

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

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EXECUTIVE SUMMARY

This is the third 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, 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: <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 2008, the Advisory Committee met five times: January 30, May 28, July 30, September 10 and November 17. The Advisory Committee has three subcommittees. This year, two subcommittees—the Education and Training Subcommittee and the Legislative Subcommittee—held meetings and made recommendations for the Advisory Committee's consideration.

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 the developments in case law relating to Maine's Freedom of Access laws. For the second time, this report includes a summary of pending Supreme Judicial Court cases and recent Supreme Judicial Court decisions.

The report also includes a brief summary of the legislative actions taken since January 2008 in response to the Advisory Committee's recommendations in its second annual report.

For its third annual report, the Advisory Committee makes the following recommendations:
(to be added after November 17th meeting)

In 2009, 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 10 through 21-A. The Advisory Committee expects to have assistance during the First Regular Session of the 124th Legislature from a legal extern, a law student at the University of Maine Law School. With staffing assistance from its legal extern, the Advisory Committee looks forward to a full year of activities and working with the Governor and Legislature to implement the recommendations contained in its third annual report.

I. INTRODUCTION

This is the third 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. Public Law 2005, chapter 631 is included as Appendix A. The first and second annual reports of the Advisory Committee can be found on the Legislature's webpage at www.maine.gov/legis/opla/reportsnew.htm.

The Right to Know Advisory Committee has 16 members; 15 members are currently serving on the Advisory Committee and there is one vacancy. During 2008, the Speaker of the House of Representatives appointed Eric Conrad to represent newspaper publishing interests to fill a vacancy on the Advisory Committee. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. Barry Hobbins Chair	<i>Senate member of Judiciary Committee, appointed by President of the Senate</i>
Rep. Deborah Simpson	<i>House member of Judiciary Committee, appointed by Speaker of the House</i>
Shenna Bellows	<i>Representing the public, appointed by the President of the Senate</i>
Karla Black	<i>Representing State Government interests, appointed by the Governor</i>
Eric Conrad	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Robert Devlin	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Sheriff Mark Dion	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Richard Flewelling	<i>Representing municipal interests, appointed by the Governor</i>
James T. Glessner	<i>Member of the Judicial Branch</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Mal Leary	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>

Judy Meyer	<i>Representing the Press, appointed by the President of the Senate</i>
Maureen O'Brien	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Chris Spruce	<i>Representing the public, appointed by the Speaker of the House</i>

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

By law, the Advisory Committee must meet at least four times per year. During 2008, the Advisory Committee met five times: January 30, May 28, July 30, September 10 and November 17. The Education and Training Subcommittee met on November 17. The Legislative Subcommittee met on June 20, July 16, July 30, September 10, October 6 and November 13. All of the meetings were held in the Judiciary Committee Room of the State House in Augusta and open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage. The Advisory Committee also established a webpage which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas and summaries of the meetings are included on the webpage.

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, publicize the needs of 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.

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 the developments in case law relating to Maine's Freedom of Access laws. In its second annual report, the Advisory Committee briefly summarized relevant Law Court decisions since 2004 and cases pending before the Law Court on Freedom of Access issues. During 2008, the Advisory Committee identified the following Law Court decisions and pending cases on Freedom of Access issues.

Pending Cases involving Maine's Freedom of Access laws

- *(to be drafted)*

2008 Maine Supreme Judicial Court Opinions involving Maine's Freedom of Access laws

- Blethen Maine Newspapers, Inc. v. Portland School Committee, 2008 ME 69 (2008) (unanimous decision) : In July 2007, the Portland School Committee held an executive session to question the school superintendent and two other school officials about a \$2.5 million shortfall. The Portland Press Herald asserted that the closed meeting was improper, because budget matters cannot be discussed in executive session, and sued to obtain notes taken in the meeting. The Maine Supreme Judicial

Court held that the committee did not violate the section of the Freedom of Access law prohibiting a public entity from discussing budgets or budget shortfalls and documents prepared for use during executive session were not public records since public was legitimately excluded from executive session and committee was discussing job performance of personnel in relation to budget shortfall.

- James P. Moore v. Charles Abbott, Esq., Hon. Eugene Beaulieu and Marvin Glazier, 2008 ME 100 (2008) (3-2 decision) The Attorney General created in 2004 an independent panel to investigate allegations that prosecutors and police misled the jury, altered notes, ignored alternative suspects and destroyed evidence concerning the 1988 murder of 12-year-old Sarah Cherry. A citizen, James Moore, asked for the records of the panel that supported its four-page report finding no misconduct. The majority of the Maine Supreme Judicial Court ruled that the panel did not fall under the Freedom of Access laws because the panel was not created by executive or legislative action, was not performing a government function, was independent from government control and received no government funding.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities, the Advisory Committee created three subcommittees to organize and focus its work: 1) Education and Training; 2) Legislative; and 3) Compliance and Resources. Each of the subcommittees was charged with a specific duty as outlined in Title 1, section 411, subsection 6; all of the subcommittees agreed to include the authority to make recommendations for statutory changes as one of its charges as described in Title 1, section 411, subsection 6, paragraph G. The Chair and Vice-chair of the Advisory Committee are ex officio members of each subcommittee.

Education and Training Subcommittee. The Education and Training Subcommittee's focus is to serve as a central source and coordinator of information about Maine's Freedom of Access laws; to serve as a resource to support training and education about Maine's Freedom of Access laws; and to support the provision of information about public access to records and proceedings via the Internet. See Title 1, section 411, subsection 6, paragraphs B, C, and D. Judy Meyer is the chair the subcommittee, and the following serve as members: Karla Black, Richard Flewelling, Sheriff Mark Dion, Mal Leary, Linda Pistner and Harry Pringle.

During 2008, the Education and Training Subcommittee met once on November 17. The subcommittee discussed the agenda and materials to be used for a FOA training seminar for members of the 124th Legislature to fulfill the statutory requirements for mandatory training of elected officials pursuant to Title 1, Section 412.

Legislative Subcommittee. The Legislative Subcommittee's focus is to serve as an adviser to the Legislature when legislation affecting public access is proposed; to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; and to examine inconsistencies in statutory language and to propose clarifying standard language. See Title 1, section 411, subsection 6, paragraphs E, F and H. Christopher Spruce is

the chair of the subcommittee and the following serve as members: Shenna Bellows, Karla Black, Suzanne Goucher, Mal Leary, Linda Pistner and Harry Pringle.

During 2008, the Legislative Subcommittee had six meetings. The subcommittee reviewed the existing public records exceptions in Titles 10 through 21-A. The subcommittee made a recommendation to the Advisory Committee to continue, amend or repeal those exceptions in Titles 10 through 21- A that were reviewed; the remaining exceptions in these titles will be reviewed in 2009. By request, the subcommittee also reviewed the exception in Title 23, section 63 related to records of the Department of Transportation and Maine Turnpike Authority; reviewed the exception in Title 21-A related to confidentiality of educational credentialing records; reviewed suggested revisions to the Freedom of Access laws suggested by Christopher Parr; and reviewed the statutory requirements for minutes of public proceedings. See discussion of Advisory Committee recommendations in Section VI.

Compliance and Resources Subcommittee. The Compliance and Resources Subcommittee's focus is to provide guidance in ensuring access to public records and public proceedings and to help establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws; and to review 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. See Title 1, section 411, subsection 6, paragraphs A and J. James T. Glessner is the chair of the subcommittee and the following serve as members: Shenna Bellows, Karla Black, Robert Devlin, Mal Leary and Linda Pistner.

The Compliance and Resources Subcommittee did not have any meetings in 2008.

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

The Right to Know Advisory Committee made several recommendations in its second annual report. The actions taken in 2008 as a result of those recommendations are summarized below.

Recommendation: Continue to support the establishment of an ombudsman position

Action: The Advisory Committee supported the enactment of LD 1923, An Act to Implement the Recommendations of the Right to Know Advisory Committee Creating the Public Access Ombudsman, which was carried over by the Judiciary Committee. As drafted and supported by the Advisory Committee, LD 1923 would establish a Public Access Ombudsman, a funded half-time position within the Department of the Attorney General. Because no General Fund appropriation was made to provide funding, LD 1923 was amended by the Judiciary Committee to authorize the Attorney General to establish the Public Access Division and appoint the Public Access Ombudsman as a pilot project if funding is available. The provisions establishing the Public Access Division and the Public Access Ombudsman are repealed June 30, 2009. LD 1923 was later enacted with these amendments. See Public Law 2007, chapter 603.

Recommendation: Implement changes to Public Law 2007, chapter 349 to address difficulties identified with the practical application of the mandatory training law

Action: The Advisory Committee proposed statutory changes to PL 2007, chapter 349 to address the difficulties identified with the practical application of the mandatory training law as first enacted. The proposed changes included amending the training requirements to establish minimum content requirements for the training programs; specifically stating that a thorough review of the information contained under the Frequently Asked Questions heading on the State's Freedom of Access law website would meet the minimum requirements; deleting the requirement that the Advisory Committee establish standards and approve training courses; and requiring elected officials to make a written record of the completion of training. The Advisory Committee also proposed to clarify the elected officials who are subject to the training and to clarify that the training requirement applies to legislators elected after November 1, 2008. The Judiciary Committee accepted the draft legislation recommended by the Advisory Committee and submitted LD 2198, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Training for Elected Officials. LD 2198 was later enacted. See Public Law 2007, chapter 576.

Recommendation: Continue, amend and repeal existing public records exceptions in Titles 1-9-B

Action: As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 1 through Title 9-B. The Advisory Committee made recommendations for each exception in the following categories: continue exceptions without change; make statutory amendments to the exceptions; and refer for further discussion and review by Judiciary Committee. The Advisory Committee submitted draft legislation to the Judiciary Committee to make the recommended statutory changes. LD 2212, An Act Concerning Public Records Exceptions (which included the Advisory Committee's recommended changes) was reported out as a bill by the Judiciary Committee and later enacted. See Public Law 2007, chapter 597.

Recommendation: Review Freedom of Access laws revision proposed by Christopher Parr

Action: Christopher Parr, Staff Attorney for the State Police within the Department of Public Safety, proposed revisions to the Freedom of Access laws as part of the Department of Public Safety's response to a survey of state agencies conducted by the Advisory Committee in 2007. While the Advisory Committee did not make specific recommendations that the amendments be adopted, the Advisory Committee did recommend that the Judiciary Committee review the proposed revisions during the Second Regular Session of the 123rd Legislature. Some of Attorney Parr's suggested changes were incorporated into the Advisory Committee's recommendations to the Judiciary Committee related to LD 1881, An Act to Improve Transparency and Accountability in Government, and became part of Public Law 2007, chapter 501. The Judiciary Committee referred the remainder of Mr. Parr's suggested changes back to the Advisory Committee for review this year. See discussion of Mr. Parr's suggested revisions in Advisory Committee Recommendations, Section VI.

Recommendation: Amend LD 1881, An Act to Improve the Transparency and Accountability in Government (*not supported by one member*)

Action: The Advisory Committee spent considerable time discussing the provisions included in LD 1881, An Act to Improve the Transparency and Accountability in Government. The Advisory Committee reviewed the original bill and a discussion draft prepared for the Legislative Subcommittee but was concerned that the proposed changes would create more complexity than necessary. Instead of the discussion draft modeled on the provisions in LD 1881, the Advisory Committee recommended LD 1881 be amended to clarify Title 1, section 408 to require an agency or public official to acknowledge receipt of a public records request within a reasonable period of time and allow an agency or official to request clarification of a request to facilitate the response. The proposed language recommended by the Advisory Committee was suggested by Christopher Parr, Staff Attorney for the Maine State Police in the Department of Public Safety.

The Advisory Committee voted 10-1 in favor of the recommendation. Shenna Bellows objected and stated that she would support LD 1881 as drafted. The Judiciary Committee accepted the majority's recommendation and included the changes in a Committee Amendment to LD 1881. LD 1881 as amended by the Committee Amendment was later enacted. See Public Law 2007, chapter 501.

Recommendation: Oppose LD 1878, An Act to Generate Savings by Changing Public Notice Requirements [*Unanimously reconsidered at January 30, 2008 meeting and item tabled with no further action taken*]

Action: LD 1878, An Act to Generate Savings by Changing Public Notice Requirements, was carried over by the State and Local Government Committee for consideration during the Second Regular Session of the 123rd Legislature. In its original form, LD 1878 would phase out the statutory requirement that government entities publish legal or public notices in a newspaper and require instead that the notices be published on an accessible website. Initially as part of the recommendations in its second annual report, the Advisory Committee voted to submit a letter in opposition to LD 1878 to the State and Local Government Committee because of concerns that the statutory changes would restrict the public's notice of government meetings and activities. At its January 30th meeting, the Advisory Committee was presented with a draft amendment to LD 1878 by Representative Henry Joy on behalf of the bill's sponsor, Representative Teresa Hayes, and had further discussions about LD 1878. The draft amendment would require the development of a State-wide web portal to provide notices and information about public proceedings and make changes to the required items in public notices placed in paid newspaper advertisements. The Advisory Committee discussed the changes and shared their concerns about the proposed draft amendment to LD 1878, but did not reach consensus on the legislation. The Advisory Committee tabled consideration of LD 1878 and took no action on the bill or proposed amendment. During the Second Regular and First Special Session, LD 1878 as amended by Committee Amendment "B" was enacted by the House and Senate, but the bill was held by the Governor without his signature in the form of a pocket veto.

VI. RECOMMENDATIONS

(to be drafted)

VII. FUTURE PLANS

In 2009, 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 10 through 21-A. With staffing assistance from its legal extern during the upcoming legislative session, the Advisory Committee looks forward to a full year of activities and working with the Governor and Legislature to implement the recommendations contained in its third annual report.

APPENDIX A

Authorizing Legislation, Public Law 2005, Chapter 631

APPENDIX B

Membership List, Right to Know Advisory Committee

APPENDIX C

Responses to Survey on Freedom of Access Issues

APPENDIX D

Draft legislation: Proposed changes to mandatory training for elected officials

APPENDIX E

Recommendations concerning existing public records exceptions, Title 1 - 9-B

APPENDIX F

Proposed revision of the Freedom of Access Laws, prepared by Christopher Parr

APPENDIX G

Draft legislation: Proposed changes to LD 1881, An Act to Improve Transparency and Accountability in Government