

Right to Know Advisory Committee
Legislative Subcommittee
October 6, 2011
Meeting Summary

Convened 12:06 p.m., Room 438, State House, Augusta

Present:

Judy Meyer, Chair
Shenna Bellows
Joe Brown
Richard Flewelling
Ted Glessner
Kelly Morgan
Linda Pistner
Harry Pringle

Absent:

Mike Cianchette
Mal Leary

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Judy Meyer, subcommittee chair, called the meeting to order and asked all the members to introduce themselves.

Criminal History Record Information Act Revision

Charlie Leadbetter, Special Assistant Attorney General, walked the Subcommittee through the side-by-side of Part 1 of Criminal History Record Information Act revision drafted by the Criminal Law Advisory Commission (CLAC) e. The side-by-side is a comparison of the proposed language with the existing law, with the confidentiality provisions highlighted. Mr. Leadbetter reminded the Subcommittee that this law applies to criminal history record information generated in other jurisdictions, in addition to Maine information. Ms. Meyer questioned the application to court records; Mr. Leadbetter pointed out the new §657, sub-§3 (which carries over current law), providing that the CHRIA does not apply to the dissemination of court records.

Mr. Leadbetter explained that the change in terminology to “public criminal history record information” and “confidentiality criminal history record information” is to make clear to the public what can be shared and what is not generally available. The existing terms are “conviction data” (which are public) and “nonconviction data” (which are generally not public). The existing law was originally based on a federal regulation, and changes in Maine law have been grafted on over time as necessary.

The new definition of “criminal history record information” appears broader than the current definition, but only to be more accurate and specific in describing what information falls within the application of the Act. CLAC believes it is important to identify what criminal history record information is, and also what it is not. The draft tries to accomplish that without making significant changes in the current law.

The question as to whether the courts should be considered a “criminal justice agency” for all purposes of this law is still open to discussion, although the draft continues the current practice of

including the courts in that definition. Mr. Leadbetter explained the redrafting of the definition of “criminal justice agency” tries to capture any unit of government that has enforcement authority. This Act would control just that unit, not the whole department.

This draft also describes “noncriminal justice purposes” - such as tenant checks, employee checks and credit checks. Before any criminal justice agency releases public criminal history record information for a noncriminal justice purpose, the agency must check with the State Bureau of Information to ensure the information is accurate and complete. Shenna Bellows noted that the ACLU-Maine receives complaints about situations in which a person shares the same name and birthdate with someone with a criminal record.

Mr. Leadbetter explained two new situations in which confidential criminal history record information may be released. Section 654, subsection 2, paragraph F allows a criminal justice agency to release information about a disposition that is confidential within 30 days of the disposition. The criminal justice agency may also release the information at the request of the person the record is about. There may be some discussion about whether the 30 days is the appropriate length for the ability to release the information; Ms. Meyer thought 12 months would be consistent with the length of time an arrest remains public without an active prosecution.

The Subcommittee discussed why CLAC had not included new language on criminalizing the further release of confidential criminal history record information by someone other than a criminal justice agency. Mr. Leadbetter explained that CLAC believes this type of conduct is hard to follow, investigate and prosecute.

Other language in the chapter has been updated and takes into account the fact that records are very often no longer kept on paper and in logbooks.

Ms. Bellows focused on the provisions concerning the right to review and ask for corrections in records. The Subcommittee agreed that it is important that InforME provide accurate information and follow up when inaccurate information has been released.

The Subcommittee agreed to review Part 2 of the Criminal History Record Information Act revision, which covers intelligence and investigative information, at a future meeting.

Diana DeJesus, Law School Extern

Linda Pistner introduced Diana DeJesus, a third-year student at the Maine Law School, who is serving as the Law School Extern to the Right to Know Advisory Committee. Her graduate school research included Florida’s “Sunshine Law” and she is pleased to continue working in this field. She is currently researching state-level Privacy Acts, as mentioned by the Judiciary Committee.

LD 1465, An Act To Amend the Laws Governing Freedom of Access

Ms. Meyer noted that she and Ms. Bellows and Mr. Pringle were all on a panel at the Maine Municipal Association conference that morning, and municipal officials are very interested in LD 1465, especially the timelines it proposes. She recommended that the Subcommittee invite both members of the public and government officials to provide comments about abuse of the FOA process.

Staff walked the Subcommittee through a chart that grouped provisions of LD 1465 into subject matter. The first topic covered was public notice of public proceedings. LD 1465 proposes that notice must be given at least three days prior to a proceeding; current law requires “ample time” for the public to attend. Current law appears to require a case-by-case analysis; the Law Court found that one day notice was sufficient in the facts of a particular case. Mr. Pringle asked whether there is a sense that the current notice provisions have been abused. Establishing a minimum of three days may easily end up being the practice, so the change will actually result in less notice. Mr. Flewelling noted that he usually advises municipalities to give seven days notice, although some proceedings are regularly scheduled and may be posted a year in advance. Ms. Morgan noted that the current law provides for notice for “emergency” meetings, but doesn’t define what constitutes as emergency. Ms. Meyer thought the practical definition is a meeting to handle anything that can’t wait until the next regularly scheduled meeting. She also noted that the Freedom of Information Coalition receives more complaints about where notice is posted than when, and agreed with Mr. Pringle and Mr. Flewelling. Ms. Bellows explained that the ACLU-Maine does not get complaints about this, and she can go either way on the proposal. The Subcommittee agreed to not recommend the changes proposed by LD 1465 concerning public notice.

The next topic discussed was the form of the requested response. Ms. Bellows agreed that the drafting could be modified, as it doesn’t make sense to invest funds to change an existing document. If the public information can be provided in Excel or another electronic format, then it should be provided that way. If someone is looking for electronic data, she said, it doesn’t make sense to provide it on paper. Mr. Cianchette was unable to attend the Subcommittee meeting and sent a letter to the Subcommittee with his comments. His letter noted that this topic also falls within the jurisdiction of the Bulk Records Subcommittee. Mr. Pringle said the law should be very simple: if the government has a document and it is not confidential, you are entitled to it. If it is electronic, you should be able to get it in that form, as long as copyright and similar requirements are met. He wasn’t sure what the language included in LD 1465 means and whether it will be accurate as technology evolves. However, he said requiring the installation of a program on a secure system is problematic. Ms. Bellows agreed, and would like to work on a draft to require providing the record in the form in which it exists. Ms. Pistner agreed, but noted that some requesters are asking for data to be changed or massaged, and that isn’t really contemplated by the FOA laws. Ms. Bellows suggested giving agencies a choice to accept software to make data exportable. Ms. Meyer added that installing new software takes up space and the training of staff to use it takes time, both of which are sometimes in short supply. The Subcommittee agreed to wait for the Bulk Records Subcommittee to discuss this issue, and then work together, if possible.

Remedies was the next topic. LD 1465 gives the Superior Court authority to issue injunctions. It was agreed that the court currently has the authority to issue injunctions. Mr. Flewelling recalled a case in which the court ordered a board to not hold another unnoticed meeting. Mr. Pringle thought it would be useful to allow public officials to bring injunctions against nuisance requesters. Ms. Bellows thought it might be helpful if it were clear that such a remedy exists for individuals. The Subcommittee agreed to not recommend the proposed changes in LD 1465 concerning remedies, although Ms. Bellows reserved judgment.

The Subcommittee then discussed public access officers (PAO). Mr. Cianchette’s letter suggested an alternative, seeing this as more a management function which should be addressed differently depending on the size and level of government. He proposed either requiring the Chief Administrative Officer of a governmental unit to undergo the same training as elected

officials, or require that the elected officials who currently undergo training establish a FOAA policy for their staff. Mr. Pringle said he thinks the requirements of new §413 represent one of those issues that make sense in the abstract. He identified several concerns. Beverly Bustin-Hatheway (Register of Deeds for Kennebec County) wondered if it would require each individual county official, such as the Treasurer, to appoint a public access officer. Ms. Meyer suggested requiring a PAO for a governmental entity, and Ms. Bellows agreed such a proposal sounded more workable. Ms. Morgan liked the expansion of the training requirement, but agreed that the responsibilities listed in the new §413 are too much. Ms. Meyer suggested identifying a point of contact in all cases. Mr. Pringle didn't think that was necessary, but thought it is reasonable to provide information for the public to know how to request information. The Subcommittee asked staff to draft language providing for a public access contact.

The Subcommittee discussed the funding for the Public Access Ombudsman. LD 1465 proposed an appropriation to fund a half-time position in the Office of the Attorney General. The statutory authority and responsibilities are contained in current law. The Subcommittee agreed to recommend funding for a full-time position.

Future meetings

The next meeting was scheduled for Friday, October 21st, starting at 11:00 a.m. to take advantage of the Bulk Records Subcommittee meeting (starting at 9:00 a.m. on the 21st). The Subcommittee will invite a few people to provide comments on problems and concerns with requests/responses under the FOA laws.

Future Scheduled Meetings:

- Friday, October 14, 2011, 9:00 a.m., Bulk Records Subcommittee PUBLIC HEARING
- Friday, October 21, 2011, 9:00 a.m., Bulk Records Subcommittee
- Friday, October 21, 2011, 11:00 a.m., Legislative Subcommittee
- Thursday, October 27, 2011, 1:00 p.m., Public Records Exceptions Subcommittee
- Thursday, November 10, 2011, 1:00 p.m., Legislative Subcommittee
- Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee

The meeting was adjourned at 2:25 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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