

Right to Know Advisory Committee
November 15, 2012
Draft Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:
Sen. David Hastings
Rep. Joan Nass
Perry Antone
Shenna Bellows
Joe Brown
Richard Flewelling
AJ Higgins
Mal Leary
Mary Ann Lynch
Judy Meyer
Kelly Morgan
Linda Pistner
Harry Pringle

Absent:
Mike Cianchette
Bill Logan
Mike Violette

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Introductions

Senator Hastings, Advisory Committee chair, called the meeting to order and asked all the members to introduce themselves.

Public Access Ombudsman Update

Brenda Kielty provided the Committee with an update on her recent activities. Ms. Kielty reported that she has been interviewed by local newspapers and had speaking engagements at the annual meetings for school board and water district members. Future events include the Freedom of Access training for the 126th Maine Legislature and an administrative law class at the University of Maine Law School. Ms. Kielty told the Committee she is willing to speak to other groups and invited the Committee to make suggestions. Ms. Kielty has also begun meeting with various stakeholder groups about FOA issues and concerns. Finally, Ms. Kielty noted that phone calls, email and mail are coming in regularly; although it is too early to analyze the data, the inquiries are not yet repetitive.

Ms. Kielty thanked the members for their suggestions and comments on the Frequently Asked Questions and reported that arrangements are being made to update the website documents. The Advisory Committee agreed that future changes and updates to the FAQs and FOA website do not need to have their prior approval. Ms. Kielty will continue to circulate information about any updates or changes to the Advisory Committee through email.

Legislative Subcommittee Report—Draft authorizing use of technology in public proceedings to allow member participation from remote locations

The Advisory Committee continued discussion of the draft amendment which was tabled at the October 11th meeting. Staff reviewed the draft amendment recommended by a majority of the Legislative Subcommittee and summarized the positions of the majority and minority on the draft.

Judy Meyer and Linda Pistner reiterated their opposition to the language in the draft that would allow participants to vote in a proceeding without having all of the materials available to those members physically present. They also expressed concern about removing the language that limited the ability of someone to participate remotely when attendance was “not reasonably practical” and letting each body determine the conditions under which remote participation is appropriate.

Commissioner Brown expressed his opposition to extending the provision to elected officials, believing that those elected should have to face the public when voting and making decisions; he was not opposed to allowing remote participation by appointed members of boards and commissions. He also wondered whether this proposal was trying to fix a process that isn't broken.

Sen. Hastings asked about the applicability of the proposal and asked if it would apply to the Legislature. Harry Pringle replied that it would apply to the Legislature, but reminded the members that the draft only authorizes public bodies to adopt a policy allowing remote participation and does not require all bodies to do so. Mr. Pringle noted that he had abstained from the Legislative Subcommittee's vote because the school board interests he represents had not taken a position on the draft. Although most school board members he has since asked about the proposal seem opposed, Mr. Pringle suggested that it was time for the Advisory Committee to recommend a proposal to the Legislature as the issue has been under consideration for several years.

Before moving forward, Mr. Pringle thought the Advisory Committee should consider the consequences of the language in subsection 1 and paragraph G as drafted; he feared that the language could be interpreted to invalidate a vote taken at a proceeding when a member participates remotely. Mr. Pringle suggested amending paragraph G to add the following language: Failure to comply with this paragraph does not invalidate the action of the body. Richard Flewelling agreed with Mr. Pringle's suggestion and said such a “savings clause” has been included by the Advisory Committee in previously recommended legislation related to written records of public proceedings.

Mal Leary expressed his support for moving forward with a proposal to the Legislature, stating that the demand for the change is based on technology. Mr. Leary noted several other states allow this practice and 4 state agencies are currently authorized by law as well. The permissive language of the draft will provide a framework for agencies, boards and commissions to consider authorizing remote participation.

Ms. Meyer again stated she was not comfortable moving forward and would like the proposal to go back to the Subcommittee for more work. Mary Ann Lynch disagreed; she thought the draft should move forward to the Legislature with Mr. Pringle's changes and the Legislature will determine whether additional changes are needed. Sen. Hastings noted that the Legislature has already made exceptions on a case-by-case basis for certain agencies and suggested that that practice should be continued.

Comm. Brown reiterated his opinion that the draft should not apply to elected bodies. Mr. Flewelling understood the concern, but pointed out that, at the local level, many elected boards would already be prohibited from using the provision under subsection 2 because the proceedings are judicial or quasi-judicial.

Mr. Pringle moved to amend the draft in paragraph G; Mr. Flewelling seconded the motion. The Advisory Committee voted 8-5 in favor of the motion (Sen. Hastings, Commissioner Brown, Ms. Meyer, Kelly Morgan and Ms. Pistner were opposed).

Ms. Meyer again asked if the Advisory Committee should step back and gather more data and input from stakeholders as not all boards and commissions were asked for comments on the draft. Mary Shenna Bellows said that she could see both sides of the issue, but will support moving forward because the draft amendment is permissive and does not mandate that all public bodies authorize remote participation.

On the motion of Ms. Bellows (second by Mr. Leary), the Advisory Committee voted 8-5 to recommend the remote participation draft to the Judiciary Committee (Sen. Hasting, Commissioner Brown, Ms. Meyer, Ms. Morgan and Ms. Pistner were opposed).

Public Records Exception Subcommittee Report

Review of Existing Exceptions in Titles 26 through 39-A

Ms. Bellows, Subcommittee Chair, reported that the Subcommittee had completed initial review of 92 exceptions in Titles 26 through 39-A as well as several exceptions tabled from 2011 in Title 22. In 2013, the Subcommittee will complete review on 29 exceptions. The Subcommittee is unanimously recommending that 54 exceptions continue without modification; only 2 exceptions are recommended without change by majority vote of the Subcommittee. The Advisory Committee accepted the recommendations of the Subcommittee that 56 exceptions be continued without modification.

With regard to the exceptions that the Subcommittee is recommending changes, staff reviewed each of the proposed amendments. The Advisory Committee made the following decisions.

Community Right to Know Act Provisions: Title 22, Sections 1696-D and 1696-F

The Advisory Committee unanimously accepted the recommended changes. The amendment clarifies that all information about toxic and hazardous substances in use or present at a specific location, including trade secrets, are public and also removes the 50-mile radius residency restriction on access to the information collected under this program.

1: 26 MRSA §3

The Advisory Committee unanimously accepted the recommended changes. The amendment makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

5: 26 MRSA §934

The Advisory Committee voted 12-0 to accept the recommended changes (Ms. Lynch abstained from voting). The amendment to the provision relating to reports of the State Board of Arbitration and Conciliation in a labor dispute would make clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

11: 29-A MRSA §152, sub-§3

The Advisory Committee voted 12-0 to accept the recommended changes (Mr. Leary abstained from voting). The amendment removes language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

14: 29-A MRSA §257

The Advisory Committee unanimously accepted the recommended changes to repeal the provision relating to the Secretary of State's motor vehicle information technology system. After further discussion and input from the Office of Information Technology, the Secretary of State's Office concurred that the provision was not necessary as the information technology system was covered under other provisions in existing law---1 MRSA § 402, sub-§ 3, ¶ M and 29-A, section 1401, sub-§8.

15: 29-A MRSA §57, sub-§4

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language that is redundant with another section of law.

80: 38 MRSA §585-B, sub-§ 6

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language relating to the confidentiality of mercury reduction plans for air emission source emitting mercury on the recommendation of DEP.

81: 38 MRSA §585-C, sub-§ 2

The Advisory Committee unanimously accepted the recommended changes. The amendment removes language relating to the confidentiality of hazardous air pollutant emissions inventory on the recommendation of DEP.

Public-Private Partnerships/DOT projects

Current law (23 MRSA §4251) designates all information that MaineDOT has about a public-private partnership project confidential until the Department determines whether the plan meets the statutory standards. Approved projects are then submitted to the Legislature for approval. Ms. Bellows explained that the Subcommittee discussed the provision on several occasions, including the morning of the meeting, and received input from the Department of Transportation, Natural Resources Council of Maine and many members of the public. The Subcommittee voted 3-2 in favor of no change, with one abstention. (Rep. Nass, Commissioner Brown and Chief Antone voting in the majority; Ms. Bellows and Mr. Higgins supporting an amendment, Ms. Pistner abstaining.) The amendment supported by Ms. Bellows and Mr. Higgins would repeal the

confidentiality provision and make information about a public-private partnership public once the information has been submitted to DOT. Ms. Bellows reiterated her strong support for the minority amendment which provides for transparency about potential projects which will have a significant impact on the public, will increase competitiveness among entities interested in these projects and will provide for consistency across state agencies in terms of access to information.

Ms. Bellows also distributed a rough draft (labeled Minority Report B) that was discussed by the Subcommittee, but was withdrawn before it was voted upon. The draft was prepared by Linda Pistner for the purpose of discussing options for making at least some information about public-private partnerships projects before the current law allows release. Ms. Pistner's concern about the current law is that by the time the plan is released and it goes to the Legislature, the opportunity for changes has passed and the only options are up or down. The draft was an attempt to find a middle ground between the current law and Minority Report A, which proposes to delete the confidentiality completely. Ms. Pistner expressed her opinion that the Legislature will revisit the issue.

Perry Antone explained his recommendation that no change be made in the current law. Large projects shouldn't go forward without some information serving as a check, but supporting free enterprise means allowing the development of plans without revealing trade secrets and other information to competitors. Businesses, he says, should have the ability to develop what they want to do until an agreement or just before an agreement is entered into with the State. Without a specific proposal that finds some middle ground, Chief Antone believes the current law should stay in place. Commissioner Brown stated that he is comfortable that DOT and the Legislature can appropriately handle the process under the current law. He believes that existing law provides sufficient transparency and public input.

Ms. Meyer asked about how the provision might impact the East-West Highway project. Ms. Bellows and Chief Antone reported that the Subcommittee had been told by DOT that they have not received any information about the East-West Highway pursuant to the public-partnership project provision. Rep. Nass reiterated that the Subcommittee had agreed that the discussion was not about a particular project, whether it is the East-West Highway or any other specific proposal, and the members should not focus on the public interest expressed about one potential project.

Ms. Lynch expressed support for the majority recommendation of no change, noting that the provision was recently enacted and reviewed by the Legislature and Advisory Committee. She was concerned about giving interested parties unhappy with the decision a "second bite at the apple." Ms. Bellows recognized Ms. Lynch's concerns, but said she was persuaded to revisit the exception because of the significant public interest made known to the Subcommittee.

The Advisory Committee voted to table the proposal, giving time for Advisory Committee members to consider the draft.

Sentinel Events

Ms. Bellows informed the Advisory Committee of the Subcommittee's decision to table consideration of the confidentiality provision in the sentinel events reporting law until 2013. Although all Subcommittee members are interested in seeking changes to the current law, the members need additional time to work with stakeholders to determine whether further discussions can identify common ground for an expansion of the information about sentinel events reported publicly.

Review of Letters Recommended by Advisory Committee

The Advisory Committee reviewed 3 draft letters and authorized Sen. Hastings to sign and send the letters on the members' behalf:

- A letter to the Board of Trustees of the Maine Criminal Justice Academy outlining the discussions of the Encryption Subcommittee and recommending that the Academy consider adopting a model policy relating to encryption of radio transmissions for use by law enforcement personnel;
- A letter to the Public Access Ombudsman outlining the discussions of the Legislative Subcommittee relating to the confidentiality of parent email addresses and asking that the Ombudsman research the issue, collect information from school boards and others and report back to the Advisory Committee in July 2013; and
- A letter to the Director of the Maine State Museum outlining the discussions of the Public Records Exception Subcommittee relating to Title 27, section 377 and recommending that the Museum consider proposing legislation to amend the definition of "site" as the scope of the suggested change has broader implications to the law.

Review of Draft Report

Staff distributed a draft copy of this year's annual report. If there are any comments or suggestions on the draft report, members should submit them to staff before 5 p.m. on Tuesday, November 27th.

Future Meetings

The Advisory Committee's final meeting for 2012 will be on Thursday, November 29, 2012 at 1:00 pm, Room 438, State House.

Sen. Hastings adjourned the meeting at 3:13 p.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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