1; P.L. 2005, ch. 91, § 1; P.L. 2005, ch. 98, § 1; P.L. 2005, ch. 103, § 1; P.L. 2005, ch. 134, § 1; P.L. 2006, ch. 602, § 1; P.L. 2007, ch. 433, § 1.)*

**Right to Know Advisory Committee**  
Comments and suggestions about remote participation

Vermont

*1 V.S.A. § 312. Right to attend meetings of public agencies*

*(a)(1) All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting, except as provided under subdivision 313(a)(2) of this title. A meeting of a public body is subject to the public accommodation requirements of 9 V.S.A. chapter 139. A public body shall electronically record all public hearings held to provide a forum for public comment on a proposed rule, pursuant to 3 V.S.A. § 840. The public shall have access to copies of such electronic recordings as described in section 316 of this title.*

*(2) Participation in meetings through electronic or other means.*

*(A) As long as the requirements of this subchapter are met, one or more of the members of a public body may attend a regular, special, or emergency meeting by electronic or other means without being physically present at a designated meeting location.*

*(B) If one or more members attend a meeting by electronic or other means, such members may fully participate in discussing the business of the public body and voting to take an action, but any vote of the public body shall be taken by roll call.*

*(C) Each member who attends a meeting without being physically present at a designated meeting location shall:*

*(i) identify himself or herself when the meeting is convened; and*

*(ii) be able to hear the conduct of the meeting and be heard throughout the meeting.*

*(D) If a quorum or more of the members of a public body attend a meeting without being physically present at a designated meeting location, the following additional requirements shall be met:*

*(i) At least 24 hours prior to the meeting, or as soon as practicable prior to an emergency meeting, the public body shall publicly announce the meeting, and a municipal public body shall post notice of the meeting in or near the municipal clerk's office and in at least two other designated public places in the municipality.*

*(ii) The public announcement and posted notice of the meeting shall designate at least one physical location where a member of the public can attend and participate in the meeting. At least one member of the public body, or at least one staff or designee of the public body, shall be physically present at each designated meeting location.*

**Right to Know Advisory Committee**  
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*(b)(1) Minutes shall be taken of all meetings of public bodies. The minutes shall cover all topics and motions that arise at the meeting and give a true indication of the business of the meeting. Minutes shall include at least the following minimal information:*

*(A) all members of the public body present;*

*(B) all other active participants in the meeting;*

*(C) all motions, proposals, and resolutions made, offered, and considered, and what disposition is made of same; and*

*(D) the results of any votes, with a record of the individual vote of each member if a roll call is taken.*

Jeff McNelly, Maine Water Utilities Association

Please pass these comments onto the RTK Committee; I hope to be there for their meeting on Monday.

Remote Participation:

The point that there is “confusion as to what is legal and permitted under the law” is an interesting one, in that nobody has stepped up and definitively stated that the remote participation practice being utilized by water districts, etc. (in some situations for years now) is not legal.

The AG’s Office has stated that they are “advising” public bodies to do such and such (or not).

Frankly, and as much as I respect the attorneys, that is of no help at all; we suggest that this “confusion” is a created conundrum.

Concerning the 2013 draft:

I have attached our testimony in opposition to LD 1809, which conveys the essence of the concerns we have relative to the direction the RTK Committee appears tempted to be headed.

A major issue is the fact that a person who is not physically present cannot be counted toward a quorum.

The requirements re: public proceedings through communications technology, while perhaps perceived (but not by us) as well intentioned, could create quagmire-ish situations that could cripple a public body - to the extent that they would be unable to make timely and critical decisions.

Recognize and acknowledge that few water/wastewater trustees will be unduly hamstrung by any public proceedings requirements that may be enacted.

**Right to Know Advisory Committee**  
Comments and suggestions about remote participation

These boards operate in an open and transparent fashion; however, if critical decisions need to be made during times of crisis it is our belief that actions which need to be implemented to protect public health will be implemented.

If there are any questions, I would certainly be willing to address them on Monday. If, for some reason, I am not at the meeting and there is an issue the RTK Committee wants feedback on, feel free to call me on my cell phone.

In closing, I do have a request:

Could I get contact information for all the RTK Committee members, to include their names, addresses, phone numbers and emails?  
Thank you.

Have a great weekend,

Jeff

Jeffrey McNelly, Executive Director  
Maine Water Utilities Association  
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March 20, 2014

**Testimony in Opposition to LD 1809 An Act Concerning Meetings  
of Public Bodies Using Communications Technology**

Maine Water Utilities Association represents and advocates for the water supply profession in Maine. We offer this testimony in opposition to LD 1809.

It is no secret that Maine's median age is one of the highest, if not the highest, in the nation. Maine has a significant retirement population. Many of those retirees are smart enough to not

**Right to Know Advisory Committee**  
Comments and suggestions about remote participation

want to spend every day of winter in Maine. Fortunately, many of our water and wastewater district have been fortunate in enticing them to serve as trustees.

Some of our member's trustees have served for decades. They possess a depth of institutional knowledge and insight that makes them valued assets to the operation of the organization.

We are aware of districts that have invested in the technology to enable trustees to participate via Skype and other technologies. Those systems that are making the effort to participate remotely have done that because they are committed to the concept of active involvement of their trustees. It is not unusual for those trustees who participate in this manner to be the ones who champion dialogue that results in informed and intelligent decisions.

Some of these boards have only three trustees. Not being able to have a quorum to a scheduled meeting may pose obvious difficulties in obtaining timely board permissions to undertake necessary operational or financial functions.

Remote attendance in executive sessions can be challenging in that it is critical to ensure that only board members are "attending". There are several ways to address that situation; these boards are capable of doing that.

Woven throughout a discussion of this issue is the key word: participation. There is little or no benefit to be derived by being so prescriptive and there is much to be gained by allowing remote attendance at these meetings. It is not always easy, particularly in a small community, to find qualified board members who can commit the time necessary to effectively contribute. What we don't need is another reason to not run for these offices.

During the pandemic scare a few years ago health officials recommended that, in the event of such a situation, group meetings should be limited as much as possible so as to minimize the threat of spread of infectious disease. Some water systems have actually modified their bylaws in order to function via that practice, should the need arise. Do we want to force attendance at trustee meetings during an influenza epidemic and risk infecting the personnel who operate our water systems? We think not.

We have heard that there are concerns, perhaps even opinions, that votes of trustees who are participating remotely could be challenged.

I have attended Right to Know Advisory Committee and subcommittee meetings over the past several months. I asked the question of one of the attorneys present: "Does Maine statute prohibit district trustees from participating remotely, should the need arise?" The answer I received was: "No."

In a letter to that committee dated October 25, 2013, in which we provided comments relative to (1) serial FOIA filers, (2) meetings of public bodies, and (3) the provision of customer information, we stated that: "It is our understanding that there is no statutory prohibition against this practice" (remote participation). There has been no communication back to us that our understanding concerning this matter is in error.

**Right to Know Advisory Committee**  
Comments and suggestions about remote participation

It is ironic that, in spite of the fact that there has only been two days' public notice for the hearing on LD 1809, we have been able to communicate with our members and some of them have been able to poll their governing boards, in order to develop and deliver positions to the committee.

Recognize that this is the communication network and protocol our profession often needs to rely on. Take comfort in the fact that they will continue to operate this way as they strive to continue to provide the public with safe and adequate water service every minute of every day.

Remote attendance is a practice that has become Standard Operations Practice for many businesses. We should not establish a policy that makes it more difficult for the districts to achieve a quorum, that could greatly impede the ability to govern during times of epidemic, or that discourages committed trustees. This bill does that.

We urge the committee to report out this bill with a unanimous Ought Not to Pass recommendation. Alternatively, if that does not happen, we request that you exempt water and wastewater utilities.

Thank you for your consideration of this testimony.



Jeffrey L. McNelly  
Executive Director

See separate comments from Maine Community College System

See separate comments from Univeristy of Maine System

See separate testimony from the PUC

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# Maine Community College System

OFFICE OF THE PRESIDENT  
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By Email

November 13, 2014

Right to Know Advisory Committee  
c/o Margaret J. Reinsch, Esq.  
Office of Policy and Legal Analysis  
13 State House Station

Re: Remote Participation in Public Meetings

Dear Ms. Reinsch:

Thank you for the opportunity to comment on the Right to Know Advisory Committee's potential legislation governing remote participation by members of a entities covered by Maine's Freedom of Access Act. This is an important issue for entities like the Maine Community College System who have a truly statewide mission and representation on its Board of Trustees and committees.

MCCS operates campuses from Wells to Presque Isle. Accordingly, our Board of Trustees has members who must travel statewide. As an example, we currently have a Trustee that resides in Fort Fairfield and when meetings are held in Wells, it requires that he travel 652 miles roundtrip to attend Board meetings. The Board typically meets six times per year. Although these meetings typically do in fact have an in-person quorum, there are instances when we need to rely on technology. Weather is often the biggest factor, but so too are the many personal and professional competing demands that our distinguished trustees face. The Board also has five standing and occasionally several ad hoc committees that also typically meet at least six times per year. These meetings are more often done by use of technology to ensure that our decisions are timely and responsive to the changing needs of the students and communities that we serve.

Technology has clearly enabled more trustees to participate both more often and more efficiently in the important work of our Board and its committees. Because MCCS is also sensitive to the issues of concern to the Right to Know Committee, MCCS has already taken steps to address those concerns. The bylaws of our Trustees currently provide the Board and its committees "may meet by use of interactive technology provided that there is a physical location designated as the meeting site for inclusion of the public; that each trustee can see or hear and understand the proceedings in process; and provided further that the public is able to see or hear the trustees participating by interactive technology. All Board members participating by such technology shall be considered present, counted for the quorum and eligible to vote." *MCCS Bylaws Sections 4.5 (Board) and 3.7.3 (Committees).*

The draft legislation would change our current approach in one very important and very burdensome way. Proposed *1 M RSA §403-A (1)(C)* would prohibit counting our Board and committee members who participate by phone or video link in their respective meetings from being counted towards the quorum. With no quorum, no action can be taken, so this would significantly interfere with our ability to conduct timely committee and Board work, particularly during the winter months when our colleges are the busiest and our travel is the most unpredictable and hazardous. Likewise, the exceptions proposed in *1 M RSA §403-A (3)(A) and (B)* are much too narrow to be ever be useful to MCCS.

MCCS requests striking proposed sections 1(C) and (3)(A) and (B), thereby permitting members who comply with all of the other requirements of the bill to have their attendance counted towards the quorum. If an entity complies with all of the other standards and requirements of the proposed legislation, a member participating by technology should be able to have both their attendance and vote counted.

Thank you for your consideration. If you require additional information, please let me know.

Sincerely yours,



John Fitzsimmons, Ed. D  
President

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Maine's  
Public  
Universities

UNIVERSITY OF MAINE SYSTEM

November 13, 2014

Margaret J. Reinsch, Esq., Legislative Analyst  
Joint Standing Committee on Judiciary  
Maine State Legislature  
Office of Policy and Legal Analysis  
13 State House Station  
Room 215, Cross State Office Building  
Augusta, Maine 04333

From: Kelley Wiltbank, General Counsel

RE: University of Maine Comments on Remote Participation by Members of a Public  
Body

The University of Maine

Members of the Right to Know Advisory Committee:

University of Maine  
at Augusta

University of Maine  
at Farmington

University of Maine  
at Fort Kent

University of Maine  
at Machias

University of Maine  
at Presque Isle

University of  
Southern Maine

The University of Maine System is submitting these comments to the Right to Know Advisory Committee's request for input regarding members of public bodies participating in public proceedings while not physically present at the publically announced location of the meeting. We offer these recommendations and comments to assist in the improvement of the laws regarding best practices in providing optimal public access while also maintaining the integrity of the Freedom of Access Act. The current FOAA statute nor other State law provide guidance in the use of rapidly developing interactive technology which without exception can provide for greater participation in the public process by the citizens of this State with the concurrent accountability for those entrusted with the public's business. The Legislative mandate is that public proceedings exist to aid in the conduct of the people's business and that actions and deliberations are taken openly with ample opportunity for attendance by the public.

The Board of Trustees is a body with a state wide mission. It consists of 16 members, 14 of which routinely serve two successive five year terms, it also includes the Commissioner of the Department of Education and Cultural Services and a student trustee. The Board's primary responsibility is the formulation, review and evaluation of education policy and the administration of its seven dispersed institutions. Each campus has a faculty representative and there are nine student representatives,

including one each from the two graduate schools. These are supported by academic and administrative officers and staff from each institution and the System office which provide the information, administration and staffing in order that the Board accomplish its role. In his appointment of Trustees the governor is to consider an equitable geographical selection and meetings must be held "from time to time at each campus", as well as provide an opportunity for citizens to address the Board at its meetings. Although the Board is only required to meet once in each quarter, its regular schedule has been six full meetings per year. However, due to the exponential increase in activities required of it over recent years between its six Board meetings and separate committee meetings it has had to hold as many as 60 or more committee meetings beyond its regularly scheduled meetings. Without the use of interactive technology the ability for any Board member or other members of the administration to commit the time necessary to fulfil the current demands of travel to a fixed site and expense of holding such meetings would further deplete necessary resources. It would likewise reduce the number of members of the public who could participate in these proceedings.

Meetings by interactive technology have allowed UMS to effectively conduct its business without excluding the participation and the oversight of the public. Through its By-Laws the Board has incorporated all those elements necessary under the Maine Freedom of Access law as well as those of other states that allow public proceedings by interactive technology, including many beyond the three examples provided in the invitation to comment.<sup>1</sup>

As either required or suggested in the laws of other states and as previously considered this by committee, a public body should at the minimum have stated in its By-laws or operating documents the provisions for off-site participation. The UMS has done so in its By-laws and has done so effectively.

For Board meetings:

It required that a "[M]ajority of the current membership of the Board shall constitute a quorum for the transaction of business. Except as otherwise provided in these By-Laws. A Trustee who cannot be in physical attendance may participate and vote by telephone, Polycom, or other similar interactive technology where the Chair has determined on the record that the physical presence of the non-attending Trustee is prevented by an exceptional occasion which makes it inadvisable or impossible to attend the meeting. The presence of the non-attending Trustee in this manner shall be counted towards a quorum. In order to exercise this option the Trustees must be able to hear clearly the non-attending Trustee and understand the proceedings in process and the public must be able to clearly hear the non-attending Trustee."

For Committee Meetings:

"Committee meetings held at time other than a regular meeting of the Board may be conducted using interactive technology and all members participating by such technology shall be considered as present, count towards the quorum, and are eligible to vote provided there is a physical location designated as the meeting site for inclusion of the public and that each Trustee

---

<sup>1</sup> Arizona, California, Georgia, Illinois, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Virginia.

must be able to clearly see or hear and understand the proceedings in process and the public is able to see or hear the Trustees participating by interactive technology. Actions taken by the Committee requiring full Board approval will be placed on the Consent Agenda of a regular meetings.”

In addition:

1. Materials necessary for an agenda item are provided in advance to all members participating by interactive technology.
2. All Meeting Agendas and Materials for Board Meetings are placed on the Board of Trustee’s Website and accessible the other participants and the public.
3. Notices of all meetings are posted in the Building as well as the Board of Trustees Website and the External Affairs Office provides information to the media regarding key items being discussed or acted upon.
4. An “anchor” site is always made available. The interactive component is primarily two way video (polycom). The public may participate from either the “anchor” or other video sites.

Conclusion:

In order that public entities with state wide functions and responsibilities are able to provide greater participation by its members within the resources available and the intended participation and oversight by the public is included and actually enhanced, the University of Maine System recommends that interactive technology become a key and acceptable component to public proceedings.



STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

THOMAS L. WELCH  
CHAIRMAN

DAVID P. LITTELL  
MARK A. VANNOY  
COMMISSIONERS

HARRY LANPHEAR  
ADMINISTRATIVE DIRECTOR

November 14, 2014

Honorable Linda M. Valentino, Chair  
Right to Know Advisory Committee  
13 State House Station  
Augusta, Maine 04333

**Re: Remote Participation By Members of Public Bodies**

Dear Senator Valentino:

The Public Utilities Commission (Commission) appreciates having the opportunity to submit comments on potential legislation to clarify Maine's Freedom of Access Act (FOAA) with regard to members of public bodies participating in public proceedings while not physically present at the meeting location (remote participation).

The Commission understands that the Right to Know Advisory Committee is seeking comments on 2013 draft legislation considered by the Advisory Committee. This draft legislation is nearly identical to LD 258, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Meetings of Public Bodies, which was considered by the Judiciary Committee during the 2013 session and which the Commission provided testimony on.

As drafted, the 2013 draft legislation would limit the Commission's ability to conduct its public deliberations concerning adjudicatory and quasi-adjudicatory matters with two of three Commission members participating by telephone except in specifically defined emergency situations. The 2013 draft legislation also provides that a member of a body who is not physically present and who is participating in the public proceeding remotely may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding. If applied to the Commission's proceedings, this requirement would create substantial practical difficulties for the Commission in carrying out its work. Much of the Commission's work occurs in adjudicatory or quasi-adjudicatory proceedings. The Commission's three Commissioners currently deliberate cases once a week, typically on Tuesday at 10:00 a.m. The Commission deliberates and votes on cases at each deliberative session. In 2013, the Commission acted on approximately 537 cases or rulemaking proceedings. Cases are the subject of sometimes voluminous prefiled testimony and adjudicatory hearings in front of the Commissioners and staff. Much of the testimony and evidence relied upon by the Commission is presented in technical conferences presided over

by a hearing examiner, and there are occasions where technical and/or evidentiary hearings are held simultaneously. While at least one Commissioner attends every rulemaking hearing (as required by the Administrative Procedure Act), and one or more Commissioners typically attends evidentiary hearings in adjudicatory cases, a requirement that all Commissioners attend all evidentiary hearings would impose an unnecessary and substantial burden. Each Commissioner reviews the record in each case prior to deciding it. Notice of the Commission's deliberative sessions is posted on the Commission's website and all parties and interested persons to cases to be deliberated are notified of the deliberation on the previous Wednesday. The Commission broadcasts its deliberations over the internet and they are also recorded and archived on our website so anyone interested can listen to the deliberations as, or after, they occur.

Title 35-A M.R.S. § 108-A, of the Commission's governing statutes, establishes that a quorum of two of three Commissioners is necessary for the Commission to act. Occasionally a Commissioner needs to call into deliberations, typically due to weather or attendance at a regional utility meeting. On rare occasions, two Commissioners may need to call into deliberations. The Commission's telebridge is connected to the sound system in the Commission's hearing room, so anyone participating by phone can be heard in the room and clearly recorded. Besides Commission deliberations, it also could be necessary for two Commissioners to call into a hearing or other meeting which meets the FOAA law's definition of public proceeding.

LD 258 noted that some State agencies are authorized to use remote-access technology to conduct public meetings in their governing statutes and LD 258 would have provided a specific exemption from the new requirements of LD 258 for those State agencies. The 2013 draft legislation that the Right to Know Advisory Committee is currently seeking comments on would do the same. In our testimony on LD 258, we respectfully requested that the bill be amended to allow for similar language in the Commission's governing statutes regarding the use of remote access technology by Commissioners in public proceedings and a similar exemption from the new requirements of LD 258.

LD 258 was not enacted. Subsequently, in July of 2013, the Commission adopted a policy for Commissioner participation in hearings and deliberations remotely by telephonic, video, electronic or other similar means. Specifically, the policy provides that one or more Commissioners may participate in deliberations remotely if the following requirements are met:

- 1) Notice of the deliberations has been provided pursuant to 1 M.R.S. § 406 and 35-A M.R.S. § 108-A;
- 2) The Commission's sound system is operating in a manner that allows all Commissioners to hear and speak to each other during the deliberations;
- 3) The Commission's sound system is operating in a manner that allows persons attending deliberations to hear all Commissioners participating in the deliberations; and
- 4) Any Commissioner participating remotely has all documents or materials to be discussed at the deliberations.

The policy provides that if these requirements have been met, the deliberations and any votes that take place will be treated in the same manner as if the Commissioner was attending in person. With respect to hearings, the policy provides that a Commissioner may participate in hearings remotely and that participating in a hearing remotely is the same as if the Commissioner was attending in person.

If the Committee moves forward with the 2013 draft legislation, the Commission respectfully requests, as we did when we testified on LD 258, that language be added to Section B of the draft legislation to amend 35-A M.R.S. § 108-A of the Commission's statutes to read:

35-A M.R.S. § 108-A. Commission action; quorum; notice

A majority of the duly appointed commissioners constitutes a quorum and the act or decision of a majority of commissioners present, if at least a quorum is present, is the act or decision of the commission in any formal proceeding before the commission. Notwithstanding Title 1, section 403-A, commissioners may participate in proceedings through telephone, video, electronic or other similar means of communication.

Finally, the Commission notes that we have been considering whether to put legislation in during the upcoming session to amend 35-A M.R.S. § 108-A to provide that Commissioners may participate in public proceedings through telephone video, electronic or other similar means of communication.

The Commission appreciates having the opportunity to provide comments on this issue and looks forward to working with the Committee as it moves forward with this legislation.

Sincerely,



Paulina McCarter Collins, Esq.  
Legislative Liaison

cc: Margaret Reinsch, Colleen McCarthy Reid, Dan Tartakoff, Legislative Analysts





**STATE OF MAINE  
127<sup>TH</sup> LEGISLATURE  
FIRST REGULAR SESSION**

**Ninth Annual Report  
of the  
RIGHT TO KNOW ADVISORY COMMITTEE**

**January 2015**

**Members:**

**Sen. Linda M. Valentino  
Rep. Kimberly Monaghan-Derrig  
Perry Antone Sr.  
Percy Brown Jr.  
Richard Flewelling  
Suzanne Goucher  
Frederick Hastings  
Mal Leary  
William Logan  
Mary Ann Lynch  
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[www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm)**



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- E. Recommended Draft Legislation: Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A
- F. Recommended Draft Legislation: Repeal the Community Right-to-Know Act
- G. Recommended Draft Legislation: Establish a process for continuing the review of public records exceptions
- H. *Recommended Draft Legislation: Amend Public Law 2013, chapter 350 concerning deadlines and appeals (????)*
- I. *Recommended Draft Legislation: Enact legislation authorizing the use of technology to permit remote participation in public meetings (????)*
- J. *Recommended Draft Legislation: Enact legislation to address unduly burdensome or oppressive FOAA requests (????)*
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## EXECUTIVE SUMMARY

This is the ninth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The 16 members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website:

[www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2014, the Advisory Committee met on August 19, September 17, November 6 and November 17.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2014 recommendations and a summary of relevant Maine court decisions from 2014 on the freedom of access laws.

For its ninth annual report, the Advisory Committee makes the following recommendations, [although not all the recommendations are unanimous]:

- Enact legislation to add an IT professional to the membership of the Right to Know Advisory Committee**
- Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee**
- Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A**
- Repeal the Community Right-to-Know Act because the program has never been implemented and public information is available through other means**
- Establish a process for continuing the review of public records exceptions**
- Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (????)*
- Enact legislation authorizing the use of technology to permit remote participation in public meetings (????)*
- Enact legislation to address unduly burdensome or oppressive FOAA requests (????)*
- Take no action to investigate the privacy and confidentiality issues presented in Resolves 2013, chapter 112 (????)*

In 2015, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.

The Advisory Committee looks forward to a full year of activities and working with the Public Access Ombudsman, the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in this its ninth annual report.

## I. INTRODUCTION

This is the ninth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at [www.maine.gov/legis/opla/righttoknowreports.htm](http://www.maine.gov/legis/opla/righttoknowreports.htm).

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. Linda M. Valentino Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Kimberly Monaghan-Derrig	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Perry Antone Sr.	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Percy Brown Jr.	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Richard Flewelling	<i>Representing municipal interests, appointed by the Governor</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Frederick Hastings	<i>Representing newspapers and other press interests, appointed by the President of the Senate</i>
Mal Leary	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
William Logan	<i>Representing the public, appointed by the Speaker of the House</i>
Mary Ann Lynch	<i>Representing the Judicial Branch, appointed by the Chief Justice of the Supreme Judicial Court</i>
Judy Meyer	<i>Representing newspaper interests, appointed by the Speaker of the House</i>

Kelly Morgan	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>
Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>

The complete membership list of the Advisory Committee, including contact information, is included as Appendix B.

## **II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES**

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- ❑ Providing guidance in ensuring access to public records and public proceedings;
- ❑ Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- ❑ Supporting the provision of information about public access to records and proceedings via the Internet;
- ❑ Serving as a resource to support training and education about Maine's freedom of access laws;
- ❑ Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;
- ❑ Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- ❑ Examining inconsistencies in statutory language and proposing clarifying standard language; and

- Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to be able to work with the Public Access Ombudsman, former Special Assistant Attorney General Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

By law, the Advisory Committee must meet at least four times per year. During 2014, the Advisory Committee met on August 19, September 17, November 6 and November 17. All of the meetings were held in the Judiciary Committee Room of the State House in Augusta and were open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage that can be found at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). Agendas, meeting materials and summaries of the meetings are included on the webpage.

### **III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES**

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of recent developments in case law relating to Maine's freedom of access laws. The Advisory Committee identified the following court decisions summarized below.

#### **2013-2014 Maine Supreme Judicial Court Decisions**

##### **Duffy v. Town of Berwick**

In *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148, the Law Court considered the appeal of a metal and automobile recycling business from a Superior Court judgment vacating the Berwick Planning Board's decision to grant a conditional use and site plan permit to the business to allow the operation of a metal shredder on its property. At issue, among other things, were a number of non-public proceedings and ex parte communications that had occurred during the Planning Board's consideration of the business's permit application. Noting that an earlier Superior Court decision had resolved many of these alleged due process deficiencies, the Law Court focused only on the Planning Board's ex parte communication with the business asking

and receiving approval of the Board's selection of an independent consultant to conduct a peer review of conflicting air emissions studies; a communication not made available to the public or to a group of abutting landowners. Recognizing first that the State's Freedom of Access Act requires meetings, records, actions, and deliberations of government actors, with very limited exceptions, to be open to the public (1 M.R.S. §§403, 405), the Law Court further explained that such proceedings must be conducted consistent with due process such that an objective participant, win or lose, would conclude that he or she had been heard, that the result was not preordained and that the process was fair. Because the communication merely sought the business's approval for a decision the Board had already made, the abutters had full opportunity to respond to the selection and findings of the consultant at a public hearing, and as there was sufficient evidence to support the Board's determination as to air emissions based, in part, on the consultant's findings, the Law Court concluded that the ex parte communication did not taint the Board's decision under the circumstances. Accordingly, the Court vacated the judgment and remanded the case for entry of judgment affirming the Planning Board's approval of the permit.

#### **Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor**

In *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, 86 A.3d 30, the Law Court found that the confidentiality provisions of Title 36, section 191 apply to all information appearing in any report, return or other information provided pursuant to Title 36, including the methodologies, formulas or calculations relating to apportionment of Maine income tax liability for nonresident partners of a professional services partnership entity based in or with a significant business presence in Maine. Such information, even if provided by Maine Revenue Services, is excepted from the definition of "public records" in the Freedom of Access Act (FOAA) because it is designated confidential, an express exception to the definition of public record in Title 1, section 402, subsection 3, paragraph A.

Preti sued Maine Revenue Services under the FOAA seeking documents containing methodologies, formulas or calculations relating to apportionment of Maine income tax liability for nonresident partners of a professional services partnership based in or with a significant business presence in Maine. Maine Revenue Services had denied the request, citing the privacy protections in 36 M.R.S. §191(1). The Superior Court sided with Maine Revenue Services and Preti appealed. The Law Court affirmed, finding that the documents covered by the request for information consist entirely of information deemed confidential pursuant to §191(1), so no redacted document is available for release. The Law Court disagreed with Preti's argument that the only information that is confidential is information provided by the taxpayer. The Court, required to strictly construe all exceptions to the FOAA, interpreted §191(1) as applying to all information, from whatever source, provided pursuant to Title 36, including information generated by Maine Revenue Services. The Law Court said the statutory context confirms that interpretation because §191 includes many detail exemptions from the privacy protections, some of which would not be necessary if Preti's interpretation was correct.

#### **Turcotte v. Human Society Waterville Area**

In *Turcotte v. Human Society Waterville Area*, 2014 ME 123, an individual appealed a Superior Court dismissal of her complaint against the Human Society Waterville Area (HSWA) to compel HSWA to permit inspection of certain records pursuant to Maine's Freedom of Access Act (FOAA). The central issue in this appeal concerned whether HSWA is in fact a public agency whose records are subject to FOAA (see 1 M.R.S. §402(3)). Citing prior precedent (*Dow*

*v. Caribou Chamber of Commerce & Indus.*, 2005 ME 113), the Law Court recognized that whether an entity qualifies as a public agency under FOAA hinges on an analysis of four factors: (1) whether the entity performs a governmental function; (2) whether the entity's funding is governmental; (3) the extent of governmental involvement in or control of the entity; and (4) whether the entity was created by statute or by private action. Applying this analysis to the facts at hand, the Court first held that HSWA does not perform a traditional governmental function, but merely provides services under a contract with a public agency, namely the City of Waterville. Next, the Court noted that HSWA receives the bulk of its funding from private donations rather than public funds. Turning to the third prong of the analysis, the Court determined that HSWA's need to comply with the terms of its contract with the City and to abide by certain licensing requirements merely constituted limited governmental interaction, but not involvement or control. Finally, the Court recognized that HSWA was created by private action rather than by statute. Based on its analysis of these four factors, the Court concluded that, although HSWA performs a function benefitting the public and assisting municipalities, it is not a public agency subject to FOAA. Accordingly, the Court affirmed the Superior Court's dismissal of the individual's complaint.

#### **IV. RIGHT TO KNOW ADVISORY COMMITTEE PROCESS**

In previous years, the Right to Know Advisory Committee has divided its workload among two or more subcommittees, which have reported recommendations back to the full Advisory Committee for action. This year, the Advisory Committee chose to handle its work in the four full Advisory Committee meetings.

##### **Summary of August 19, 2014 meeting.**

###### **Public Access Ombudsman update**

Public Access Ombudsman Brenda Kielty provided the Advisory Committee with an update on her recent activities and presented the Annual Report that summarizes the activities of the Ombudsman. Ms. Kielty explained the contacts she recorded and resolved; the bulk are from private citizens seeking advice. She also engaged in outreach and training and continues to provide information. Ms. Kielty stated that she has received lots of questions about whether the public have a right to speak at public meetings. She has also fielded questions about whether a public body can meet remotely and encouraged the Advisory Committee to make clarification of that question a priority. There have also been questions about whether certain organizations are subject to the FOAA.

Ms. Kielty reported that the Administration had committed to following through with the recommendations about coordinated access throughout the Executive Branch, but that she had not yet received an update on those activities.

Ms. Kielty mentioned that many people don't understand that it is important for the process of deliberation to be open. Members of a public body cannot use GoogleDocs or other types of

technology to collect comments and make changes to proposals; those activities should be conducted in open public proceedings.

### **Update on Government Oversight Committee's request to Attorney General Mills and Secretary of State Matthew Dunlap**

The Government Oversight Committee requested that both Attorney General Mills and Secretary of State Dunlap address the Committee's concerns that were identified when reviewing the document shredding and the contract award process within DHHS. Deputy Attorney General Linda Pistner explained that the two key questions of the inquiry are whether documents were properly retained and disposed of and whether there was appropriate supporting documentation for contracts that were out to bid. In response, a work group has been established to regularize document retention, work out retention schedules with Archives and establish training. Senator Valentino acknowledged that GOC would keep the Advisory Committee apprised as a courtesy.

Tammy Marks, Director of Records Management, Maine State Archives, introduced herself and explained how her office is working with state agencies. She recommends that each agency appoint a records officer to ensure that the appropriate records are retained for the established time periods. Ms. Marks said that her office is working on retention policies and procedures for saving email.

### **Existing public records exceptions review process**

The Advisory Committee will not be reviewing any existing public records exceptions this year.

### **Public records exceptions on the web**

Staff updated the Advisory Committee on the public records exceptions search function on the Internet, which may be accessed from the State's Freedom of Access webpage.

### **Collection and maintenance of state agency documents**

Adam Fisher of the Maine State Library explained the project the library has undertaken to collect and maintain documents from state agencies. No action by the Advisory Committee is required at this time.

### **Summary of September 17, 2014 meeting.**

#### **Discussion of technology, cloud computing and social media**

Greg McNeal, Chief Technology Officer at the Office of Information Technology, Department of Administrative and Financial Services; Jennifer Smith, Director of Legislative Affairs and Communications, Department of Administrative and Financial Services; and Brenda Kielty, Public Access Ombudsman briefed the Advisory Committee on these matters. Mr. McNeal generally described for the Advisory Committee the various types of technologies utilized by state agency employees, noting that pursuant to a recent executive order, email is the official form of communication to be used by executive branch employees. While he acknowledged that some state agencies do have a Facebook, Twitter, or other social media presence, he suggested that these communication technologies are typically used to provide information to the public rather than to engage in a dialogue with individuals. Each agency individually manages its social

media presence pursuant to the executive branch's social media policy as well as the agency's own corresponding policy. Advisory Committee members expressed interest in reviewing a copy of this social media policy, as well as any social media policy in place for the Legislature or legislative offices.

Mr. McNeal also described the use of cloud storage technology by executive branch agencies, noting that while state government servers are technically "cloud storage," unlike commercial storage providers, these servers are located on site and the State has complete control over the security, privacy, and management of stored data. State agency use of commercial cloud storage appears to be rare.

Regarding retention of emails, social media posts, and other electronic communications, Mr. McNeal noted that his office can typically recover deleted emails, which are archived nightly, while retention of social media records depends on the site in question, although most of these sites have some sort of data recovery ability. Mr. McNeal acknowledged that the government has no control over personal email accounts of employees. Ms. Kielty added that under FOAA, it is irrelevant what sort of account or technology medium government business is transacted on; if it qualifies as a public record, an agency, office, etc. has a duty to reasonably try to acquire those records if a request is filed. She recalled dealing with a number of requests for records contained in an employee's or official's personal email accounts, noting that in all of these cases, the individual in question has voluntarily facilitated production of the records.

There was further discussion of the recent executive order instituting email as the official form of communication for executive branch employees and restricting cell phone use in the transaction of government business. The Advisory Committee requested that a copy of this order be produced for review. The Advisory Committee also agreed to discuss at the next meeting whether it should recommend that a spot check or audit of executive branch employee compliance with this order be conducted.

Ms. Smith explained to the Advisory Committee that, while there is an overarching communications policy for the executive branch, each agency has also developed its own communications policy incorporating those directives, which include retention rules for communications utilized by each agency. Ms. Kielty reiterated that all of these forms of communications the Advisory Committee had been discussing, when used to transact government business, are considered public records under FOAA. The major issue to be addressed here instead concerns retention of these often dynamic, changing records. For example, she noted, how do you adequately "capture" and then retain various iterations of a social media page as it is updated? Neither FOAA nor the retention schedules adequately answer this question in her opinion. Ms. Kielty agreed to bring back to the Advisory Committee some suggestions for addressing these specific issues.

Mr. McNeal also discussed document centric collaboration platforms, such as Google Docs or Office 365. To his knowledge, Google Docs is not utilized by state employees to conduct business; however, his office is looking into implementing Office 365 for executive agency use in the near future. Ms. Kielty noted that with these platforms, major areas of concern are the retention of drafts – does an agency have to, or can they even retain all versions of a document –

and public meetings issues – if multiple members of a board, body, etc. are collaborating in real time on one of these documents, does this constitute a public meeting under FOAA?

### **Other state approaches**

Advisory Committee staff described various approaches to these issues taken by different states, noting initially that many states are just starting to address concerns raised by new communication technology within their public records and open meetings laws. Staff noted that, like Maine's FOAA, most state's public records laws are very broad and their definition of public record encompasses all new forms of communication. Instead, as Ms. Kielty had suggested, the issues to be dealt with in this context largely concern records retention and what constitutes a public meeting. Staff described pending legislation in Minnesota that, as originally proposed, would have exempted social media use from public meeting requirements so long as certain criteria were met. Staff shared a Mississippi ethics commission opinion finding that text messages contained on private phones of government officials, but used to conduct government business, were subject to the state's public records law. Staff provided an example of a state social media policy (Ohio), noting that a number of states had set forth similar comprehensive social media and communications policies for government employees and agencies. Advisory Committee members requested that staff compile a spreadsheet comparing and contrasting Maine's social media and communications policies with approaches taken by other states, municipalities, etc.

### **Resolve 2013, c. 112: Study of Social Media Privacy in School and the Workplace**

Advisory Committee staff summarized two bills – LDs 1194 and 1780 – that the Judiciary Committee and the Education Committee, respectively, worked on during the Second Regular Session. These bills, whose topics overlapped somewhat, were combined into Resolve 2013, chapter 112 to be studied over the interim. However, because the study did not receive the necessary outside funding, it was suggested that the Advisory Committee might consider addressing some of these privacy issues during its interim work. After discussion, however, Advisory Committee members decided that the issues to be addressed by the study were beyond the scope of the Advisory Committee and those members present unanimously voted to take no further action on this resolve.

### **Update on activities relating to LD 1818**

Advisory Committee staff updated the Advisory Committee on activities related to LD 1818, An Act to Facilitate Public Records Requests to State Agencies. Staff noted that since the last meeting, the Judiciary Committee had written a letter to the Legislative Council, requesting that the Council adopt measures to increase the ability of the public to make records requests online and to discuss coordination with State agencies on these goals. Additionally, Jonathan Nass, Senior Policy Advisor to Governor LePage wrote a letter to the Advisory Committee updating it on actions taken by the executive branch with respect to LD 1818, namely coordinating meetings between DAFS staff and the Public Access Ombudsman to implement a tracking and reporting tool for requests made to executive branch agencies. Ms. Kielty, the Public Access Ombudsman, stated that she was thus far pleased with the progress made in implementing the goals outlined in LD 1818.

## Summary of November 6, 2014 meeting.

### **Public Access Ombudsman update**

Brenda Kielty, Public Access Ombudsman, updated the Advisory Committee on the activities of the Work Group on State's Records Retention Framework. The work group is working to complete a review of the State's records retention requirements and policies at the request of the Government Oversight Committee and will report to the GOC by February 15, 2015. Ms. Kielty anticipates that GOC will provide additional opportunities for public input and input from state agencies following submission of the report. Ms. Kielty reviewed a summary chart outlining the tasks requested by the GOC and the group's work plan to complete the report. The Advisory Committee requested that Ms. Kielty provide the members with a copy of the draft report so that individual members may provide comments. Formal comments from the Advisory Committee cannot be provided since the draft report will not be completed until after the Committee's final meeting of 2014 on November 17<sup>th</sup>. Harry Pringle suggested that the work group take into account the practical impact of its recommendations for records retention on custodians of public records, particularly the impact and burden on local government officials. Guidance on records retention, especially electronic records, is a crucial issue.

### **Social media policies**

Advisory Committee staff reviewed a summary chart comparing state social media policies, including Maine. The Maine Office of Information Technology, Department of Administrative and Financial Services, has posted a social media policy (adopted in 2011) on its website. Although Jennifer Smith, Director of Legislative Affairs and Communications, Department of Administrative and Financial Services, informed staff that the policy was not the "official" policy and was currently under review by the Bureau of Human Resources, staff provided copies of the policy to the Advisory Committee and included it for comparison purposes in the chart. Ms. Smith told Advisory Committee staff that the Executive Branch does not have a current social media policy applicable to all state agencies. Christopher Parr remarked that it was important for the Executive Branch to clarify the status of its policy and educate employees about the use of social media by government.

With regard to Freedom of Access and records retention, staff noted that all state social media policies make it clear that all social media content, when used to transact government business, are considered public records under FOAA and subject to state records retention requirements.

The Legislature and the Judicial Branch have not adopted social media policies. MaryAnn Lynch said the primary reason the Judicial Branch does not have a policy is because it only uses social media in a limited way, using Twitter to make public announcements of court schedules and the release of court decisions. Ms. Lynch stated that it would be inappropriate and contrary to how judges decide cases to use Facebook or other social media sites which provide an opportunity for public comment.

At the September 17<sup>th</sup> meeting, Ms. Smith advised the Advisory Committee that state agencies were required by executive order to conduct all official state business through email and told the Advisory Committee she would provide copies of that Executive Order. Following the meeting, Ms. Smith told staff that there was no executive order, but the communications policy for all

executive branch agencies applies. The communications policy includes a directive that all employees use email as the official form of electronic communication to allow for the retention of records in a more efficient manner. Sen. Valentino noted that the Advisory Committee was given inaccurate information by Ms. Smith at the September 17<sup>th</sup> meeting relating to the existence of an executive order and requested that it be reflected in the Committee's meeting summary.

### **Electronic communications between legislators and the public during hearings, work sessions and House and Senate sessions**

At the request of Mr. Parr, the Advisory Committee discussed electronic communications between legislators and the public during hearings, work sessions and House and Senate sessions. Currently, there is no uniform prohibition on the use of email, texting or other forms of electronic communication between legislators and the public. Staff researched the issue and reported that there are no statutes in other states that govern the use of electronic communication by legislators, although chamber rules in some legislatures prohibit texting by legislators during certain proceedings.

Sen. Valentino and Rep. Monaghan both felt that rules related to electronic communications would be difficult to enforce and wondered how different it was from the passing of written notes or personal conversations in the halls. Legislators are becoming more adept at using technology to become informed on the issues. Mr. Parr's concerns relate to the lack of courtesy to a member of the public testifying at a public hearing and to the lack of transparency if electronic communications are being used. Perry Antone and Suzanne Goucher reiterated Mr. Parr's concern about transparency, stating that the public needs to know how legislative decisions are being made and records of those decisions must be retained.

Ms. Goucher moved that the Advisory Committee write a letter to the Legislative Council asking them to adopt the Executive Branch's directive that email is the official form of communication. Mr. Parr seconded the motion. Linda Pistner stated her belief that this was not a FOA issue as all forms of communication, whether a written note or text, would be considered a public record. Ms. Lynch didn't think these types of communications among legislators was that different than partisan caucuses, which are not considered public proceedings. Ms. Lynch also stressed that the public and the lobby must be able to petition the government. Mr. Parr withdrew his second of the motion; the fact is that electronic communications are public records.

### **Remote participation by members of public bodies**

The Advisory Committee discussed the issue of remote participation by public bodies and reviewed the legislative recommendation made last year. Because the bill was not enacted, Sen. Valentino stated that she didn't think the Advisory Committee would be successful if the same proposal was submitted again, but she welcomed further discussion.

Mr. Parr agreed, but noted that the failure of the legislation was related to differing legal opinions from the Attorney General's Office and the Maine Municipal Association about whether current law permits public bodies to meet remotely. Since the interpretation of the current law is not consistent, Mr. Parr suggested that the Legislature clarify the issue one way or another. Fred Hastings stated he would not be comfortable if the Advisory Committee did not

discuss the issue further. Mr. Hastings pointed to the Utah statute included in the background materials prepared by staff as an approach for the Advisory Committee to consider. Judy Meyer also expressed concern that, if the Advisory Committee did not make a recommendation, other proposals might come forward that the Advisory Committee would not support.

If the Advisory Committee wants to continue the discussion, Sen. Valentino suggested that representatives of the Maine Municipal Association and other stakeholders be invited to provide comments. Although he could not speak to the MMA's position, Richard Flewelling stated that MMA representatives would be available to participate in a discussion at the next meeting. The Advisory Committee agreed to discuss remote participation by public bodies at the next meeting and directed staff to invite comments from MMA and other stakeholders. Mr. Pringle noted that this issue was an important one to the Maine School Management Association, which he represents on the Committee. Mr. Pringle asked if a representative of Maine School Management Association could sit in for him as he would be absent from the next meeting. Sen. Valentino said that no one could replace Mr. Pringle at the table, but that MSMA would be invited to provide comments during the discussion.

#### **Remedies for abusive/burdensome public records requests**

Staff reviewed a chart comparing other states approaches to abusive, repetitive or unduly burdensome public records requests. While legislation was proposed in California, Virginia and Washington, Connecticut appears to be the only state that provides a statutory authority to a state agency to seek declaratory or injunctive relief from abusive, repetitive or unduly burdensome public records requests. Several states—California, Illinois, Kansas, Kentucky, New Jersey, Pennsylvania and Utah—have laws allowing agencies to deny records requests if the request is unduly burdensome or meets other criteria. Alaska, Connecticut, Georgia, Illinois, Tennessee and Utah are examples of states that provide authority for an agency to require fees to be paid in advance or to impose fines for frivolous or repetitive requests.

The Advisory Committee reviewed draft language recommended to the Judiciary Advisory Committee last year. The proposed draft was not put forward in a bill by the Judiciary Committee. The draft would add a statutory provision to allow a public body, agency or official to seek relief from overly burdensome requests under the Freedom of Access Act by filing an action in Superior Court seeking a determination whether the request may be denied.

The Advisory Committee also reviewed an alternative draft proposal suggested by Ms. Pistner. While the proposal was vetted internally, the draft had not been reviewed and approved by the Attorney General. Ms. Pistner told the Advisory Committee the draft is intended to achieve the same goal as the previously recommended draft. Instead of establishing a "new" standard for the court to interpret, the draft uses a standard and process similar to the one used by the courts to grant exemptions from discovery. The burden remains on the state agency to seek relief from the court before denying a public records request on the basis that the request is unduly burdensome or oppressive. Mr. Parr inquired whether the draft would preclude an agency from asking requesters of public records to narrow their request. Ms. Pistner stated that the intent was to allow negotiation and discussion to continue between parties. Mr. Parr also asked if Ms. Pistner has considered language authorizing the State to seek attorney's fees. Ms. Pistner responded that she did not consider such a provision, preferring to leave that issue out. Mr. Pringle

complimented the draft as proposed; he noted that that the Advisory Committee had considered the attorney's fee provision in the past, but felt it might have a more chilling effect on records requests than the Advisory Committee was comfortable with. Ms. Lynch said she was concerned about the language requiring a scheduled hearing by the court because of the potential impact on court resources. Ms. Lynch wondered whether the court could use other summary approaches to resolve an agency's request for relief. Ms. Pistner agreed that a formal hearing would not be necessary in all instances; the language could be revised. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee, subject to review of a revised draft at the November 17<sup>th</sup> meeting.

#### **New existing public records review schedule**

Advisory Committee staff outlined proposed draft language to codify the new existing public records review schedule, which was recommended to the full Advisory Committee by the Public Records Subcommittee in 2013. Under the new schedule, the Advisory Committee will begin its review of existing public records exceptions enacted after 2004 and before 2013 during 2015 or 2016. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

#### **Review of other legislative recommendations from 2013**

The Advisory Committee reviewed draft legislation to implement the recommendations made to the Judiciary Committee last year, which were incorporated into LD 1821, An Act to Implement the Recommendations of the Right to Know Advisory Committee. LD 1821 was enacted by the Legislature, but the bill was vetoed by the Governor. The Advisory Committee directed staff to prepare individual drafts according to the subject matter; the Advisory Committee reviewed four separate draft legislative proposals.

*Public records exceptions.* The proposed draft incorporates the same provisions relating to existing public records exceptions in Title 22 and Titles 26 to 39-A that were included in draft legislation recommended to the Judiciary Advisory Committee in 2013. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

*RTKAC membership—IT expertise.* The proposed draft adds a representative with expertise in information technology as a member of the Committee. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

*Reporting date for Public Access Ombudsman.* The proposed draft changes the reporting date for the annual report of the Public Access Ombudsman to January 15<sup>th</sup>, which is the same date by which the Advisory Committee is required to submit its annual report to the Legislature. The Advisory Committee unanimously voted to recommend the draft legislation to the Judiciary Committee.

*Deadlines and appeals.* The Advisory Committee reviewed two draft proposals addressing deadlines and appeals for public records requests. One proposal was recommended last year to the Judiciary Committee. That draft clarifies that the date of receipt of a request to copy or inspect a public record is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record; clarifies that

refusing to allow inspection or copying is considered a denial, as is the failure, within 10 days of the receipt of a request, to provide a written notice that the request is denied; and provides that, if no written notice of denial is provided, the requestor may file an appeal within 40 calendar days of the request.

The Advisory Committee also reviewed an alternative draft suggested by the Attorney General's Office. This draft makes clear that an agency's or official's written notice of denial in response to a request to copy or inspect records may be a statement that the agency or official expects to deny the request in full or in part, but that decision can be made only after reviewing the records subject to the request; eliminates the need for a de novo trial, and instead requires the Superior Court to conduct a review of an appeal de novo; and amends the laws governing public access officers by specifically requiring that a request for public records be acknowledged within 5 working days of the receipt of the request to be consistent with the current acknowledgement deadline in the Maine Revised Statutes, Title 1, section 408-A, subsection 3.

Ms. Meyer expressed concern that the draft put forward by the Attorney General's Office removed the "grace period" for acknowledgment of FOA requests. Ms. Meyer recalled that language was added to accommodate representatives of certain water districts that have limited business hours and limited staff available to respond to FOA requests. Ms. Kielty and Ms. Pistner understood the concern, but noted that this wasn't a significant area of complaint from the public. Ms. Kielty stated that the larger concern in preparing the draft was to be consistent and address the timeline and process for making appeals.

The Advisory Committee tabled discussion of the drafts until the next meeting. Ms. Pistner agreed to review both drafts and amend the proposal to address the concerns raised by the Committee.

### **FOA Training for Elected Officials**

Advisory Committee staff asked whether the Advisory Committee had suggestions for changes to the FOA training required for elected officials, including Legislators. Mr. Pringle noted that there is no need for additional training or changes in the way training is provided, but that many issues are in need of clarification for elected officials, e.g., responsibility for retention of electronic records and authority to conduct meetings remotely. Once these issues are clarified, they can be incorporated into existing training materials. At this time, the Advisory Committee has no suggestions for changes.

### **FAQs**

Advisory Committee staff asked whether the Advisory Committee had suggestions for changes or updates to the "Frequently Asked Questions" document. Ms. Kielty has assumed responsibility for management and oversight of the State's Freedom of Access website and periodically updates the content, including the FAQs. At this time, the Advisory Committee has no suggestions for changes or updates.

### **Draft report**

The Advisory Committee approved the general format for the draft report and agreed to include copies of the veto letters of bills implementing Advisory Committee recommendations in the

Appendices. Mr. Flewelling advised that the Law Court had issued a decision related to FOA on November 4<sup>th</sup>; staff agreed to summarize the decision and include it in the report along with summaries of other FOA-related cases decided in 2013 and 2014.

**Summary of November 17, 2014 meeting.**

*(to be added)*

**V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE  
RECOMMENDATIONS CONTAINED IN EIGHTH ANNUAL REPORT**

The Right to Know Advisory Committee made several recommendations in its eighth annual report. The actions taken in 2014 as a result of those recommendations are summarized below.

<p><b>Recommendation:</b> Enact legislation to expand the membership of the Right to Know Advisory Committee to include an information technology professional</p>	<p><b>Action:</b> The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee contained in <i>LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. The recommendation to expand the membership of the Right to Know Advisory Committee to add a member experienced in information technology issues was included as Part B of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained. <i>(See veto letter in Appendix K.)</i></p>
<p><b>Recommendation:</b> Communicate to the Joint Standing Committee on Veterans and Legal Affairs about the public records exception in Title 28-A, section 755 relating to business and financial records of liquor licensees</p>	<p><b>Action:</b> Letter from the Advisory Committee to the Veterans and Legal Affairs Committee; no legislative action taken.</p>
<p><b>Recommendation:</b> Continue without modification, amend and repeal the specified existing public records exceptions in Titles 26 through 39-A</p>	<p><b>Action:</b> The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in <i>LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee</i>. The Judiciary Committee made a date change with regard to when a report submitted by the State Board on Arbitration and Conciliation must be made public, but otherwise accepted the Advisory Committee’s recommendations, printed as Part A of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was</p>

	sustained. <i>(See veto letter in Appendix K.)</i>
<b>Recommendation:</b> Make no change to the confidentiality provision in the sentinel events reporting law	<b>Action:</b> No action was taken.
<b>Recommendation:</b> Repeal the Community Right-to- Know Act in Title 22	<b>Action:</b> The Judiciary Committee voted “Ought to Pass as Amended” on the Advisory Committee’s recommendation to repeal the Community Right-to-Know Act because it has never been implemented. The Judiciary Committee received written comments from the Health and Human Services Committee supporting the proposed repeal. The repeal of the Act was included as section 1 of Part A of <i>LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee</i> . Governor LePage vetoed LD 1821 as amended, and the veto was sustained. <i>(See veto letter in Appendix K.)</i>
<b>Recommendation:</b> Establish a future process for review of public records exceptions	<b>Action:</b> No legislative action recommended for 2014 but new proposed schedule expected for review in 2015.
<b>Recommendation:</b> Enact legislation authorizing the use of technology to permit remote participation in public meetings (divided report)	<b>Action:</b> A majority of the Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee with regard to remote participation in meetings as proposed in <i>LD 1809, An Act Concerning Meetings of Public Bodies Using Communications Technology</i> . The majority report, with the new title of <i>An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi Municipal Corporations and Districts That provide Water, Sewer and Sanitary Services</i> , limited the bill’s application to the governing bodies of quasi-municipal corporations and districts. Governor LePage vetoed LD 1809 as amended, and the veto was sustained. <i>(See veto letter in Appendix K.)</i>
<b>Recommendation:</b> Enact legislation to address overly burdensome FOAA requests	<b>Action:</b> The Judiciary Committee decided to not support the proposed legislation, and no bill was printed or considered during the Second Regular Session of the 126th Legislature.
<b>Recommendation:</b> Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (divided report)	<b>Action:</b> The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee contained in <i>LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee</i> . The Judiciary Committee made changes in the recommended

	language to clarify the date of receipt of a request to inspect or copy a public record, and modified other proposed language concerning appeals and deadlines, all incorporated as Part D of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained. <i>(See veto letter in Appendix K.)</i>
<b>Recommendation:</b> Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee	<b>Action:</b> The Judiciary Committee voted “Ought to Pass as Amended” on the recommendations of the Advisory Committee contained in <i>LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee</i> . The recommendation to align the reporting date of the Public Access Ombudsman with the annual report date of the Right to Know Advisory Committee was included as Part C of LD 1821. Governor LePage vetoed LD 1821 as amended, and the veto was sustained. <i>(See veto letter in Appendix K.)</i>
<b>Recommendation:</b> Communicate with the Joint Standing Committee on State and Local Government about issues identified by the Registers of Deeds relating to the redaction of Social Security numbers from filed documents	<b>Action:</b> Letter from the Advisory Committee to the State and Local Government Committee; no legislative action taken.

## VI. RECOMMENDATIONS

During 2014, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

**Enact legislation to add an IT professional to the membership of the Right to Know Advisory Committee**

The Advisory Committee recommends the enactment of legislation to add an Information Technology (IT) professional (someone experienced in digital communications) to the membership of the Right to Know Advisory Committee to be appointed by the Governor. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

*See draft legislation in Appendix C.*

**Enact legislation to align the annual reporting date for the Public Access Ombudsman with the annual reporting date for the Right to Know Advisory Committee**

The Advisory Committee recommends legislation changing the date of the Public Access Ombudsman annual report to January 15 to align the date with the annual report of the Advisory Committee. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

*See draft legislation in Appendix D.*

**❑ Continue without modification, amend or repeal the existing public records exceptions in Title 26 through 39-A**

As required by law, the Advisory Committee reviewed existing public records exceptions identified in Title 26 through Title 39-A. The Advisory Committee's recommendations are summarized below and are also posted at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). The Advisory Committee made the same recommendations in its Eighth Annual Report, but they did not become law.

The Advisory Committee recommends that the following exceptions in Titles 26 through 39-A be continued without modification.

- ◆ Title 30-A, section 503, subsection 1-A, relating to county personnel records concerning the use of force
- ◆ Title 30-A, section 2702, subsection 1-A, relating to municipal personnel records concerning the use of force
- ◆ Title 32, section 2599, relating to medical staff reviews and hospital reviews – osteopathic physicians
- ◆ Title 32, section 3296, relating to Board of Licensure in Medicine medical review committees
- ◆ Title 32, section 13006, relating to real estate grievance and professional standards committees hearings
- ◆ Title 32, section 16607, subsection 2, relating to records obtained or filed under the Maine Securities Act
- ◆ Title 34-A, section 5210, subsection 4, relating to the State Parole Board report to the Governor
- ◆ Title 35-A, section 1311-B, subsections 1, 2 and 4, relating to public utility technical operations information
- ◆ Title 35-A, section 1316-A, relating to Public Utilities Commission communications concerning utility violations
- ◆ Title 35-A, section 9207, subsection 1, relating to information about communications service providers
- ◆ Title 36, section 575-A, subsection 2, relating to forest management and harvest plan provided to Bureau of Forestry and information collected for compliance assessment for Tree Growth Tax Law
- ◆ Title 36, section 579, relating to the Maine Tree Growth Tax Law concerning forest management plans
- ◆ Title 37-B, section 708, subsection 3, relating to documents collected or produced by the Homeland Security Advisory Council

- ◆ Title 37-B, section 797, subsection 7, relating to Department of Defense, Veterans and Emergency Management, Maine Emergency Management Agency reports of hazardous substance transportation routes
- ◆ Title 38, section 470-D, related to individual water withdrawal reports
- ◆ Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans
- ◆ Title 38, section 1610, subsection 6-A, paragraph F, relating to annual sales data on the number and type of computer monitors and televisions sold by the manufacturer in this State over the previous 5 years
- ◆ Title 38, section 1661-A, subsection 4, relating to information submitted to the DEP concerning mercury-added products
- ◆ Title 38, section 2307-A, relating to information submitted to the DEP concerning toxic use and hazardous waste reduction
- ◆ Title 39-A, section 153, subsection 9, relating to the Workers' Compensation Board audit working papers
- ◆ Title 39-A, section 355-B, subsection 11, relating to records and proceedings of the Workers' Compensation Supplemental Benefits Oversight Committee concerning individual claims
- ◆ Title 39-A, section 403, subsection 3, relating to workers' compensation self-insurers proof of solvency and financial ability to pay
- ◆ Title 39-A, section 403, subsection 15, relating to records of workers' compensation self-insurers
- ◆ Title 39-A, section 409, relating to workers' compensation information filed by insurers concerning the assessment for expenses of administering self-insurers' workers' compensation program

The Advisory Committee recommends that the following public records exceptions be amended, including provisions previously recommended for changes in LD 420, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Public Records Exceptions.

- ◆ Title 26, section 3, relating to information, reports and records of the Director of Labor Standards within the Department of Labor
- ◆ Title 26, section 934, relating to report of the State Board of Arbitration and Conciliation in labor dispute
- ◆ Title 29-A, section 152, subsection 3, relating to the Secretary of State's data processing information files concerning motor vehicles
- ◆ Title 29-A, section 257, relating to the Secretary of State's motor vehicle information technology system
- ◆ Title 29-A, section 517, subsection 4, relating to motor vehicle records concerning unmarked law enforcement vehicles
- ◆ Title 35-A, section 8703, subsection 5, relating to telecommunications relay service communications
- ◆ Title 38, section 585-B, subsection 6, paragraph C, relating to mercury reduction plans for air emission source emitting mercury
- ◆ Title 38, section 585-C, subsection 2, relating to the hazardous air pollutant emissions inventory

*See draft legislation in Appendix E.*

- Repeal the Community Right-to-Know Act because the program has never been implemented and public information is available through other means**

The “Community Right-to-Know Act” was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public’s right to access information collected by the Department of Health and Human Services. Trade secrets are completely protected. The Advisory Committee understands that the Community Right-to-Know Act has never been implemented by the Department of Health and Human Services so no records subject to the confidentiality provisions exist. Based on this information, the Advisory Committee recommends repeal of the Act. The Advisory Committee made the same recommendation in its Eighth Annual Report, but it did not become law.

*See draft legislation in Appendix F.*

- Establish a process for continuing the review of public records exceptions**

The Advisory Committee discussed draft legislation, proposed by the Public Records Exception Subcommittee in the Eight Annual Report, to require the Advisory Committee to review public records exceptions according to a new schedule, starting in 2015. The Advisory Committee recommends that the Judiciary Committee pass legislation implementing the new public records exceptions review schedule, starting in 2015.

*See draft legislation in Appendix G.*

- Enact legislation to amend Public Law 2013, chapter 350 concerning deadlines and appeals (????)**

*See draft legislation in Appendix H.*

- Enact legislation authorizing the use of technology to permit remote participation in public meetings (????)**

*See draft legislation in Appendix I.*

- Enact legislation to address unduly burdensome or oppressive FOAA requests (????)**

*See draft legislation in Appendix J.*

- Take no action to investigate the privacy and confidentiality issues presented in Resolves 2013, chapter 112 (????)**

## **VII. FUTURE PLANS**

In 2015, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

C

**Right to Know Advisory Committee**  
Draft: Add Information Technology expert to RTK AC membership

**Sec. 1. 1 MRSA §411, sub-§2** is amended to read:

**2. Membership.** The advisory committee consists of the following members:

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; ~~and~~

M. The Attorney General or the Attorney General's designee; and

N. One member with broad experience and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use

C

**Right to Know Advisory Committee**

Draft: Add Information Technology expert to RTK AC membership

of communication technologies to support meetings, including audio and web conferencing; databases for records management and reporting; and information technology system, development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

**SUMMARY**

This bill adds one additional member to the Right to Know Advisory Committee, appointed by the Governor. The new position will bring information technology expertise to the Advisory Committee.

DRAFT

**Right to Know Advisory Committee**  
Draft: Change reporting date for Public Access Ombudsman

**Sec. 1. 5 MRS §200-I, sub-§5** is amended to read:

**§200-I. Public Access Division; Public Access Ombudsman**

**1. Public Access Division; Public Access Ombudsman.** There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.

**2. Duties.** The ombudsman shall:

- A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;
- B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;
- C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;
- D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;
- E. Make recommendations concerning ways to improve public access to public records and proceedings; and
- F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests.

**3. Assistance.** The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

**4. Confidentiality.** The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall

**Right to Know Advisory Committee**

Draft: Change reporting date for Public Access Ombudsman

maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

**5. Report.** The ombudsman shall submit a report not later than ~~March~~ January 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A. The total number of inquiries and complaints received;
- B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;
- C. The number of complaints received concerning respectively public records and public meetings;
- D. The number of complaints received concerning respectively:
  - (1) State agencies;
  - (2) County agencies;
  - (3) Regional agencies;
  - (4) Municipal agencies;
  - (5) School administrative units; and
  - (6) Other public entities;
- E. The number of inquiries and complaints that were resolved;
- F. The total number of written advisory opinions issued and pending; and
- G. Recommendations concerning ways to improve public access to public records and proceedings.

**SUMMARY**

Current law requires the Public Access Ombudsman to submit an annual report to the Right to Know Advisory Committee and the Legislature by March 15th of each year. This bill changes the reporting date to January 15th of each year, which is the same date by which the Right to Know Advisory Committee is required to submit its annual report.

EF

**Right to Know Advisory Committee**  
Draft: Statutory changes to public records exceptions

F

→ **Sec. 1.** 22 MRSA c. 271, sub-c. 2 (§1696-A to §1696-F) is repealed.

**Sec. 2.** 26 MRSA §3 is repealed and the following enacted in its place:

**§3. Confidentiality of records**

**1. Confidential records.** Except as provided in subsections 2 and 3, all information and reports received by the director or the director's authorized agents under this Title are confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

**2. Exceptions.** Reports of final bureau action taken under the authority of this Title are public records for the purposes of Title 1, chapter 13, subchapter 1.

**3. Authorized disclosure.** The director shall make or authorize any disclosure of information of the following types or under the following circumstances with the understanding that the confidentiality of the information will be maintained:

**A.** Information and reports to other government agencies if the director believes that the information will serve to further the protection of the public or assist in the enforcement of local, state and federal laws; and

**B.** Information and records pertaining to the work force, employment patterns, wage rates, poverty and low-income patterns, economically distressed communities and regions and other similar information and data to the Department of Economic and Community Development and to the Governor's Office of Policy and Management for the purposes of analysis and evaluation, measuring and monitoring poverty and economic and social conditions throughout the State and to promote economic development.

**Sec. 3.** 26 MRSA §934 is amended to read:

**§934. Conciliation; notification of dispute; proceedings in settlement; report**

Whenever it appears to the employer or employees concerned in a labor dispute, or when a strike or lockout is threatened, or actually occurs, he or they may request the services of the board.

If, when the request or notification is received, it appears that a substantial number of employees in the department, section or division of the business of the employer are involved, the board shall endeavor, by conciliation, to obtain an amicable settlement. If the board is unable to obtain an amicable settlement it shall endeavor to persuade the employer and employees to submit the matter to arbitration.

EF

**Right to Know Advisory Committee**  
Draft: Statutory changes to public records exceptions

The board shall, upon notification, as soon as practicable, visit the place where the controversy exists or arrange a meeting of the interested parties at a convenient place, and shall make careful inquiry into the cause of the dispute or controversy, and the board may, with the consent of the Governor, conduct the inquiry beyond the limits of the State.

The board shall hear all interested persons who come before it, advise the respective parties what ought to be done by either or both to adjust the controversy, and shall make a confidential written report to the Governor and the Executive Director of the Maine Labor Relations Board. The Governor or executive director ~~may~~ shall make the report public if, after 15 days from the date of its receipt, the parties have not resolved the controversy and the public interest would be served by publication. In addition, either the Governor or the executive director may refer the report and recommendations of the board to the Attorney General or other department for appropriate action when it appears that any of the laws of this State may have been violated.

**Sec. 4. 29-A MRSA §152, sub-§3** is amended to read:

**3. Central computer system.** Notwithstanding any other provisions of law, purchase and maintain a central computer system for purposes of administering this Title and conducting departmental operations. All other uses must be approved by the Secretary of State. ~~The Secretary of State shall adopt rules regarding the maintenance and use of data processing information files required to be kept confidential and shall distinguish those files from files available to the public;~~

**Sec. 5. 29-A MRSA §257** is repealed.

**Sec. 6. 29-A MRSA §517, sub-§4** is amended to read:

**4. Unmarked law enforcement vehicles.** An unmarked motor vehicle used primarily for law enforcement purposes, when authorized by the Secretary of State and upon approval from the appropriate requesting authority, is exempt from displaying a special registration plate. Records for all unmarked vehicle registrations are confidential.

~~Upon receipt of a written request by an appropriate criminal justice official showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.~~

**Sec. 7. 35-A MRSA §8703, sub-§5** is amended to read:

**5. Confidentiality.** ~~Relay service communications must be~~ The providers of

**Right to Know Advisory Committee**

Draft: Statutory changes to public records exceptions

telecommunications relay services must keep relay service communications confidential.

**Sec. 8. 38 MRSA §414, sub-§6** is amended to read:

**6. Confidentiality of records.** Any records, reports or information obtained under this subchapter is available to the public, except that upon a showing satisfactory to the department by any person that any records, reports or information, or particular part of any record, report or information, other than the names and addresses of applicants, license applications, licenses and effluent data, to which the department has access under this subchapter would, if made public, divulge methods or processes that are entitled to protection as trade secrets as defined in Title 10, section 1542, subsection 4, these records, reports or information must be confidential and not available for public inspection or examination. Any records, reports or information may be disclosed to employees or authorized representatives of the State or the United States concerned with carrying out this subchapter or any applicable federal law, and to any party to a hearing held under this section on terms the commissioner may prescribe in order to protect these confidential records, reports and information, as long as this disclosure is material and relevant to any issue under consideration by the department.

**Sec. 9. 38 MRSA §585-B, sub-§6** is amended to read:

**6. Mercury reduction plans.** An air emission source emitting mercury in excess of 10 pounds per year after January 1, 2007 must develop a mercury reduction plan. Except as provided in subsection 7, the mercury reduction plan must be submitted to the department no later than September 1, 2008. The mercury reduction plan must contain:

- A. Identification, characterization and accounting of the mercury used or released at the emission source; and
- B. Identification, analysis and evaluation of any appropriate technologies, procedures, processes, equipment or production changes that may be utilized by the emission source to reduce the amount of mercury used or released by that emission source, including a financial analysis of the costs and benefits of reducing the amount of mercury used or released.

~~The department may keep information submitted to the department under this subsection confidential as provided under section 1310-B.~~

The department shall submit a report to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than March 1, 2009 summarizing the mercury emissions and mercury reduction potential from those emission sources subject to this subsection. In addition, the department shall include an evaluation of the appropriateness of the 25-pound mercury standard established in subsection 5. The

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evaluation must address, but is not limited to, the technological feasibility, cost and schedule of achieving the standards established in subsection 5. The department shall submit an updated report to the committee by March 1, 2013. The joint standing committee of the Legislature having jurisdiction over natural resources matters is authorized to report out to the 126th Legislature a bill relating to the evaluation and the updated report.

**Sec. 10. 38 MRSA §585-C, sub-§2, ¶D is repealed.**

**Sec. 11. 38 MRSA §1310-B, sub-§2 is amended to read:**

**2. Hazardous waste information and information on mercury-added products and electronic devices and mercury reduction plans; chemicals.** Information relating to hazardous waste submitted to the department under this subchapter, information relating to mercury-added products submitted to the department under chapter 16-B, information relating to electronic devices submitted to the department under section 1610, subsection 6-A, ~~information relating to mercury reduction plans submitted to the department under section 585-B, subsection 6,~~ information related to priority toxic chemicals submitted to the department under chapter 27 or information related to products that contain the "deca" mixture of polybrominated diphenyl ethers submitted to the department under section 1609 may be designated by the person submitting it as being only for the confidential use of the department, its agents and employees, the Department of Agriculture, Conservation and Forestry and the Department of Health and Human Services and their agents and employees, other agencies of State Government, as authorized by the Governor, employees of the United States Environmental Protection Agency and the Attorney General and, for waste information, employees of the municipality in which the waste is located. The designation must be clearly indicated on each page or other portion of information. The commissioner shall establish procedures to ensure that information so designated is segregated from public records of the department. The department's public records must include the indication that information so designated has been submitted to the department, giving the name of the person submitting the information and the general nature of the information. Upon a request for information, the scope of which includes information so designated, the commissioner shall notify the submitter. Within 15 days after receipt of the notice, the submitter shall demonstrate to the satisfaction of the department that the designated information should not be disclosed because the information is a trade secret or production, commercial or financial information, the disclosure of which would impair the competitive position of the submitter and would make available information not otherwise publicly available. Unless such a demonstration is made, the information must be disclosed and becomes a public record. The department may grant or deny disclosure for the whole or any part of the designated information requested and within 15 days shall give written notice of the decision to the submitter and the person requesting the designated information. A person aggrieved by a

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decision of the department may appeal only to the Superior Court in accordance with the provisions of section 346. All information provided by the department to the municipality under this subsection is confidential and not a public record under Title 1, chapter 13. In the event a request for such information is submitted to the municipality, the municipality shall submit that request to the commissioner to be processed by the department as provided in this subsection.

**SUMMARY**

This proposed legislation implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Title 22 and Titles 26 to 39-A. The legislation does the following.

Section 1 repeals the Community Right to Know Act, a program within the Department of Health and Human Services intended to provide disclosure of information about hazardous substances in the community that has never been implemented.

Section 2 makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

Section 3 relates to reports of the State Board of Arbitration and Conciliation in a labor dispute. The amendment makes clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

Section 4 repeals language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

Section 5 repeals a provision relating to the Secretary of State's motor vehicle information technology system because the confidentiality of the system is already addressed in another provision of law.

Section 6 removes language that is redundant with another section of law.

Section 7 clarifies that it is the responsibility of the providers of telecommunications relay services to keep relay services communications confidential.

Section 8 adds a cross-reference to the definition of "trade secret".

Section 9 repeals language making mercury reduction plans for air emission source emitting mercury confidential.

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Draft: Statutory changes to public records exceptions

Section 10 repeals language making hazardous air pollutant emissions inventory reports confidential.

Section 11 removes language cross-referencing language repealed by Section 9 of this bill relating to the confidentiality of mercury reduction plans for air emission sources emitting mercury.

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**Right to Know Advisory Committee**  
Draft: New schedule for review of existing public records exceptions

**Sec. 1.** 1 MRS §433, sub-§2 is repealed and the following enacted in its place:

**2-A. Scheduling guidelines.** The advisory committee shall use the following list as a guideline for scheduling reviews of public records exceptions and reporting its recommendations to the review committee:

A. Exceptions enacted after 2004 and before 2013 are scheduled to be reviewed by the review committee no later than 2017.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2019:

- (1) Title 1;
- (2) Title 2;
- (3) Title 3;
- (4) Title 4;
- (5) Title 5;
- (6) Title 6;
- (7) Title 7; and
- (8) Title 7-A.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2021:

- (1) Title 8;
- (2) Title 9-A;
- (3) Title 9-B;
- (4) Title 10;
- (5) Title 11; and
- (6) Title 12.

C. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2023:

- (1) Title 13;
- (2) Title 13-B;
- (3) Title 13-C;
- (4) Title 14;
- (5) Title 15;
- (6) Title 16;
- (7) Title 17;
- (8) Title 17-A;
- (9) Title 18-A;
- (10) Title 18-B;
- (11) Title 19-A;
- (12) Title 20-A; and
- (13) Title 21-A.

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D. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2025:

- (1) Title 22;
- (2) Title 22-A;
- (3) Title 23;
- (4) Title 24; and
- (5) Title 24-A.

E. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2027:

- (1) Title 25;
- (2) Title 26;
- (3) Title 27;
- (4) Title 28-A;
- (5) Title 29-A;
- (6) Title 30;
- (7) Title 30-A;
- (8) Title 31; and
- (9) Title 32.

F. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2029:

- (1) Title 33;
- (2) Title 34-A;
- (3) Title 34-B;
- (4) Title 35-A;
- (5) Title 36;
- (6) Title 37-B;
- (7) Title 38; and
- (8) Title 39-A.

**Sec. 2. 1 MRSA §433, sub-§3** is amended to read:

**3. Scheduling changes.** The advisory committee may make adjustments to the scheduling guidelines provided in subsection 2 2-A as it determines appropriate and shall notify the review committee of such adjustments.

**SUMMARY**

This draft repeals the public records exceptions review schedule that was completed in 2014 and replaces it with a new review schedule. The advisory committee

**Right to Know Advisory Committee**

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will review public records exceptions enacted after 2004 but before 2013 and report its recommendations to the review committee over the course of 2 years, with the final review by the review committee completed no later than 2017. The advisory committee will then begin to review all the public records exceptions codified in the statutes over a 12-year period. The review committee will conduct its review of the advisory committee's recommendations in 2019, 2021, 2023, 2025, 2027 and 2029. The "advisory committee" is the Right to Know Advisory Committee and the "review committee" is the joint standing committee of the Legislature having jurisdiction over judiciary matters.

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# 126th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2013

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Legislative Document

No. 258

H.P. 195

House of Representatives, February 5, 2013

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**An Act To Implement the Recommendations of the Right To Know  
Advisory Committee Concerning Meetings of Public Bodies**

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Reported by Representative PRIEST of Brunswick for the Joint Standing Committee on  
Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph  
G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint  
Rule 218.

*Millicent M. MacFarland*

MILLICENT M. MacFARLAND

Clerk

1 Be it enacted by the People of the State of Maine as follows:

2 PART A

3 Sec. A-1. 1 MRSA §403-A is enacted to read:

4 **§403-A. Public proceedings through other means of communication**

5 This section governs public proceedings, including executive sessions, during which  
6 public or governmental business is discussed or transacted through telephonic, video,  
7 electronic or other similar means of communication.

8 **1. Requirements.** A body subject to this subchapter may conduct a public  
9 proceeding during which a member of the body participates in the discussion or  
10 transaction of public or governmental business through telephonic, video, electronic or  
11 other similar means of communication only if the following requirements are met:

12 A. The body has adopted a policy that authorizes a member of the body who is not  
13 physically present to participate in a public proceeding through telephonic, video,  
14 electronic or other similar means of communication in accordance with this section.  
15 The policy may establish circumstances under which a member may participate when  
16 not physically present;

17 B. Notice of the public proceeding has been given in accordance with section 406;

18 C. Except as provided in subsection 3, a quorum of the body is assembled physically  
19 at the location identified in the notice required by section 406;

20 D. Each member of the body participating in the public proceeding is able to hear all  
21 the other members and speak to all the other members during the public proceeding,  
22 and members of the public attending the public proceeding in the location identified  
23 in the notice required by section 406 are able to hear all members participating from  
24 other locations;

25 E. Each member who is not physically present and who is participating through  
26 telephonic, video, electronic or other similar means of communication identifies the  
27 persons present at the location from which the member is participating;

28 F. All votes taken during the public proceeding are taken by roll call vote; and

29 G. Each member who is not physically present and who is participating through  
30 telephonic, video, electronic or other similar means of communication has received  
31 prior to the public proceeding any documents or other materials that will be discussed  
32 at the public proceeding, with substantially the same content as those documents  
33 actually presented. Documents or other materials made available at the public  
34 proceeding may be transmitted to the member not physically present during the  
35 public proceeding if the transmission technology is available. Failure to comply with  
36 this paragraph does not invalidate the action of a body in a public proceeding.

37 **2. Voting; judicial or quasi-judicial proceeding.** A member of a body who is not  
38 physically present and who is participating in a judicial or quasi-judicial public  
39 proceeding through telephonic, video, electronic or other similar means of

1 communication may not vote on any issue concerning testimony or other evidence  
2 provided during the judicial or quasi-judicial public proceeding.

3 **3. Exception to quorum requirement.** A body may convene a public proceeding  
4 by telephonic, video, electronic or other similar means of communication without a  
5 quorum under subsection 1, paragraph C if:

6 A. An emergency has been declared in accordance with Title 22, section 802,  
7 subsection 2-A or Title 37-B, section 742;

8 B. The public proceeding is necessary to take action to address the emergency; and

9 C. The body otherwise complies with the provisions of this section to the extent  
10 practicable based on the circumstances of the emergency.

11 **4. Annual meeting.** If a body conducts one or more public proceedings pursuant to  
12 this section, it shall also hold at least one public proceeding annually during which  
13 members of the body in attendance are physically assembled at one location and where no  
14 members of the body participate by telephonic, video, electronic or other similar means  
15 of communication from a different location.

16 **PART B**

17 **Sec. B-1. 10 MRSA §384, sub-§5** is enacted to read:

18 **5. Meetings.** The board shall have a physical location for each meeting.  
19 Notwithstanding Title 1, section 403-A, board members may participate in meetings by  
20 teleconference. Board members participating in the meeting by teleconference are not  
21 entitled to vote and are not considered present for the purposes of determining a quorum,  
22 except in cases in which the chair of the board determines that the counting of members  
23 participating by teleconference and the allowance of votes by those members is necessary  
24 to avoid undue hardship to an applicant for an investment.

25 **Sec. B-2. 32 MRSA §88, sub-§1, ¶D**, as amended by PL 2007, c. 274, §19, is  
26 further amended to read:

27 D. A majority of the members appointed and currently serving constitutes a quorum  
28 for all purposes and no decision of the board may be made without a quorum present.  
29 A majority vote of those present and voting is required for board action, except that  
30 for purposes of either granting a waiver of any of its rules or deciding to pursue the  
31 suspension or revocation of a license, the board may take action only if the proposed  
32 waiver, suspension or revocation receives a favorable vote from at least 2/3 of the  
33 members present and voting and from no less than a majority of the appointed and  
34 currently serving members. ~~The Notwithstanding Title 1, section 403-A, the board~~  
35 ~~may use video conferencing and other technologies to conduct its business but is not~~  
36 ~~exempt from Title 1, chapter 13, subchapter 1.~~ Members of the board, its  
37 subcommittees or its staff may participate in a meeting of the board, subcommittees  
38 or staff via video conferencing, conference telephone or similar communications  
39 equipment by means of which all persons participating in the meeting can hear each  
40 other, and participation in a meeting pursuant to this subsection constitutes presence  
41 in person at such meeting.



1           7. Each member who is not physically present and who is participating through  
2 telephonic, video, electronic or other similar means of communication must have  
3 received, prior to the proceeding, any documents or other materials that will be discussed  
4 at the public proceeding, with substantially the same content as those documents actually  
5 presented.

6           8. A member of a body who is not physically present may not vote on any issue  
7 concerning testimony or other evidence provided during the public proceeding if it is a  
8 judicial or quasi-judicial proceeding.

9           9. If a body conducts one or more public proceedings using remote-access  
10 technology, the body must also hold at least one public proceeding annually during which  
11 all members of the body in attendance are physically assembled at one location.

12           Under current law, the following state agencies are authorized to use remote-access  
13 technology to conduct meetings: the Finance Authority of Maine, the Commission on  
14 Governmental Ethics and Election Practices, the Emergency Medical Services' Board and  
15 the Workers' Compensation Board. Part B provides a specific exemption from the new  
16 requirements for the Small Enterprise Growth Board, the Emergency Medical Services'  
17 Board and the Workers' Compensation Board.

