

Right to Know Advisory Committee
September 29, 2011
Meeting Summary

Convened 1:08 p.m., Room 438, State House, Augusta

Present:

Sen. David Hastings
Rep. Joan Nass
Perry Antone
Shenna Bellows
Joe Brown
Mike Cianchette
Richard Flewelling
Ted Glessner
Mal Leary
Bill Logan
Linda Pistner
Harry Pringle

Absent:

Judy Meyer
Mike Violette

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Introductions and Welcome to New Member

Senator Hastings called the meeting to order and asked all the members to introduce themselves. Senator Hastings also welcomed Bill Logan, a lawyer in private practice in Newport, as a new member representing the public. Mr. Logan replaces Robb Weaver who resigned from the Advisory Committee.

Bulk Records Subcommittee Update

Michael Cianchette, chair of the subcommittee, reported that the subcommittee met once on September 12th. At the meeting, the subcommittee received an update from staff on the activities of the last year's Bulk Records Subcommittee as well as a briefing from Greg McNeal of the Office of Information Technology on the work of the OIT Stakeholder Group convened at the request of the State and Local Government Committee. Previous discussions focused on county registry of deeds and requests for bulk data.

Mr. Cianchette explained that the subcommittee discussed the scope of its charge and agreed that issues related to bulk data go beyond records maintained by county registry of deeds and that bulk data requests impact a wide range of records and electronic databases maintained by government agencies. The subcommittee reviewed other state laws that define bulk data and determined that other state laws do not provide any guidance for a clear statutory definition or approach to bulk data. The subcommittee decided to gather public input and suggestions for how to address bulk data issues.

Mr. Cianchette reported that the subcommittee will hold a public hearing on Friday, October 14th to get input from state and local government agencies and interested parties on four questions:

1. What is bulk data and how should it be defined?
2. What is the appropriate method of determining the cost that a requestor must pay for bulk data?
3. Should a requestor of bulk data be entitled to the records in the format and type of access requested? Should a distinction be made between a requester seeking access to records and a requester seeking ownership of records?
4. Should the law distinguish between bulk data requests of public records for commercial purposes versus requests for noncommercial purposes?

After the public hearing on October 14, the subcommittee will meet on October 21 to discuss the testimony provided at the hearing.

Sen. Hastings stated that he believed that this is an important issue that would benefit from a comprehensive analysis as previous legislative actions have been haphazard and focused on county registry of deeds records. Mr. Cianchette agreed; the subcommittee is interested in addressing bulk data as a whole in a straightforward manner without focusing solely on deeds.

However, Shenna Bellows and Mal Leary noted the ongoing litigation between MacImage and the county registries of deeds related to this issue and told the Advisory Committee that the ACLU of Maine and the Maine Freedom of Information Coalition have filed amici briefs in support of MacImage in the appeal being considered by the Maine Supreme Judicial Court. Mr. Leary expressed his concern about some of the legal arguments being made in the case that assert that deeds are not public records. Because of the important legal issues being considered about whether businesses making requests for records can be treated differently, Mr. Leary also wondered whether the subcommittee or the Advisory Committee can resolve this issue before the Law Court weighs in. Harry Pringle stated that the MacImage case is an interesting Law Court case, but he believed the Advisory Committee has the ability to bring common sense to the issue by balancing the right to know with the ability of government to charge for reasonable access to records. Mr. Pringle commended the subcommittee for its decision to hold a public hearing.

Joe Brown stressed the importance of defining bulk data for registries of deeds, but also for state government agencies and law enforcement. Mr. Brown also asserted his opinion that there is a difference between the use of public records or bulk data like deeds for commercial use versus personal use. Sen. Hastings asked if the law should require a person to state the purpose of a records request. Mr. Pringle explained that the law does not require a person to state a reason for a request, but the law does permit a government agency to ask for clarification from the requester about which record or records are being requested. Mr. Leary noted his concerns about the application of the law if requests from businesses are treated differently than requests from individuals. Mr. Cianchette remarked that the law could distinguish between the identity of the requester and the intended use of the records requested; the goal of the subcommittee is to develop a statutory framework, if possible. Sen. Hastings stated that the subcommittee and Advisory Committee will have a better idea if a statutory solution is possible after the public hearing.

Public Records Exception Subcommittee Update

Shenna Bellows, chair of the subcommittee, gave the update from the Public Records Exception Subcommittee. The subcommittee met twice, including the morning of the Advisory Committee

meeting, and will meet again on October 27. The subcommittee has reviewed 31 existing public records exceptions; these are the remaining exceptions of the more than 120 exceptions in Titles 22 to 25 that the subcommittee began reviewing last year. The subcommittee has made recommendations on 21 exceptions and has done its due diligence in its review by seeking input from the Department of Health and Human Services, Bureau of Insurance, Maine Turnpike Authority, Maine Department of Transportation, Board of Licensure in Medicine, Attorney General's Office, Maine Health Data Organization and Maine Trial Lawyers' Association.

The subcommittee has tabled 8 exceptions for further discussion at its next meeting. Ms. Bellows flagged four issues identified by the subcommittee that she wanted to bring to the Advisory Committee's attention.

Issue #1: The subcommittee has identified certain statutes as obsolete, but records exist. The subcommittee is recommending language to preserve the confidentiality of certain records, if necessary, after the statute is repealed.

Issue #2; The subcommittee has identified certain statutes that have never been implemented that contain confidentiality provisions which have been recommended for complete repeal. The subcommittee believes the policy question related to the repeal of an entire program authorized in statute (including its public records exceptions) but never implemented goes beyond their scope. The subcommittee will recommend that the issue be referred to the relevant policy committee of the Legislature for further review.

Issue # 3: The subcommittee has identified the use of inconsistent statutory language in certain public records exceptions, e.g. exception relating to confidentiality of examination records held by the Bureau of Insurance. The subcommittee will note the inconsistency when identified and will recommend that the issue be referred to the relevant policy committee of the Legislature for further review.

Issue #4: The subcommittee is reviewing an existing exception that protects information related to sentinel events, i.e. substantial medical errors leading to injury or death in hospitals and other facilities, reported to the Department of Health and Human Services. After discussing the exception at this morning's meeting with a representative of the Attorney General's Office, Ms. Bellows noted the mixed feelings of the subcommittee about the very broad confidentiality provision; whether the provision is needed to ensure that hospitals and others report sentinel events and whether, as a result, there is no mechanism to alert the public about serious medical errors. Ms. Bellows explained that the subcommittee has several options for moving forward with their discussion of sentinel events and asked the Advisory Committee members for their opinion on how best to move forward. Should the subcommittee recommend an amendment to the provision for review? Should the subcommittee hold a hearing and/or seek input from the Department of Health and Human Services, the Maine Hospital Association, Maine Medical Association and other stakeholders? Should the subcommittee recommend that this issue be referred to the Health and Human Services Committee or Judiciary Committee for review? After brief discussion, the Advisory Committee recommended that the subcommittee bring the interested parties together before making a final recommendation on the sentinel events provision.

Legislative Subcommittee Update

Mal Leary gave the update for the Legislative Subcommittee for Subcommittee Chair, Judy Meyer, who was absent. The Legislative Subcommittee held one meeting; another is scheduled for October 6.

Mr. Leary reported that the subcommittee received a presentation from a representative of the Criminal Law Advisory Commission of a proposed re-draft of the Criminal History Record Information Act. The Criminal History Record Information Act implicates public and confidential records; the subcommittee will review the specific confidentiality provisions in the Act at the next meeting. Mr. Leary also noted that this proposed redraft will be an important policy issue when presented to the Legislature for consideration.

The subcommittee also heard an overview presentation from the Maine Heritage Policy Center on LD 1465, An Act to Amend the Laws Governing Freedom of Access. The Maine Heritage Policy Center worked with Sen. Rosen and other stakeholders in drafting LD 1465 but was the leading proponent of the bill before the Legislature. The overview focused on 3 reforms included in LD 1465: timelines, form of requests and public access officers. Mr. Leary noted that the subcommittee will discuss LD 1465 at its next meeting. The hardest issue to resolve will be the proposed timelines in the bill for responses to FOA requests. Other proposals in the bill related to public access officers and ombudsman funding may generate more agreement among the subcommittee. The subcommittee discussed the potential for making unanimous recommendations that certain provisions of LD 1465 move forward.

Mr. Leary reported that the subcommittee also discussed a request from Chris Parr, Staff Attorney in the Maine State Police, Department of Public Safety, asking the subcommittee to consider the question of what is a FOA request and whether a formal request that cites the FOA laws is necessary. The subcommittee agreed that formality is not and should not be required for a request, particularly for the general member of the public making a request. Mr. Cianchette noted that the subcommittee discussed whether formality may become more necessary if changes to the law like the timelines proposed in LD 1465 are adopted. Finally, Mr. Leary stated that the subcommittee has not yet discussed the letter received by the Governor related to possible abuses of the FOA laws through frivolous requests made to the Governor's Office, but that the subcommittee plans to discuss the issue in the future.

Sen. Hastings asked for the Advisory Committee's thoughts on LD 1465, particularly the proposed timelines. Linda Pistner stated that she believed it would be hard to develop a fixed timeline for all bodies; the current law's reasonable time standard is recognition by the Legislature that one approach may not fit everyone. Richard Flewelling agreed that the current law allows a balancing test to consider the scope of the request and the staff time needed to respond, but also requires that agencies acknowledge the request within a reasonable time. Mr. Flewelling noted that he does not represent the policy position of the Maine Municipal Association on legislation, but stated that he believed it would be very hard for municipalities to comply with the deadlines proposed in LD 1465.

Sen. Hastings asked about the recourse available in the law when agencies do not respond. Mr. Flewelling noted the provision allowing for the recovery of attorney's fees when government bodies act in bad faith. Ms. Bellows stated that her organization does get complaints about lack of responses to FOA requests and indicated her belief that timelines could be developed with escape clauses. Mr. Cianchette agreed that the example brought forward by the Maine Heritage Policy Center of the Maine Turnpike Authority's failure to respond to a request in a timely manner is

egregious. However, Mr. Cianchette believes the language in LD 1465 is ambiguous; the “reasonable” standard in current law is a legal term of art that courts can interpret on a case by case basis. Mr. Pringle stated his view that the current law is reasonable; the MTA example would be “unreasonable” under current law and an easy case for a court to decide. Mr. Pringle also noted that the Legislature recently enacted a law requiring that a record of public proceedings be provided in a “reasonable” period of time. Mr. Pringle cautioned against using one obvious abuse of the statute as a reason to make changes. Kelly Morgan stated that the proposed timelines in LD 1465 are not likely to pass as drafted, but expressed her concern about requiring persons to go to court as the only mechanism to enforce the law. Mr. Leary expressed his strong belief that an ombudsman is clearly needed to make sure government bodies are complying with the FOA laws, noting the success of ombudsman offices in other states like Texas.

Sen. Hastings asked about the provision in LD 1465 requiring that government bodies designate a public access officer and whether government bodies had the capacity to do so. Mr. Leary reminded the Advisory Committee that LD 1465 allows an agency to assign an existing employee as the public access officer; it does not require that a new position be created and budgeted. Mr. Cianchette stated that Governor LePage reissued the Executive Order requiring state agencies to have an FOA contact person, but indicated some concern that LD 1465 may overreach in dictating management functions for agencies. Mr. Cianchette noted that the bill as written requires FOA requests to be answered in the absence of the public access officer. He suggested a better approach might be to require FOA training for the chief administrative officer of government bodies. Mr. Leary stated he supported such a proposal several years ago and continues to support this, but that concerns about whether it is a municipal mandate affected its passage. Mr. Flewelling reiterated that he cannot take a legislative position on behalf of MMA, but stated that MMA has advocated for making mandatory training applicable to appointed officials as well as elected officials and has conducted extensive FOA training for its members.

Discussion: How to resolve FOA requests/response problems?

Sen. Hastings remarked that the Advisory Committee’s discussion led nicely into the last agenda item for discussion: How to resolve FOA requests/problems? Is there a resolution process that is fair to both requesters and public offices? Sen. Hastings noted the informal role of the Attorney General’s Office, and of Linda Pistner herself, in resolving issues brought to them. Although the Ombudsman position has never been funded, Sen. Hastings stated he believed the AG’s Office has been able to resolve almost all issues and suggested that funding the Ombudsman position and formalizing that role may be the most effective way to resolve disputes. Mr. Pringle agreed completely that the need for an ombudsman is critical and that the Advisory Committee has supported its establishment and funding for many years. Ms. Bellows suggested that an ombudsman could bring savings by helping to avoid litigation. Sen. Hastings asked if the Legislative Subcommittee would be willing to review the statutory duties of the ombudsman and make recommendations for any changes. Mr. Leary agreed to bring the issue to the Legislative Subcommittee. Mr. Cianchette indicated that, if the Advisory Committee is able to address concerns raised by Governor, the Governor will again consider providing funding for the Ombudsman position in the budget. Sen. Hastings stated that, although it is up to the Legislature to fund the position, the inclusion of the position in the Governor’s budget is an important factor and he hopes that the Governor recognizes the value of the position.

Sen. Hastings suggested that the Legislative Subcommittee review LD 1465 with the expectation that the ombudsman will be funded and wondered if some of the provisions in LD 1465 would still be necessary if an ombudsman were in place.

Scheduling of Future Meetings

After recognizing that the subcommittees may benefit from additional time to complete their work, the Advisory Committee agreed to cancel its October 27th meeting. The Advisory Committee agreed to keep its November meeting date as scheduled and will meet on December 8, which they had previously scheduled only if necessary,

Meetings of the Advisory Committee and subcommittees are scheduled as follows. All meetings are to be held in Room 438 of the State House.

Advisory Committee:

- Thursday, November 17, 2011, starting at 1:00 p.m.; and
- Thursday, December 8, 2011, starting at 1:00 p.m.

Public Records Exceptions Subcommittee:

- Thursday, October 27, 2011, starting at 1:00 p.m.

Legislative Subcommittee:

- Thursday, October 6, 2011, starting at 12:00 noon.

Bulk Records Subcommittee:

- Friday, October 14, 2011, starting at 9:00 a.m. (*Public Hearing*); and
- Friday, October 21, 2011, starting at 9:00 a.m.

The meeting was adjourned at 3:00 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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