

Right to Know Advisory Committee
Bulk Records Subcommittee
October 21, 2011
Meeting Summary

Convened 9:06 a.m., Room 438, State House, Augusta

Present:

Michael Cianchette, Chair
Joe Brown
Richard Flewelling
Judy Meyer
Mal Leary
Shenna Bellows

Absent:

Perry Antone

Staff:

Colleen McCarthy Reid
Peggy Reinsch

Michael Cianchette, subcommittee chair, called the meeting to order and asked the members to introduce themselves. Mr. Cianchette noted the additional participation of Shenna Bellows, an Advisory Committee member who is not a member of the Subcommittee.

What is Bulk Data? Is a definition needed?

The Subcommittee began by giving their thoughts and reaction to comments received at the public hearing. Mr. Cianchette said he was particularly struck by the suggestion made by John Simpson of MacImage and Peter Merrill of Maine State Housing Authority that requests for bulk data (or electronic data) should not be separated from the existing process for FOA requests. Mr. Cianchette asked if the Subcommittee should try to craft a specific solution for bulk data or not? Richard Flewelling remarked that perhaps the Subcommittee should take a step back and asked three questions: 1) why is the Subcommittee looking at the issue?; 2) who suggested the issue to the Subcommittee?; and 3) what are the expectations? Staff explained that issues related to requests for computerized data have been brought to the Legislature from different perspectives, including requests for public access to accident reports maintained by the Department of Public Safety, public access to the sex offender registry database and public access to the digitized records of county registers of deeds. The Legislature has enacted specific statutory solutions sought by State agencies and the counties to address concerns about personal information included within electronic databases and about the costs and scope of the requests. If possible, the Judiciary Committee is interested in developing a more comprehensive and consistent approach rather than addressing the issues on a case by case basis as they are brought forward. The Judiciary Committee has asked for input from the Advisory Committee.

Turing back to the initial question, Mr. Cianchette asked how the Subcommittee wanted to address bulk data. Is it unique? While all members agree that all records are public, no matter their form, are there differences in the scope and use of requests for bulk data? Joe Brown remarked that all of the issues could not be grouped together and that access to deeds was different than access to the sex offender registry or accident reports. Mr. Brown suggested that different treatment may be necessary. Judy Meyer responded that it would be a nightmare if every agency or government entity crafted their own definition of bulk data and cautioned that the Subcommittee should not assume requests for bulk data create an additional administrative

burden than FOA requests for other types of records. Ms. Meyer stated that the Subcommittee is obliged to try to define bulk data even if the answer is that bulk data requests are the same as requests for other records. Shenna Bellows agreed with Ms. Meyer and suggested it would be useful to make it clear in the statute that bulk data is the same as other data.

Bulk Data: What is the appropriate cost for access?

Mal Leary agreed with Ms. Meyer and Ms. Bellows that requests for bulk data should be treated the same as other requests, but stated that the real question is the cost of access. Mr. Leary noted that some agencies conduct rulemaking to set fees for access to records and suggested that the Subcommittee consider that framework and approach. Mr. Leary does not favor determining fees in statute as has been done with the registries of deeds; he believes that parameters could be put into the law and that government entities could determine reasonable fees through rulemaking. Mr. Brown liked Mr. Leary's suggestion and noted that this would provide the flexibility to government entities to change the fee over time.

However, Mr. Brown reiterated that registers of deeds do believe a definition of bulk data/records is important. Mr. Cianchette pointed out that InforME's written comments suggested that bulk data be defined as electronic data and asked if members disagreed with that characterization. Mr. Leary responded that a separate definition is not needed and that the focus should be on how a government entity can recover its reasonable cost in making records available. Mr. Cianchette wondered when a different cost structure would apply. Mr. Leary agreed there would be differences in fees for providing reasonable access and again suggested that agency rulemaking could address the differences. Ms. Bellows asked whether bulk data was the right term to be using and pointed out the North Dakota law which uses language referring to automation and electronic storage of records. Mr. Cianchette stated there must be clear parameters for certain records like email and other electronic records as the records must be reviewed and redacted, if necessary, to remove confidential information.

Mr. Brown noted the distinction in providing public access in the registry of deeds—records are available for inspection at no cost during regular business hours, but copies of the records come with a cost. Mr. Leary stated that if a requester wants a copy of a record, the government entity should determine the reasonable cost of the copy. Mr. Brown again expressed concerns about setting fees in statute, pointing out that the \$10 hourly fee for search and retrieval of records is outdated and does not reflect the hourly wage of employees fulfilling records requests. Mr. Leary agreed that the \$10 hourly fee is problematic for some agencies depending on the request and that his suggestion for rulemaking would provide the public with a chance to comment within the parameters set out in statute before an agency set the fees for access.

Mr. Cianchette asked whether Mr. Leary was suggesting rulemaking for only bulk data requests or all FOA requests. Mr. Leary responded that the statute should require the fee to be reasonable and set out the factors that can be considered in setting the fee. Agencies should be permitted to recover the incremental cost of providing access to the data, but should not be permitted to go way beyond that in determining the fee. The cost of paper copies may be different than the cost of access to electronic data and even access to computerized data may have different cost structures depending on the technology. Ms. Meyer stated that the law already addresses "actual cost" and that access to electronic data should be based on that standard; the fee should not be used to subsidize the creation and storage of the electronic data.

Bulk data: Commercial v. non-commercial purposes

Mr. Cianchette asked the Subcommittee to consider whether the fee for access should consider whether the request is made for commercial purposes. Ms. Bellows expressed her opinion that no distinction should be made even if the request is being made for commercial purposes. She noted that the original record remains with the government and that information is an infinite resource. Ms. Meyer agreed that no distinction should be made based on the purpose of the request and worried about who would make that decision. Ms. Meyer gave the example of the Sun Journal's request for speeding ticket records that revealed one of the common reasons cited on tickets for speeding was drivers travelling south to methadone clinics. As a result, methadone clinics were established in Lewiston, which served a commercial purpose. Ms. Meyer noted the difficulty in determining the public good or public detriment that can result from a records request and who would determine that. Mr. Cianchette played devil's advocate, raising the concern that information is not a finite resource and that taxpayers are subsidizing the inventory costs for commercial businesses seeking access to bulk data. Ms. Meyer responded that the data still must be maintained for government purposes and that the public must rely on that data, not the data of the commercial entity, for official purposes. Ms. Bellows thought the appropriate distinction is not between commercial versus noncommercial purposes, but between public and private information. She noted that what's interesting is that technology can be used to make redacting personal information easier. Mr. Flewelling stated that he also agreed with Ms. Meyer and Ms. Bellows; he would not want to put local officials in the position of deciding whether a request was being made for commercial purposes or not.

The Subcommittee returned to the discussion of the cost of access. Ms. Meyer suggested defining reasonable cost as the personnel and material costs of duplication, not overhead or costs of collecting or maintaining data and letting agencies determine the particular fees through rulemaking. Mr. Cianchette again asked whether this approach would apply to all FOA requests. Mr. Leary said that's why he used the term "incremental" because the cost should be reasonable and focused on the cost of copying the data; if redaction is necessary that would result in more cost. Mr. Brown expressed concerns about that limitation and the impact on counties if the fee wasn't permitted to recover the full cost of providing access. Mr. Leary responded that there should be a separate fee structure for recording deeds and copying deeds and that the counties should be able to recover the cost of maintaining the registry through upfront recording fees, not the copying fees. Ms. Bellows liked the parameters suggested by Ms. Meyer of personnel and material costs of duplication, but wanted to add one more factor—the costs associated with responding to the request and any necessary redaction. Ms. Meyer remarked that what the Subcommittee was discussing is already in law and suggested adding a declarative statement in the statute that records include electronic records.

With the leave of the Subcommittee chair, Rep. Terry Hayes asked whether the Subcommittee should consider whether disclosure should be made by the government at the time of collecting information from individuals that their personal information may be included when public records requests are made in the future. The Subcommittee believed the issue raised by Rep. Hayes was beyond their charge, but recommended that the issue be referred to the full Advisory Committee for discussion.

Returning to the issue of cost, Mr. Cianchette inquired if it was the Subcommittee's recommendation that bulk data not be defined, but that agencies be authorized through rulemaking to determine the reasonable cost of access with different cost structures allowed for large electronic requests. Mr. Leary wanted any recommendation to make it clear that an individual could have access to the individual's own record at little or no cost. After consideration, Ms. Meyer asked whether a rulemaking requirement was too formal and whether in practice it would make it more difficult for government entities when the Subcommittee was

trying to make the process easier. Mr. Flewelling explained that municipalities do not follow the requirements of the Administrative Procedure Act applicable to State agencies but adopt administrative rules and policies through a more informal, yet rational, process. Mr. Cianchette thought Mr. Leary was suggesting a public process among all government agencies for consistency. Mr. Leary reiterated that any fee charged by government entities must be reasonable and expressed concern that an actual cost standard may result in all requests being referred for review by lawyers to increase the cost. The Subcommittee also discussed the need to consider whether the \$10 hourly fee should be revisited. The fee was originally recommended by the Advisory Committee to allow agencies the ability to recover the costs for responding to requests, which were not previously allowed under the statute. Ms. Meyer stated she was still concerned about the threshold for when rulemaking would be required; would agencies be required to adopt rules setting fees for access to each database? Ms. Meyer expressed her interest in putting the factors for determining a reasonable fee in the statute in a manner that would be applied by all government entities consistently. Mr. Cianchette noted that, after all of the discussion, the Subcommittee may have arrived back at the starting point—the current law’s requirement that any fee charged must be reasonable.

Mr. Flewelling pointed out the language in the North Dakota law that defines a “reasonable” fee and suggested that the Subcommittee consider adopting similar language. The Subcommittee agreed to consider his suggestion and asked staff to prepare a draft for review at the next meeting based on comparing Maine law to North Dakota law.

Future meetings

The Subcommittee agreed to hold a joint meeting with the Legislative Subcommittee on Thursday, November 10, 2011, starting at 1:00 p.m.

The Subcommittee meeting was adjourned at 10:35 a.m.

Scheduled Meetings:

- Thursday, November 10, 2011, 1:00 p.m., Bulk Records & Legislative Subcommittees
- Thursday, November 17, 2011, 9:00 am, Public Records Exception Subcommittee
- Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee
- Thursday, December 8, 2011, 1:00 p.m., Right to Know Advisory Committee

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid