

Right to Know Advisory Committee
June 22, 2016
Meeting Summary

Convened 10:07 a.m., Room 438, Maine State House, Augusta

Present:

Sen. David Burns
Rep. Kim Monaghan
Suzanne Goucher
A. J. Higgins
Richard LaHaye
Judy Meyer
Kelly Morgan
Chris Parr
Linda Pistner
Harry Pringle
Helen Rankin
William Shorey
Eric Stout

Absent:

Mary Ann Lynch
Luke Rossignol

Staff:

Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves, including two newly appointed members: Eric Stout, representing information technology expertise, and A.J. Higgins, representing broadcast interests.

Summary of the Right To Know Advisory Committee duties and powers

Staff reviewed the Advisory Committee's duties as set forth in Maine's Freedom of Access Act (FOAA) at 1 MRSA §411, sub-§6.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA: RTKAC recommendations

Staff began the discussion by reviewing the legislative outcome of the recommendations included in the Advisory Committee's January 2016 report. The 2016 report included proposed legislation regarding remote participation by members of public bodies; in response to Advisory Committee's recommendation, the Judiciary Committee created LD 1586, "An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceedings." A majority of the Judiciary Committee voted "Ought Not to Pass" on LD 1586, however a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by

members that also describes how the policy meets the principles of FOAA. The bill and the amendment were not passed by the Legislature.

The Judiciary Committee considered another remote participation bill, LD 1241, “An Act To Increase Government Efficiency,” which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine Municipal Bond Bank) to conduct public proceedings with members participating via remote access technology in certain circumstances (i.e., the member is needed for a quorum, illness of the member, weather that makes driving hazardous, or unexpected traffic delays or vehicle breakdowns when the commissioner is traveling to the meeting). LD 1241 was finally enacted as Public Law 2016, chapter 449.

Mr. Parr asked what should be inferred from this legislation regarding what authority is needed in law before a body may allow remote participation by its members at public proceedings. Staff noted that there still seem to be two approaches clarifying remote participation in public meetings: 1) specifying broad authority for remote participation in FOAA itself, and 2) providing specific authority for a governmental entity in its statutes. Staff also noted the Governor’s position that remote participation is already permitted under FOAA as long as all FOAA requirements are otherwise met, as stated in the veto message to LD 1809, “An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi-municipal Corporations and Districts That Provide Water, Sewer and Sanitary Services”; that veto was not overridden by the 126th Legislature.

Ms. Goucher stated that she would like to see the Advisory Committee attempt another recommendation in this area, because the issue is not going away until there is some guidance and clarity given. The Advisory Committee did not take a formal action on this request.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA: Proposed public records exceptions reviewed by Judiciary Committee

Staff summarized the proposed public records exceptions referred from policy committees to the Judiciary Committee for review in the Second Regular Session. As required by FOAA at 1 MRSA §434, when a majority of a joint standing policy committee of the Legislature supports proposed legislation that contains a new public records exception, the legislation is referred to the Judiciary Committee for review according to the criteria laid out in statute. The following legislation was reviewed:

- LD 466, “An Act To Increase Competition and Ensure a Robust Information and Telecommunications Market,” which was referred by the Energy, Utilities and Technology Committee, contained a provision making confidential any competitive information about an area’s telecommunications companies gathered by the Public Utilities Commission when considering whether to relieve FairPoint Communications from “provider of last resort” duties for a community. A new requirement for quarterly service quality reports from FairPoint Communications also provided that those reports

would be confidential unless the company failed to meet service quality requirements. The Judiciary Committee recommended no changes, and the bill was enacted.

- LD 1467, “An Act Regarding Maine Spirits,” which was referred by the Veterans and Legal Affairs Committee, contained a provision making new sales data records collected by the Bureau of Alcoholic Beverages and Lottery Operations public records and provided that the bureau must release the information in a way that would not specifically identify the business to which it pertains. The Judiciary Committee determined that no review was necessary because this new provision creates an exception to the blanket confidentiality that would have otherwise applied to these records, thereby making more information public. The bill was enacted.
- LD 1498, “An Act To Clarify Medicaid Managed Care Ombudsman Services,” which was referred by the Health and Human Services Committee, contained a confidentiality provision for records contained by a newly established ombudsman program for Medicaid services offered by the State. The Judiciary Committee recommended no changes, and the bill was enacted.
- LD 1499, “An Act To Increase the Safety of Social Workers” was heard in the Judiciary Committee; the bill proposed to make confidential the home address of licensed social workers. The Judiciary Committee amended the bill to also make licensee’s and license applicants’ telephone numbers confidential. In connection with this bill, the Judiciary Committee requested by letter that the Advisory Committee consider the broader issue of licensee confidentiality (discussed further below).
- LD 1578, “An Act To Update Maine's Solid Waste Management Laws,” which was referred by the Environment and Natural Resources Committee, contained a confidentiality provision affecting certain proprietary information submitted to the Department of Environmental Protection in connection with a proposed battery stewardship program. The Judiciary Committee recommended no changes, but the bill failed to pass in both Houses of the Legislature.

Review of public records exceptions enacted from 2005- 2012 pursuant to 1 MRSA §433

Staff reviewed the status of the Advisory Committee’s review of existing public records exceptions, which the Advisory Committee began last year and is due by 2017. The Public Records Exceptions Review Subcommittee reviewed a number of exceptions after the Advisory Committee’s last meeting in 2015 that will be presented for final action by the full committee in 2016. Next year, the Advisory Committee will begin reviewing all existing public records exceptions found in Titles 1 through 7-A. That review will be due by 2019.

Staff provided an update on a potential issue identified in 2015 involving the Department of Education’s ability to share teacher disciplinary information with other states because of the breadth of confidentiality provided at 20-A MRSA §13004, sub-§2-A. In 2015 the Subcommittee recommended to the full Advisory Committee that it draft legislation, with direction from the Department of Education, to address the issue. The Advisory Committee decided not to recommend a change to the statute, and instead notified the Education and Cultural Affairs Committee about this issue and the issue of teacher discipline confidentiality more generally. The Education and Cultural Affairs Committee determined that the Department does not seek to share confidential disciplinary information with other states. It seems this issue is resolved for

both the Right to Know Advisory Committee and the Education Committee. Ms. Pistner asked if this provision would come back to the Public Records Exceptions Review Subcommittee, as she recalled there may be other issues with the language. Staff answered that there was no expectation from the Education and Cultural Affairs Committee that the Advisory Committee would take up the issue again. Ms. Pistner stated that she would like to double check with her office before setting the issue aside. Staff noted that this would be tentatively added to the next Subcommittee meeting agenda.

Potential topics and projects for 2016

- *Confidentiality of hazardous material transfer by railroads*

Staff related a request from the Judiciary Committee for the Advisory Committee to include in its public records exceptions review a provision enacted by LD 484 in 2015 and now codified at 1 MRSA §402(3)(U), which makes information held by the Department of Environmental Protection relating to the transfer of hazardous material by railroads confidential. Mr. Pringle moved for the Advisory Committee to take action on this item. The vote was unanimous of those present that the full Advisory Committee discuss the issue.

- *Confidentiality of personal contact information for professions and occupations regulated by the State*

Staff related a request from the Judiciary Committee for the Advisory Committee to develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State. In the Second Regular Session of the 127th Legislature, LD 1499 enacted a new confidentiality provision for social worker licensees' and license applicants' addresses and telephone numbers; in connection, the Judiciary Committee sought a uniform policy for all licensing information. Staff noted that some licensing boards do make certain licensee information confidential in statute already. The Advisory Committee discussed how a uniform policy would need to balance the safety interests of the public in having access to licensee information with the privacy interests of licensees and license applicants.

Commissioner Head of the Department of Professional and Financial Regulation addressed the Advisory Committee. She acknowledged this was a tough issue, and that it would be good for the Advisory Committee to take a look. Mr. Parr noted that, in his experience dealing with private investigator licensing and FOAA requests for this information, it is amazing how much information in these licensing records is public. He asked Commissioner Head about the amount of information in her department's licensing records. Her reply was that all information in licensing applications, including contact information but excluding social security numbers, is generally public. There may be medical information in a licensing complaint file, but this information is already confidential and protected by statute. In response to another question, she stated there was generally no differentiation in the licensing records between a licensee's home address and work address – the agency has whatever the licensee gives it. A notable exception is the Maine Board of Licensure in Medicine, which has designated personal licensee information confidential, but professional information public. A licensing application generally contains

demographic information, education and exam results. Applicants are notified that any information given to the agency (except for social security numbers) will be public information.

Ms. Goucher asked Commissioner Head whether any other licensees besides social workers have requested their information be confidential, to which Commissioner Head answered that they had not. Commissioner Head stated that the Commissioner of Public Safety had asked her to remove home addresses for every pharmacist from public view because of an increase in pharmacy robberies.

Mr. Stout asked whether the licensing records were paper or electronic. Commissioner Head answered that they are paper applications scanned into a digital database. Chief LaHaye asked whether State law enforcement also had access to the information in this database such as addresses. Commissioner Head noted that she is required to assist law enforcement in public safety matters. The issue, she said, is more about prohibiting the public from having access to this information, not law enforcement. She noted that in the recent bill there was a clause permitting the Department of Professional and Financial Regulation to disclose confidential social worker information as required by the normal course of business. Rep. Monaghan wondered if a differentiation could be made between categories of licensees with inherent safety issues (for example those working with domestic violence victims). Commissioner Head noted there may be those that would make similar safety arguments as the social workers, and stated her concern with a piecemeal approach to confidentiality.

After brief further conversation on the topic, Mr. Parr moved for the full Advisory Committee to take up this topic in its business this year. All present were in agreement except for Mr. Higgins and Ms. Goucher. Mr. Higgins stated that his reluctance was due to concern with how far this would go toward confidentiality, and concern with expanding confidentiality even when licensees are not requesting it. Ms. Goucher stated that her opposition to the vote was because we already have a uniform policy – that these records are public – and any deviation from that requires a group to come before the Legislature to make its case and seek an exception. Mr. Higgins noted that it seemed we are trying to turn current policy on its head. Sen. Burns stated that it would be good for the Judiciary Committee to have guidelines to help in its considerations of future confidentiality proposals in the licensing area. Rep. Monaghan agreed it is important to have a uniform policy as new requests for confidentiality are inevitable. Ms. Pistner stated there were obviously some competing concerns, but expressed that she thought a compromise could be reached (for example, if a personal phone number is to be confidential, the licensee would have to provide a work number that would be open to the public).

Staff offered to provide information detailing the occupations and professions licensed by the Department of Professional and Financial Regulation, as well as other licensing agencies. Staff could also provide the status of current law regarding confidential information in the various categories of licensing. Additionally, staff offered to look to see how some other states treat licensee information.

Mr. Stout noted that licensing was a prime example of when citizens need to provide personally identifiable information to the government, and the balancing that must go on between the needs of the agency to conduct its function versus the need to make that information public. Serious

concerns are raised with providing contact information, but this information can be tailored. Ms. Meyer stated that she and others use the professional licensing database for consumer information, and noted that there are thousands of licensed professions so staff may have a difficult time gathering information on all of them.

Sen. Burns reiterated that the Judiciary Committee was not looking to change policy, but wanted to establish factors to consider when making decisions about new confidential licensing provisions. He requested staff provide some written material before the next meeting regarding this licensee confidentiality topic.

- *FOAA assistance for indigent members of the public*

The Advisory Committee next considered the request of Ken Capron for the development of a mechanism to help provide funds for indigent complainants to bring forward FOAA cases and the possibility of developing a standard court form to help pro se indigent complainants. The Advisory Committee took no action on this topic.

- *FOAA agency time and cost estimates, fee waiver policies and remedies for requesters*

Jack Comart of Maine Equal Justice Partners emailed the group in April with 5 suggestions: 1) require agencies to provide an estimate of time and cost for each separate component of a request for information; 2) require agencies to publically post and make available their fee waiver policy; 3) require that agencies grant fee waiver requests based upon reasonable standards; 4) clarify when estimates of time and cost must be provided by the agency; and 5) provide some recourse for requesters of information for agency action that may be arbitrary or capricious.

Staff reviewed current agency FOAA response time requirements, and also noted that while FOAA allows an agency to waive fees under FOAA, there is no requirement that the agency have a fee waiver policy or publicly post such policy. The Advisory Committee took no action on this topic.

Discussion of any additional topics and projects for 2016

Sen. Burns gave the group notice that there would be an agenda item relating to a potential issue involving executive sessions for the Committee's consideration at the next meeting. The discussion was opened up to the group regarding any other items of concern for potential consideration this year.

- *Criminal History Record Information Act (CHRIA) and the Judicial Branch*

Ms. Meyer raised a possible topic for future Advisory Committee discussion regarding the Judicial Branch's recent reversal of an October decision to make case files for dismissed cases confidential within 30 days of judgement. The prior policy had been based on an interpretation of the Criminal History Record Information Act (CHRIA) and an administrative order, which the media challenged. There may be a need to clarify some statutory ambiguity. Ms. Meyer

suggested that this discussion should not happen without Ms. Lynch from the Court System being present.

Ms. Pistner noted that this is a complicated issue because the courts are not bound by FOAA. She suggested that the Advisory Committee hear an explanation from the Attorney General's Office and the Judicial Branch's interpretation. Sen. Burns agreed that this should appear on the next agenda for the purposes of gathering more information to decide whether further action was warranted from the Advisory Committee.

There was discussion about what records were being sealed; Ms. Meyer replied that this was the entire criminal record. Record of the arrest is public, but, if a case is dismissed, that dismissal is not public information and so there is no proof of the dismissal. This situation led to problems with the media not having verification to report on these dismissals after having already reported on the initial charges. Mr. Parr expressed some concern about police reports being made public in these files, which include sensitive information such as victim statements. Ms. Meyer countered that this is important information for the public to understand how a case unfolded.

Sen. Burns asked about the difference between sealed cases and expunged cases. Ms. Pistner explained that all that was involved in this issue is whether dismissed cases should be released to the public, and that it did not affect sealed records in general. Sen. Burns moved to include this item in the next agenda and it was agreed by unanimous consent.

- *Social Security Numbers in medical files held by the Dept. of Health and Human Services*

Ms. Morgan asked if former Rep. Bradley Moulton could address the group about a concern he had based on his dealings with the Department of Health and Human Services in his capacity as a private attorney; Sen. Burns welcomed Rep. Moulton to the microphone.

Rep. Moulton explained that those who bring complaints before the medical boards make their records public information. His client had to file FOAA requests with the Department of Health and Human Services to access her medical review records. His and his client's chief concern was that these records included his client's social security number, and that this sensitive information was being treated as a public record. The Advisory Committee took no action on this topic.

- *Warden's Service FOAA requests*

Rep. Monaghan asked to discuss the issue of the Warden's Service FOAA requests about which the Advisory Committee had been asked to hold a public meeting. Sen. Burns gave the Advisory Committee an update, stating that he, Rep. Monaghan, the Presiding Officers of the Legislature and a representative of the Attorney General's Office were to have a meeting later that day to discuss the best way to proceed. Mr. Higgins moved to include an agenda item for the next meeting to discuss the outcome of this meeting; it was agreed by unanimous consent.

Discussion of Subcommittees

There will be a Public Records Exceptions Review Subcommittee, with Sen. Burns, Rep. Monaghan, Ms. Pistner, Ms. Lynch as members, and with the addition of Mr. Stout and Mr. Parr this year. The Subcommittee will meet at 10:00 a.m., with the full Advisory Committee meeting at 1:00 p.m. on July 20, 2016.

Scheduling of future meetings

The Committee's second meeting is scheduled for Wednesday, July 20th at 1:00 p.m. The third meeting will be held on Wednesday, August 17th at 1:00 p.m., and the fourth and final meeting will be held on Wednesday, September 14th at 1:00 p.m. All meetings will be held in Room 438 of the State House.

The next meeting of the Public Records Exceptions Subcommittee will be at 10:00 a.m. on Wednesday, July 20th in Room 436 (Criminal Justice and Public Safety Committee Room) at the State House.

The meeting was adjourned at 12:12 p.m.