

Right to Know Advisory Committee
Bulk Records Subcommittee
October 27, 2010
DRAFT Meeting Summary

Convened 10:14 a.m., Room 438, State House, Augusta

Present: Bob Devlin, Chair; Judy Meyer; Karla Black

Absent: Richard Flewelling

Staff: Peggy Reinsch, Carolyn Russo & Marion Hylan Barr

Chair, Bob Devlin, convened the meeting of the Bulk Records Subcommittee of the Right to Know Advisory Committee at 10:14 a.m. and asked the members to introduce themselves. Mr. Devlin then asked if anyone in the audience wanted to speak to the Subcommittee in response to the inquiry that was sent to FOA contacts and interested parties. The Subcommittee sought input from state and municipal government agencies and other interested parties regarding proposed draft legislation for determining reasonable fees for bulk data requests. Specifically, the Subcommittee asked state agencies and other governmental entities for:

- Reactions/comments regarding the proposed draft for reasonable fees, which would amend Title 1 to include the reasonable fees language enacted in Title 30-A pursuant to Public Law 2009, chapter 575; and
- Explanations regarding how the entity's statutory authority to set fees by rulemaking is set up and whether the proposed draft language would conflict with that existing authority.

Those speaking to the Subcommittee included the following.

- Michael Malloy, an attorney who represents Androscoggin County in the MacImage case, told the Subcommittee that the parties had submitted their findings of fact and law and that the case is under advisement by Justice Tom Warren. Justice Warren may schedule oral arguments in the next few weeks.
- Beverly Bustin-Hatheway, the Kennebec County Register of Deeds, pointed out that the Subcommittee had received many comments from other counties, that the State and Local Government Committee had adopted a reasonable fee standard for county records and that the Judiciary Committee had requested that the RTKAC look at the issue of bulk sales. In her opinion, not speaking on behalf of all registers, Maine needs a bulk sales law. Maine needs a guide regarding data and fees for all custodians of records, not just deeds, and the reasonable fees language in Title 30-A is one way to set a standard. She also mentioned looking at other states' approaches, including examples that exclude from the fees the press and others with public safety purposes and that limit resale or restrict commercial use, if not in violation of interstate commerce limitations. For now, she recommended putting the reasonable fees standard in law and then working on a more comprehensive policy, tasking some entity with all stakeholders to create a model.

Subcommittee member Karla Black noted that she was concerned starting with the reasonable fees standard, as it tends to pit state agencies and municipalities against each other because different agencies use different fees. Discussing bulk requests will only expand the problem. Ms. Black stated that more considerations need to be taken into account before she can commit to putting the reasonable fees standard in the freedom of access laws.

Subcommittee member Judy Meyer said that she has heard many people say that the current law is confusing, and if the RTKAC puts the draft language forward now and we then receive Justice Warren's decision later, the result will be even more confusion. We may be doing a lot of work that may just be undone.

Mr. Devlin expressed that this is a big issue for many constituencies, and he did not want the Subcommittee to do nothing, if there was something that could be addressed now. (i.e., defining "bulk data"?)

- Secretary of State Matt Dunlap then addressed the Subcommittee, noting that the "reasonable fees" standard did not provide a bright beacon for custodians, that defining "bulk data" is very difficult, and that it is important to look at how the data is handled. The RTKAC's focus is on the public's right to know, while other entities must be concerned about citizens' privacy. Secretary Dunlap explained that the sale of bulk information by his office serves a valuable public service and the information sold is done so for one use (i.e., insurance companies use a record to set rates). Secretary Dunlap said that these issues really break down into 2 parts: 1) what is subject to freedom of access? (public) and 2) what is subject to bulk sale? It is also about money and the value of the public records, which is significant. Secretary Dunlap believes that there is a difference between government interactions and knowing what your neighbor's driving record is. You may have a right to one but not necessarily the other. Secretary Dunlap finished by stating that he thought that the Subcommittee's focus should be identifying when a public record should be subject to freedom of access and then determining appropriate fees for that access.

Ms. Black asked if the current law (reasonable fees in Title 30-A) is what is being challenged in the MacImage case. Mr. Malloy explained that one of the issues is which law should apply – the previous or current law. The parties have different views on what law should apply and what the result should be.

The Subcommittee then reviewed the written responses regarding the reasonable fees proposal and the potential implication on rules. Staff pointed out some themes, including: there is no definition for "bulk records"; the counties' focus may be more on technical issues – perhaps we are putting the cart before the horse with the pending litigation; and lumping bulk sales with freedom of access requests may not be needed at this point. Mr. Devlin asked again if it is possible to come up with a reasonable standard for copy charges, given that agencies differ. He noted that "reasonable" needs fine-tuning. Staff reminded the Subcommittee that the first RTKAC's original recommendation was to set a maximum fee for copies, but this was not acceptable to municipalities and state agencies so they went with the "reasonable fee."

Richard Cayer, a member of the public, then explained situations that he has experienced when requesting to inspect public records in Madawaska. The fees that he was charged, \$350 and \$500, did not seem reasonable, and there has been no explanation to him of the exact costs incurred to actually pull the requested information together. Mr. Cayer also described fact-finding meetings that he was excluded from; executive sessions were held that appeared to him to be called in violation of the law (without a statutory basis).

Ms. Meyer voiced her concern that she cannot support drawing a line between public records as one document and bulk data where only some of the records are public and some are not. Ms. Black asked if the differential didn't already exist now. (i.e., one report from InforME may be \$15, but a database may be made available for free under a freedom of access request.)

Kelly Hokkanen from InforME explained that currently bulk records are sold at a discount in comparison to a per record fee. Some agencies have set up different systems for bulk sales. Ms. Meyer again expressed her concern about allowing fees to be set by rulemaking; the issue should be kept under the freedom of access law. Ms. Bustin-Hatheway shared that counties have discussed this issue a lot, as the counties change vendors and prices change. Ms. Meyer also pointed out that commercial restrictions on the use of public records would restrict her employer, the Sun Journal. The newspaper sells public information every day. She does not believe that the RTKAC should be deciding how public information is used. Mr. Devlin explained that the counties have tried to put a disclaimer on documents that are released, indicating that they are "not official copies" of the registry, and requesters have balked at this.

Ms. Bustin-Hatheway offered that PRIA (Property Records Industry Association) provides a summary of each state's approach to bulk sales (fees and whether they restrict purpose or use). Mr. Devlin continued that he believes that the "reasonable fees" language in Title 30-A has served us well, and he remains ready to put the language into Title 1. Ms. Meyer reminded the Subcommittee that they had discussed meeting later in the session and creating some kind of place holder for the issue, so that it could be revisited after the litigation is resolved. Staff again suggested including that as a recommendation to the Judiciary Committee. Ms. Hokkanen also mentioned that the Bulk Records Working Group created at the direction of the State and Local Government Committee has moved its reporting date up to at least March 15th. Ms. Black expressed that she was nowhere near ready to make informed comprehensive recommendations yet; although there may be some small recommendations to move the issue forward. She suggested that perhaps "bulk data" should be defined, even if we do not know the purpose for which it is used, but she could not support putting the "reasonable fees" language into the freedom of access law without knowing where the litigation was going to end up, especially with the agency feedback indicating that the language is confusing.

Mr. Devlin also mentioned that he did not think that the media's use should be affected (restricted), but Ms. Meyer responded that there should be no exceptions for the press – treating them differently than every one else would not be a good thing.

The Subcommittee then revisited the issue of redaction of SSNs. Staff reminded the Subcommittee that the full RTKAC had accepted the draft proposal of the Legislative

Subcommittee, which states that SSNs are not public. This change would give the record custodian the authority to redact a SSN but would not require the redaction. Ms. Black asked if this proposal would have an impact on Archives; if SSNs are not public, wouldn't Archives have an obligation to redact? Staff explained that there is an interpretation of a difference between "confidential" and "not public"; if a record is "not public", there is neither a public right to access the record nor a requirement that the custodian not release the record. The next step would be to tell the custodian what to do with the record. While this proposal is not perfect, it avoids some of the problems found with the prior SSN proposal that was rejected.

The Subcommittee then discussed the issue of public access to databases. Does the public have the right to access data or the entire database? There are some protections of software and technology in creating the database. How we look at this issue is difficult; the system originally contemplated a file cabinet of records that was searchable, and now there are databases with huge amounts of records, software and proprietary information. Ms. Hokkanen described the issue as a question of: "do you want access to information in the book or do you want the whole book?" She noted that making entire databases of public records available to the public was a problem, because what is an agency's responsibility to make the database "useable"? Must an agency translate data into another format? Mr. Malloy told the Subcommittee that all counties have different software vendors, and agreements with those vendors are confidential and proprietary. There are also security issues; if one is authorized to access county records by connecting a hard drive to a database, a county may want to have the vendor supervise that, and that will lead to additional costs for the county. Ms. Meyer noted that registries are complicated, but tax records are not.

Ms. Bustin-Hatheway stated that vendors with whom registries contract would not let anyone connect and access their systems directly; they would instead provide a "silent client" to load data on for security reasons so that the data cannot be changed. However, if requesters are buying and selling records in bulk from registries, there is no guarantee that the records that they are receiving are "authentic documents." The only official website for registry records is the Registry of Deeds. Ms. Meyers observed that requesters should be able to receive data requested if the request is reasonable, and if we impose such restrictions like records being accessible only by paper when they are on an electronic database, this defies where we are in record keeping. Do we want clerks printing paper copies? If records are electronic, they should be provided in electronic format, and the costs to provide the records should be charged and paid. Ms. Bustin-Hatheway clarified that vendors will give you data but will not give you codes. If people want bulk sales, we need to have a way to convert records, because vendors can't and won't give out their codes.

Mr. Devlin asked about InforME's role and about agencies responding to requests for bulk data now. Ms. Hokkanen explained that InforME does not respond to FOA requests. They instead respond to agencies requests for public services in bulk, and they develop service-level agreements with those agencies. InforME then serves as the mechanism by which an agency's data is made available to the public. Ms. Black asked if other state agencies are selling data through other means besides InforME. Ms. Hokannan answered that probably there are, but that the sales are probably more often one-time situations. She did not believe that other agencies

typically act as a service like InforMe, which provides requesters with monthly updates and other service agreements for ongoing access. InforME's purpose is to provide a gateway for public information, which requires funding. If public records are free through the FOA process, it will mean that InforMe will not be able to provide electronic services and ready access to the public. Ms. Black asked if it would be helpful to InforME to specify that when a state agency has contracted with InforME, a request for public records must be made through InforME and not the agency. Ms. Hokannen agreed that would be helpful, but Ms. Meyer said that she could not support forcing a requester to go to InforME instead of the custodian of the record. She noted that freedom of access requests are not free, and that requesters should be able to go through the department or agency that is the custodian of the records and pay the agency directly. Ms. Black then asked what the purpose of InforME is. Mr. Devlin answered that InforME is a portal for records, similar to that like the registries are working to create. Ms. Meyer expanded on that -- InforME is a portal for convenience.

Mr. Devlin then asked the Subcommittee what the next step might be. Ms. Meyer noted that although the discussion has been great and useful, the agenda and outcomes at another meeting will not change until we have a ruling in the MacImage case. Staff agreed to outline the questions and issues raised by the Subcommittee, so that they could be presented to the full RTKAC. Mr. Devlin adjourned the meeting at 12:12 p.m.

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