

Right to Know Advisory Committee

September 6, 2017

Meeting Summary

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

Present:

Sen. Lisa Keim
Rep. Chris Babbidge
Stephanie Grinnell
Mary-Anne LaMarre
Mary Ann Lynch
Judy Meyer
Paul Nicklas
Chris Parr
Linda Pistner
Luke Rossignol
Eric Stout

Absent:

Suzanne Goucher
AJ Higgins
Richard LaHaye
William Shorey

Staff:

Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves, including three recently appointed members: Sen. Lisa Keim and Rep. Christopher Babbidge, representing the Legislature; and Mary-Anne LaMarre, representing school interests.

Election of Chair

The Advisory Committee is required to elect a chair. Rep. Babbidge nominated Sen. Lisa Keim (motion seconded by Mary Ann Lynch). Sen. Keim was unanimously elected chair of the Advisory Committee.

Freedom of Access Law updated

Staff distributed a copy of Maine's Freedom of Access Act (FOAA), updated to reflect statutory changes made through the end of 128th Legislature's First Regular Session. Two statutory changes were made: 1) the repeal of a redundant provision related to the confidentiality of social security numbers; and 2) the addition of language in 1 MRSA §408-A, subsection 8, paragraph F that allows an agency or official having custody of a public record to require payment of all costs before the public record is provided to the requestor. Staff noted the changes take effect November 1, 2017 and also briefly reviewed the duties of the Advisory Committee found at 1 MRSA §411, sub-§6.

Summary of actions taken based on recommendations in last year's RTKAC report

Staff reviewed the actions taken on the recommendations included in the Advisory Committee's January 2017 report. The recommendations are shown in italics

- Communicate the Advisory Committee's interpretation of 1 MRSA §402, sub-§3, ¶U, which relates to hazardous materials transported by rail, to the Joint Standing Committee on Judiciary and*

recommend that the Judiciary Committee draft a bill and hold a public hearing on that bill to elicit public input on public access concerns associated with passage of PL 2015, ch. 161, §3.

The Advisory Committee sent a letter to the Judiciary Committee expressing the Advisory Committee's belief that the exception "is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State . . . or to prohibit disclosure of information about spills or discharges of hazardous materials." The Advisory Committee also recommended that the Judiciary Committee consider submitting a committee bill to allow additional input from stakeholders and further expressed concerns about the scope of the exception.

The Judiciary Committee considered the Advisory Committee's recommendation and felt a bill would be a good vehicle for raising potential issues with the law, but, after seeking input through its committee analyst, ultimately did not feel stakeholders could express concerns that would be helpful in drafting proposed legislation.

- ❑ *Communicate to the Joint Standing Committee on Judiciary guidelines for considering proposed legislation relating to the confidentiality of personal information about professional and occupational licensees and applicants.*

The Advisory Committee sent a letter to the Judiciary Committee expressing the Advisory Committee's determination that a uniform policy on the confidentiality of licensed professionals' contact information must balance the professionals' privacy and safety interests with the public's interest in determining a professional's training and competency. The Advisory Committee recommended focusing on keeping categories of information confidential, such as personal contact information, unless personal contact information is the other way to identify the professional or when the professional affirmatively opts to allow the information to be disclosed.

In response, the Judiciary Committee considered two bills (LD 1267 and LD 1541) related to the confidentiality of professional licensing information. The Judiciary Committee has carried those bills over to any special or regular session of the 128th Legislature and has asked that the Advisory Committee provide input on resolution of the issues presented in those bills.

- ❑ *Communicate to the Joint Standing Committee on Health and Human Services potential concerns that the proposed rule of the Maine Center for Disease Control and Prevention appears to limit the scope of information available to the public about threats to public health, including communicable diseases.*

The Advisory Committee sent a letter to the Health and Human Services Committee about the Department of Health and Human Services proposed Data Release Rule, 10-144 CMR, ch. 175, which would have affected the release of certain data held by the Maine Center for Disease Control and Prevention. The Advisory Committee expressed concerns about the proposed rule's limitation on the release of records.

The Department of Health and Human Services rescinded the proposed rule.

- ❑ *Enact legislation to clarify that government entities may require advance payment before providing a public record to a requestor.*

The Legislature accepted the recommendation of the Advisory Committee and passed Public Law 2017, chapter 158, which enacted Title 1, section 408-A, subsection 8, paragraph F, and allows an agency or

official having custody of a public record to require payment of all costs before the public record is provided to the requestor.

- ❑ *Continue without modification, amend or repeal certain existing public records exceptions enacted after 2004 and before 2013.*

The Legislature accepted most of the recommendation of the Advisory Committee and passed Public Law 2017, chapter 163, which amended Title 35-A, section 10106, subsection 1 to change the criteria for designation of records of the Efficiency Maine Trust as confidential, except that the Legislature did not accept the recommendation that the director of the Efficiency Maine Trust be allowed to determine which records contain information that would give a user a competitive advantage and instead kept that authority in the Efficiency Maine Trust Board.

The Legislature accepted the recommendation of the Advisory Committee that a redundant public records exception for social security numbers be repealed.

- ❑ *Communicate with the Joint Standing Committee on Health and Human Services about potential repeal of the Mental Health Homicide, Suicide and Aggravated Assault Review Board.*

The Advisory Committee sent a letter to the Health and Human Services Committee notifying it of the apparent dormancy of the Mental Health Homicide, Suicide and Aggravated Assault Review Board, but asked the Committee to consider whether the Board should be revived or if the provision of law establishing the Board should be repealed.

The Health and Human Services Committee drafted a bill to repeal this board and, after holding a public hearing on the bill, voted to repeal the Mental Health Homicide, Suicide and Aggravated Assault Review Board. The Legislature repealed the board and its associated public records exceptions in Public Law 2017, chapter 93.

Potential topic for 2017: Remote Participation

The Advisory Committee discussed whether to renew its discussion of proposed legislation to clarify the law relating to remote participation in public proceedings. Mr. Parr indicated he would support that discussion and asked if other members of committee were also interested. For several years, the Advisory Committee has discussed the issue and has proposed recommended legislation that has not been enacted. Mr. Parr also expressed concern that the use of cyber messaging and texting may be restricting the transparency of public proceedings and the public's access to those proceedings.

Rep. Babbidge wanted to know what the status quo is with regard to remote participation. Ms. Pistner reminded the Advisory Committee that the Attorney General's Office advises state agencies that remote participation is not permitted under current law unless specifically authorized (there are several examples in the law that specifically authorize participation in public proceedings by telephone or other electronic communication). Ms. Pistner and Mr. Parr acknowledged, however, that because FOIA is silent with regard to remote participation generally, there is ambiguity because there has been no litigation or court decision to provide other legal guidance.

Several members of the Advisory Committee noted their belief that remote participation in public proceedings is occurring at the local level, with Ms. Lynch referring to it as the "wild west" due to the lack of a legal framework and consistent application by local government entities. Ms. Lynch and Ms. Meyer would support the Advisory Committee's renewed discussion of the issue. Ms. Pistner and Mr. Parr agreed that there needs to be a framework and guidance for government entities and that the

Advisory Committee should try again to craft recommended legislation for consideration by the Legislature. Mr. Rossignol, Mr. Nicklas and Mr. Stout verbalized their support for additional discussion of the issue.

The Advisory Committee agreed to add the topic of remote participation to the agenda for future meetings. Staff will prepare background materials on prior discussions and proposals to assist the Advisory Committee.

Legislation related to FOAA issues considered by Judiciary Committee

Staff reviewed four bills introduced during the First Regular Session related to the public's access to licensing information for professions and occupations and to the public's access to information about employees of the State and local government.

Two bills have been carried over by the Judiciary Committee to the next session in order to solicit feedback from the Right to Know Advisory Committee during the interim:

- ❑ LD 1267, An Act To Protect Licensing Information of Medical Professionals. This bill provides that information concerning the application for and granting of licenses issued by the State Board of Nursing, the Board of Osteopathic Licensure and the Board of Licensure in Medicine is confidential, except that each board is required to allow inspection of certain information (the applicant's name, business contact information, educational and occupational background, orders and findings that result from formal disciplinary actions, evidence provided to meet financial responsibility requirements for licensure, for example).
- ❑ LD 1541, An Act To Protect Certain Administrative Licensing Files. This bill makes polygraph examiner and professional investigator administrative licensing files confidential by law, except the final written decision of whether a license is issued or denied, or of whether, in response to a complaint, adverse action is taken against a licensee's license, is publicly accessible and records may be disclosed for criminal justice purposes or to a government licensing agency of this State or another state. In the case of the issuance or denial of a license, the final written decision must state the basis for which a license is issued or denied, and, in the case of a complaint against a licensee's license, the final written decision must state the basis for which adverse action was or was not taken against the license. The Private Security Guards Act also is amended to ensure consistency with the changes made to the Polygraph Examiners Act and Professional Investigators Act.

A related bill was proposed for introduction by the Judiciary Committee, but was indefinitely postponed and not referred to any committee:

- ❑ LD 1633, An Act Concerning Private Personal Information of Public Employees and Licensed Individuals. This bill is based on a recommendation of the Right To Know Advisory Committee concerning the protection of private personal information that may be considered public records. The bill directs the joint standing committee of the Legislature having jurisdiction over judiciary matters to balance the public's right to know about public employees and professional and occupational licensees and license applicants with the privacy and safety interests of the individuals involved when a proposed public records exception concerns the private personal information of public employees and professional or occupational licensees or license applicants.

Another bill was initially enacted by the Legislature, but subsequently vetoed by the Governor:

- ❑ LD 146, An Act to Protect the Confidentiality of State and Local Government Employees' Private Information. This bill (and Committee Amendment put forward by the Judiciary Committee) amends the law governing the confidentiality of personal information of municipal employees and county employees to parallel the same protections for state employees, with the addition of keeping as confidential any genetic information and information about the sexual orientation of the employee if contained in the records of the municipality. The bill also amends the state employee personnel records provisions to include confidentiality of genetic information and sexual orientation.

The Advisory Committee briefly discussed some of the challenges associated with trying to determine the types of personal information that should be kept confidential and the types that should be accessible to the public with regard to professions and occupations licensed or regulated by the government and with regard to public employees. Mr. Parr outlined the two potential models available to policymakers: 1) make all licensing information public, except for certain types of information designated as confidential; or 2) make all licensing information confidential, except for certain types of information designated as public.

The Advisory Committee agreed to combine the issues raised by these bills into one agenda item for the next meeting. Staff will prepare background materials on the legislative proposals to assist the Advisory Committee with its discussion.

Public Access Ombudsman Update

Brenda Kielty, Public Access Ombudsman, introduced herself to the Advisory Committee and briefly reviewed the duties of her position. Ms. Kielty noted that she views her position as an intermediary between government agencies and requestors for public records or for access to public proceedings, focusing on informal dispute resolution and education about the Freedom of Access Act. Ms. Kielty informed the Advisory Committee of the website maintained by the Ombudsman, www.maine.gov/foaa, which includes the Ombudsman's Annual Reports and Frequently Asked Questions. In response to an inquiry from Mr. Parr, Ms. Kielty stated that the number of contacts from the public since 2013 continues to increase annually. Of the contacts made in 2016, 366 inquiries were related to public records and 112 inquiries were related to public proceedings.

Mr. Parr also asked about whether a private citizen has standing under FOAA to challenge the validity of a public proceeding. Ms. Kielty responded that she believed 1 MRSA §409, subsection 2 provides authority to challenge the validity of an executive session by any person and may likely provide more general authority. She also noted that the Attorney General has only filed one lawsuit pursuant to its authority under §410. Further, Ms. Kielty remarked that, during a presentation to the Judiciary Committee in the First Regular Session, it was suggested by Rep, Bailey that the Advisory Committee consider whether the current civil penalty (\$500 per violation) for violations of FOAA in §410 is appropriate.

Ms. Kielty also expressed support for the Advisory Committee's decision to discuss remote participation and suggested that the Advisory Committee consider resubmitting its prior legislative recommendation.

Discussion about Formation of Technology Subcommittee

The Advisory Committee discussed the recommendation from last year's report that the Committee establish a Technology Subcommittee. Ms. Lynch expressed concern that a separate subcommittee singularly focused on technology might detract from the broader issues of public access. Ms. Lynch reiterated the benefit of having an Advisory Committee member with technology expertise, but stated that she did not see a need for a separate subcommittee. Ms. LaMarre concurred that a separate subcommittee was not necessary. Mr. Stout, who is the member with technology expertise, did not disagree with the

sentiments expressed by Ms. Lynch and Ms. LaMarre , but noted there are instances when technology intersects with freedom of access issues and process and a deeper understanding of how technology relates to these issues is beneficial. Sen. Keim stated that there appeared to be no need for a freestanding technology subcommittee, but that technology expertise would be welcomed as part of the Advisory Committee's ongoing discussion of many issues.

The Advisory Committee declined to establish a Technology Subcommittee.

Discussion about formation of Public Records Exception Subcommittee; review of existing public records exceptions

Staff described the requirements of 1 MRSA §433 requiring the Advisory Committee's review of existing public records exceptions found in Titles 1 through 7-A before 2019. The Advisory Committee agreed to appoint a Public Records Exception Subcommittee to review the exceptions on behalf of the Advisory Committee that will be presented for final action by the full committee in 2018. Consistent with past practice, the Advisory Committee directed staff to solicit initial input on existing exceptions from state agencies and other stakeholders using the questionnaire developed for that purpose. Once a sufficient number of responses are received, the Public Records Exception Subcommittee will be convened to begin its review.

Rep. Babbidge, Ms. Grinnell, Mr. Nicklas, Mr. Parr, Mr. Rossignol and Mr. Stout volunteered to serve as members of the subcommittee.

Potential topics for future discussion

Ms. LaMarre asked how the Advisory Committee would respond to recent communications emailed by staff from members of the public. Staff regularly forwards email and other communication on issues and topics related to the Freedom of Access Act to the Advisory Committee. The Advisory Committee agreed to consider at the next meeting whether to put any of the issues raised in the emails on an agenda for a future meeting.

Scheduling of future meetings

The Committee's second meeting is scheduled for Wednesday, September 20th at 9:00 a.m. The third meeting will be held on Thursday, October 12th at 9:00 a.m., and the fourth and final meeting will be held on Wednesday, November 15th at 9:00 a.m. All meetings will be held in Room 438 of the State House.

The meeting was adjourned at 11:45 a.m.

Right to Know Advisory Committee
September 20, 2017
Meeting Summary

Convened 9:00 a.m., Room 438, Maine State House, Augusta

Present:

Sen. Lisa Keim
Rep. Chris Babbidge
Stephanie Grinnell
Mary Ann Lynch
Judy Meyer
Suzanne Goucher
Richard LaHaye
Paul Nicklas
Chris Parr
Linda Pistner
Eric Stout

Absent:

Mary-Anne LaMarre
Luke Rossignol
AJ Higgins
William Shorey

Staff:

Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

The Chair of the Advisory Committee, Sen. Lisa Keim, convened the meeting; members introduced themselves.

Review of past legislative and Advisory Committee work related to remote participation

Staff reviewed past efforts of the Legislature, including amendments developed by the Joint Standing Committee on Judiciary, and the Advisory Committee to amend the Freedom of Access Act to provide additional guidance or requirements around allowing members of public bodies to participate in meetings of those bodies when not physically present. Staff distributed copies of and briefly summarized the following legislative documents: LD 258 (126th Legislature); LD 1809, the Judiciary Committee amendment to LD 1809 and the Governor's veto message on LD 1809 (126th Legislature); LD 448 (127th Legislature); LD 1241, the Judiciary Committee amendment to LD 1241, a Senate amendment to LD 1241 and the public law of the enacted version of LD 1241 (127th Legislature); and LD 1586 (127th Legislature).

Advisory Committee members discussed the view of the Attorney General's Office that remote participation is not allowed under the Freedom of Access Act because members of a public body must be present and subject to the public's eye, which is the position taken in a 1979 Opinion of the Attorney General. Advisory Committee members compared that opinion with the Governor's veto message on LD 1809, which reflects the Governor's view that the Freedom of Access Act does not prohibit remote participation as long as the other requirements of the Act are met, such as the notice and recordkeeping requirements. The Advisory Committee expressed some concern that agencies, boards and commissions of state government, including the Public Utilities Commission, appear to be allowing members to participate in meetings remotely without express statutory authorization or more clarity in the Freedom of Access Act. The Advisory Committee noted that eight public bodies are currently authorized in statute to allow members to participate in meetings remotely.

Advisory Committee members questioned why previous efforts to enact legislation regarding remote participation have failed: members noted that bodies with urgent needs to meet and make decisions for financial or public safety reasons had been successful at obtaining express authorization for remote participation, but that other attempts to define the circumstances under which remote participation is authorized or the bodies that may allow remote participation had been opposed by bodies whose existing policies would contradict those requirements or who would be excluded from the proposal. The discussion focused on whether elected members should be allowed to participate remotely rather than face their constituents in person and on whether a quorum of the body should be required to be physically present at the meeting.

Members of the Advisory Committee decided to resume the discussion at the next meeting with LD 1586 as the starting point because LD 1586 was introduced to the 127th Legislature as a result the Advisory Committee's discussions in 2015. Staff agreed to gather testimony on prior bills to provide a clearer picture of why some may have been opposed, to determine what practices may currently be in use in the State, to gather information on how other states address remote participation, and to catalogue the areas where decisions would affect the bodies using remote participation. No decisions were made and the item will be discussed at the Advisory Committee's third meeting in 2017.

Review of prior legislation affecting access to records related to licensed professionals

At its first meeting in 2017, the Advisory Committee agreed to consider two bills carried over from the First Regular Session of the 128th Legislature in the Judiciary Committee: LD 1267 and LD 1541. The Advisory Committee also agreed to consider two other bills that died during the First Regular Session: LD 1633 and LD 146. All of the bills relate to confidentiality of personal information.

With respect to LD 1267 and LD 1541, staff reviewed how LD 1267 generally treats information submitted by license applicants to certain licensing boards as confidential unless otherwise specified in the law, and how LD 1541 treats license application information for polygraph examiners and professional investigators confidential except in certain specified circumstances. These bills raised questions within the Judiciary Committee about developing a comprehensive approach to professional licensing information accessibility where perhaps categories of information could be identified as either deserving default confidentiality or default public accessibility. Sen. Keim explained that the Judiciary Committee became bogged down by the number of potential categories of information, the possible differences in expectations of privacy of various licensed professionals and public employees, and with the task of reviewing existing confidentiality provisions to attempt to make those more uniform. Mr. Stout contrasted Maine's exception-based Freedom of Access Act with the federal Privacy Act, which protects personally-identifiable information. The Advisory Committee generally discussed two potential models available to policymakers: 1) make all licensing information public, except for certain types of information designated as confidential; or 2) make all licensing information confidential, except for certain types of information designated as public.

With respect to LD 1633 and LD 146, the Advisory Committee did not discuss specific policy approaches, but felt that further information and discussion about professional licensing information would also be helpful in addressing the personal information issues raised in these bills.

The Advisory Committee agreed to continue discussion at the next meeting. Staff will provide materials outlining the categories of personal information protected from disclosure for public employees and licensed professionals under current law and the additional categories of personal information proposed to be protected under the proposed legislation. Staff will also provide background information on the Federal Privacy Act, which provides protection for "personally-identifiable information" as defined in federal law.

Update on status of review of existing public records exceptions

Staff informed the Advisory Committee that questionnaires are being compiled to be sent to the appropriate administrators of the existing public records exceptions in Titles 1 through 7-A, which the Advisory Committee is required by law to review prior to 2019. A subcommittee of the Advisory Committee expects to begin reviewing the returned questionnaires at a meeting in November.

Discussion of emails received by the Advisory Committee

The Advisory Committee occasionally receives email from members of the public with potential topics for discussion at Advisory Committee meetings. The agenda provided an opportunity for members of the Advisory Committee to discuss the contents of any of those emails; members did not choose to discuss the emails at this meeting and agreed that staff should acknowledge receipt to the senders.

Discussion of civil penalty amount for violations of the Freedom of Access Act

Staff reviewed the provision of law that establishes a \$500 civil penalty for every willful violation of the Freedom of Access Act. Mr. Stout recalled that federal law provides for up to a \$5,000 penalty, which is charged to the individual for criminal violations of the Privacy Act. Other members commented that under the Freedom of Access Act the fine is paid by the violating agency with taxpayer dollars and does not benefit the aggrieved person. Mr. Parr suggested that the penalty could allow for some discretion in the amount and could accrue to a special fund meant to advance the objectives of the Freedom of Access Act. Ms. Meyer commented that other states levy the fine against the violator in his or her individual capacity rather than against the person as a government employee.

Staff agreed to gather further information, including how the term “willful” is applied, how many willful violations have occurred, and what other remedies are available under the Freedom of Access Act, such as attorneys’ fees and injunctive relief. The matter is anticipated to be discussed at the Advisory Committee’s third meeting.

Scheduling of future meetings

The Committee’s third meeting will be held on Thursday, October 12th at 9:00 a.m., and the fourth and final meeting will be held on Wednesday, November 15th at 9:00 a.m. All meetings will be held in Room 438 of the State House.

The meeting was adjourned at 11:30 a.m.

Right to Know Advisory Committee

October 12, 2017

Meeting Summary

Convened 9:05 a.m., Room 438, Maine State House, Augusta

Present:

Sen. Lisa Keim
Rep. Chris Babbidge
James Campbell
Stephanie Grinnell
Suzanne Goucher
Richard LaHaye
Mary-Anne LaMarre
Judy Meyer
Paul Nicklas
Chris Parr
Linda Pistner
William Shorey

Absent:

Mary Ann Lynch
Luke Rossignol
Eric Stout

Staff:

Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

The Chair of the Advisory Committee, Sen. Lisa Keim, convened the meeting; members introduced themselves.

Review of prior legislation affecting access to records related to licensed professionals

Staff outlined the materials provided to the Advisory Committee: a comparison of the categories of personal information protected from disclosure for public employees (State employees, county and municipal employees, and Maine State Housing Authority employees); a comparison of the discussion draft amendments to carry over bills, LD 1267 and LD 1541, related to licensed professionals; and a copy of the Federal Privacy Act and the definition of “record”, which limits the scope of the federal law to records containing information that identifies an individual.

The Advisory Committee reviewed the categories of personal information protected as confidential in State employee personnel records and were generally supportive; members wondered why LD 146 was not enacted, which would have made the personnel records law for county and municipal employees consistent with the provision for State employees. Sen. Keim explained that there were concerns about the breadth of the proposal; she and others felt additional time and consideration of the transparency and privacy issues was needed. It would be beneficial for the Advisory Committee to review the categories of personal information, including complaint information about specific individuals, protected as confidential under current law and in proposed legislation for public employees and licensed professionals.

The Advisory Committee generally discussed the potential models for addressing personal information in licensing files: 1) make all licensing information public, except for certain types of information designated as confidential, reflected in current law and in the discussion draft amendment to LD 1267; or 2) make all licensing information confidential, except for certain types of information designated as

public, reflected in discussion draft amendment to LD 1541. During the discussion, the Advisory Committee noted that the appropriate policy approach may depend on context. For the purposes of the Freedom of Access Act and transparency, the current default that records are public unless designated as confidential makes sense. But, from an administrative perspective, the alternative approach may be more practical as it seems easier to parse out specific information that can be made public rather than the more labor intensive process to redact confidential information.

The Advisory Committee discussed the privacy interests associated with personnel records and licensing files. Christopher Parr explained his view that individuals' privacy rights are equally as important as the right of the public to know about the activities of its government, and that government has a duty to be responsible in collecting, retaining, securing, and disseminating the personal information it collects from and about individuals. Mr. Parr suggested that an additional criterion be added to the prescribed criteria for review of existing and proposed public records exceptions: "Whether public disclosure of the record or information contributes significantly to public understanding of the operations or activities of government".

Members expressed interest in the approach taken in LD 1267's proposed amendment as a starting point. For the next meeting, staff will outline the categories of personal information included as confidential in LD 1267 as well as additional types of personal information protected in State employee personnel records under current law. Members agreed also that the disclosure of personal information designated as confidential in the aggregate should be permitted as long as an individual could not be identified. The Advisory Committee will review the outline in advance of the meeting and, at the meeting, consider what types of personal information should be designated as confidential and under what circumstances confidential information may be disclosed.

The Advisory Committee agreed to continue discussion at the next meeting.

Review of past legislative and Advisory Committee work related to remote participation

Staff reviewed LD 1586, which was introduced to the 127th Legislature as a result the Advisory Committee's discussions in 2015, as well as the submitted on the bill. Staff also provided the committee with information on laws related to remote participation in other states. LD 1586 proposed to allow a body subject to the Freedom of Access Act, except a publicly-elected body, to conduct a public proceeding through telephonic, video, electronic or other similar means of communication only if certain conditions were met.

At the outset, members agreed that it is appropriate for statutory clarifications to be made with regard to remote participation. The Advisory Committee's discussion focused on LD 1586 and whether the scope and conditions of LD 1586 should continue to be recommended for remote participation in public proceedings. Using an outline of the issues raised in previously discussions of remote participation and by LD 1586, the Advisory Committee indicated, by straw vote, their initial opinion on the following questions:

1. *Whether eligibility for remote participation should make a distinction based on the function of the public body?* 12 members voted yes.
2. *Whether eligibility for remote participation should include publicly-elected bodies?* 7 members voted yes.
3. *Whether a quorum should be required at the meeting location?* 11 members voted yes.
4. *Whether voting should be limited to only those members attending in person?* 9 members voted yes.

5. *Whether there should be limits on the reasons when remote participation is permitted?* The members deferred voting on this issue until the next meeting.
6. *Whether members participating remotely can participate in executive sessions?* 3 members voted in favor.
7. *Whether members participating remotely can participate in adjudicatory matters?* 0 members voted in favor.
8. *Whether members participating remotely must have access to all materials available to members participating in person?* 9 members voted in favor.
9. *Whether there should be specific requirements for audio-visual equipment or technology?* The members deferred voting on this issue until the next meeting

No decisions were made. The Advisory Committee will review the results of the straw votes and continue the discussion of the issue at the November 15th meeting.

Suggestion of other topics for Advisory Committee discussion

Ms. Meyer suggested that the Advisory Committee consider offering comment on the proposed recommendations of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records. Ms. Meyer stated she felt it would be appropriate for the Advisory Committee to comment on issues affecting public access to court records. Ms. Pistner agreed, although she noted that the Freedom of Access Act does not apply to the Judicial Branch. Mr. Parr cautioned that the Advisory Committee may not have adequate time to review and discuss the recommendations in order to prepare comments. The Advisory Committee agreed to add this item to the agenda for the next meeting and requested that staff forward electronic copies of the draft task force report and recommendations in advance of the meeting so that members will be prepared for a brief discussion. Ms. Meyer also asked that correspondence to the Task Force and Chief Justice from several public interest organizations and news organizations be shared with the Advisory Committee.

Mr. Parr also inquired about a recent email forwarded to the Committee from Brenda Kielty. The email noted that Ms. Kielty has received a suggestion that current law be amended to require training in FOIA for officials appointed to government positions that are now subject to the training requirement if the official is elected to the position.

Discussion of the penalty provision in 1 MRSA §410

The Advisory Committee did not discuss this agenda item due to time constraints; discussion may be deferred until the next meeting.

Scheduling of future meetings

The Committee's next meeting will be held on Wednesday, November 15th at 9:00 a.m., with a Public Records Subcommittee meeting at 1:00 p.m. Based on the Advisory Committee's deliberations on November 15th, Sen. Keim also suggested that the Advisory Committee may need to schedule an additional meeting in December. All meetings will be held in Room 438 of the State House.

The meeting was adjourned at 11:40 a.m.

Right to Know Advisory Committee

November 15, 2017

Meeting Summary

Convened 9:04 a.m., Room 438, Maine State House, Augusta

Present:
Sen. Lisa Keim
Rep. Chris Babbidge
James Campbell
Stephanie Grinnell
Suzanne Goucher
Richard LaHaye
Mary-Anne LaMarre
Mary Ann Lynch
Judy Meyer
Paul Nicklas
Chris Parr
Linda Pistner
Luke Rossignol
William Shorey
Eric Stout

Absent:
None.

Staff:
Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

The Chair of the Advisory Committee, Sen. Lisa Keim, convened the meeting; members introduced themselves.

Discussion of proposal to amend training provisions in the Freedom of Access Act to require officials to complete training when appointed to offices for which training is currently required if elected

The Advisory Committee reviewed a proposal received from a member of the public to require officials in certain appointed positions to complete the training on the Freedom of Access Act that is currently required of officials who are elected to those positions. Brenda Kielty, the Public Access Ombudsman, described the current training process and requirements in Title 1, section 412 of the Maine Revised Statutes; she explained that the section's application to only elected officials in the listed positions may create some disparity among trained officials simply because some officials are elected to those positions while others are appointed.

In response to Ms. Lynch's concern that amending the law as proposed would constitute a municipal mandate, Garrett Corbin offered the preliminary opinion of Maine Municipal Association ("MMA"). Mr. Corbin expressed that, although the training is offered online and at no cost, the addition of appointed officials would probably be considered a relatively insignificant mandate because it would occupy additional staff time. Mr. Corbin further expressed his view that MMA's legislative policy committee would likely support the change, with the understanding that the list of officials would not expand, that the frequency of training would not increase from its current amount, and that it would continue to be offered online.

Staff will prepare a draft bill reflecting the proposal for review at the Advisory Committee's next meeting.

Discussion of penalty provisions in the Freedom of Access Act

Staff reviewed the current penalty provisions in the Freedom of Access Act, which provide for a civil penalty of \$500 and for an award of attorney's fees for substantially prevailing plaintiffs in appeals of denials of records or when actions are illegally taken in executive session. The civil penalty is enforceable only by the Attorney General, and the civil fine is paid by the responsible agency or entity rather than by the individual in his or her personal capacity.

The Advisory Committee discussed the standards applicable to each violation. For the civil penalty in section 410, the violation must have been committed willfully; for a plaintiff to be awarded attorney's fees under section 409, the violation must have been committed in bad faith. The Advisory Committee considered whether increasing the amount of the civil penalty or amending the standards for imposition of the penalties would achieve greater compliance with the FOAA, but ultimately determined that the issue is complex enough to warrant the attention of a dedicated subcommittee. The members of the subcommittee will be determined at the next full Advisory Committee meeting.

Discussion of whether to comment on proposed recommendations of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records

In March 2017, the Chief Justice of the Maine Supreme Court established the Judicial Branch Task Force on Transparency and Privacy in Court Records. On September 30, 2017, the Task Force issued its report (the "TAP Report"), which recommended allowing everyone to obtain court-generated information online in non-confidential cases, other than juvenile cases, while parties (except juveniles) and counsel of record would have online access to both court-generated information and other case filings; anyone who is not a party or counsel in a case could access those other non-confidential case filings electronically from any courthouse. The Judicial Branch has invited comments on the TAP Report by December 15, 2017.

Some members of the Advisory Committee acknowledged the TAP Report's recommendation to expand availability of court documents beyond the current system, which requires a person to visit a particular courthouse to view the physical records. These members also suggested that complete availability of court records via the Internet may not align with the FOAA's objectives of increasing government transparency when the court records pertain to private litigants.

Other members of the Advisory Committee questioned why records that are currently public in physical form would not all be made available online to all members of the public, rather than only to parties and attorneys in the case.

The Advisory Committee acknowledged that it could be difficult to reconcile members' concerns; the Advisory Committee agreed that it would not submit comments on the TAP Report as a group, but that members could still submit comments individually.

Discussion of remote participation by members of public bodies

The Advisory Committee reviewed a summary of straw votes taken by members at the previous Advisory Committee meeting on policy decisions related to remote participation by members of public bodies at meetings of those bodies. The Advisory Committee also reviewed a comparison of LD 258 from the

126th Legislature and LD 1586 from the 127th Legislature, as well as the provisions in law regarding remote participation in Massachusetts, Connecticut, New Hampshire, and Vermont.

The straw votes indicated that a majority of the Advisory Committee supported: allowing remote participation based on the entity's function; allowing remote participation by elected officials; requiring a physical quorum to be present at the advertised meeting location; allowing voting only by members who are physically present; prohibiting remote participation in executive sessions; prohibiting remote participation in adjudicatory matters; and requiring remote participants to be able to access materials available at the meeting.

Upon further discussion, the Advisory Committee refined the details of proposed remote participation requirements. Members agreed that the body must adopt a policy on remote participation, which would govern the use of remote participation by that body to the extent not prescribed by state law. One member felt that the policy should be approved by voters represented by the body. Members further agreed that remote participants should not be allowed to cast a vote in a proceeding that is adjudicatory in nature, and that the Legislature should be prohibited from allowing remote participation in its meetings.

Members discussed whether other state agencies should be prohibited from allowing remote participation at their meetings, but did not determine which particular agencies would be prohibited or how to define the categories of bodies that would be prohibited. Members also discussed whether remote participation should be allowed in executive sessions: some felt that, because no votes may be taken in an executive session, restricting access to those sessions would merely require remote participants to make decisions during a regular session of the body without the benefit of the executive session discussion; others felt that, because executive sessions by nature involve sensitive information, the uncertainty about being overheard, intercepted, or having confidentiality otherwise compromised requires those sessions to occur only in person.

Staff agreed to draft a summary of discussions and prepare a draft bill with possible language alternatives on the issues discussed for the Advisory Committee's next meeting. The materials will be distributed to members and posted publicly in advance.

Discussion of access to records and person information related to licensed professions and state and local government employees

The Advisory Committee did not discuss this agenda item due to time constraints; discussion may be deferred until the next meeting.

Scheduling of future meetings

The Advisory Committee will hold a fifth meeting at a date and time to be determined.

The meeting was adjourned at 11:30 a.m.

Right to Know Advisory Committee

December 5, 2017

Meeting Summary

Convened 1:02 p.m., Room 438, Maine State House, Augusta

Present:

Sen. Lisa Keim
Rep. Chris Babbidge
James Campbell
Richard LaHaye
Mary Ann Lynch
Judy Meyer
Paul Nicklas
Linda Pistner
Eric Stout

Absent:

Stephanie Grinnell
Suzanne Goucher
Mary-Anne LaMarre
Chris Parr
Luke Rossignol
William Shorey

Staff:

Craig Nale and Colleen McCarthy Reid

Welcome and Introductions

The Chair of the Advisory Committee, Sen. Lisa Keim, convened the meeting; members introduced themselves.

Review of draft legislation to amend training provisions in the Freedom of Access Act to require officials to complete training when appointed to offices for which training is currently required if elected

The Advisory Committee reviewed draft legislation to amend the training provisions in the Freedom of Access Act (1 MRSA §412) to require officials to complete training when appointed to offices for which training is currently required if elected.

The Advisory Committee unanimously approved (9-0 of members present) the draft bill and voted to recommend the proposed legislation in its annual report. The Advisory Committee also agreed that the draft legislation would be recommended as a separate bill if any other proposed legislation is recommended to the Judiciary Committee.

In his comments to the Advisory Committee prior to the meeting, Mr. Parr suggested that the publicly accessible website made available to public officials for the purposes of FOAA training be clarified that text messages and email communications “received or prepared for use in connection with the transaction of public or governmental business or [that] contain information relating to the transaction of public or governmental business” constitute public records under FOAA. The Advisory Committee agreed that this issue was separate from the changes to the training requirements and could be addressed at a later time if necessary.

Formation of subcommittee to discuss penalty provisions in the Freedom of Access Act

At the November 15th meeting, the Advisory Committee agreed to form a subcommittee to discuss the penalty provisions in the Freedom of Access Act, but deferred action to appoint the subcommittee chair and members.

The Advisory Committee unanimously voted (9-0 of members present) to name Judy Meyer chair of the Subcommittee. Rep. Babbidge, Eric Stout, Chris Parr, Luke Rossignol and Linda Pistner agreed to serve as members of the subcommittee.

Discussion of remote participation by members of public bodies; review of potential draft legislation

The Advisory Committee reviewed draft legislation related to remote participation by members of public bodies in public proceedings. The draft legislation was based on straw votes taken by members and discussion of previous proposals at prior meetings. Linda Pistner also suggested revisions to the draft proposal for the Advisory Committee's consideration.

The draft proposal as presented at the meeting did the following:

- Allows bodies subject to the Freedom of Access Act to conduct public proceedings through telephonic, video or other electronic means of communication when the body has adopted a written policy that authorizes remote participation in a manner that allows all members to simultaneously hear and speak to each other during the proceeding and allows members of the public attending the proceeding at the noticed location to hear all members of the body;
- If the policy allows remote participation in executive sessions, the policy must establish procedures and requirements that ensure the privacy of the executive session;
- Requires a quorum of the body to be physically present at the noticed meeting location unless immediate action is imperative and physical presence of a quorum is not reasonably practical within the period of time requiring action;
- Requires each member participating remotely to identify all persons present at the remote location, that all non-unanimous votes are taken by roll call, and that remote participants receive documents or other materials presented or discussed at the proceeding in advance or when made available at the meeting, if the technology is available;
- Prohibits the Legislature from conducting public proceedings and allowing members to participate in public proceedings through telephonic, video or other electronic means of communication, but without restrictions on the use of technology to enhance access for the public to listen to and observe the Legislature's proceedings; and
- Provides specific exemptions from the new remote participation requirements for state agencies that are authorized to use remote-access technology to conduct meetings.

Rep. Babbidge told the Advisory Committee that he is uncomfortable with remote participation and concerned that it will become the norm or expectation; he felt that requiring a member's physical presence at a meeting should be the expectation. Rep. Babbidge also raised concerns that authorizing remote participation in law lessens a member of a body's accountability for that member's decisions; that members may not have full access to all relevant materials if participating remotely; and that it is inappropriate for executive sessions to be conducted with some members participating remotely.

Members discussed how to address adjudicatory proceedings and executive sessions. Members agreed to add language to the draft to prohibit remote participation by a member at an adjudicatory hearing. With regard to executive sessions, members expressed support for the language in the draft as proposed, which

leaves the decision to each body as to whether remote participation is permitted, but requires that the policy establish procedures for the privacy of any executive session.

The Advisory Committee discussed the draft proposal's language that would allow bodies to convene meetings without a quorum physically present when immediate action is necessary. Members agreed that the language should be revised to clarify that when a meeting is convened without a physical quorum, the discussion at that meeting should be limited to the topic requiring immediate attention.

Ms. Meyer questioned whether the draft proposal's requirement that each member participating remotely identify all persons present at that location would require, for example, that a member participating from an airport identify every person at the airport. After some discussion and agreement that this is not the intent of the language, the Advisory Committee decided that the provision is sufficient to achieve disclosure of those present who might interact with the participant and would not require identifying each individual present when not practical. The Advisory Committee did agree that the disclosure of persons present should be included in the record of the meeting, and that the obligation to disclose continues throughout the meeting.

At Mr. Parr's suggestion, members also discussed whether to include a provision in the draft legislation to sunset the provisions in current law that authorize certain state agencies to conduct meetings through remote participation or whether to recommend separate legislation. Members agreed not to recommend proposed legislation at this time, but agreed that the Advisory Committee should first contact each state agency to get more information from these agencies and discuss the current provisions in law.

Members also talked about the provision in the draft prohibiting remote participation by the Legislature and whether the draft should further prohibit other elected bodies from allowing remote participation. While previous proposals did contain language distinguishing elected bodies, the Advisory Committee agreed to move forward with the proposal as drafted. Ms. Meyer indicated to the Advisory Committee that the Maine Press Association would not support the draft proposal before the Legislature on this basis.

Mr. Stout also observed that that the Legislature already broadcasts House and Senate sessions via video web links and its committee hearings and work sessions via audio web links. This long-standing practice should be encouraged to enhance public access to Legislature's committee and chamber sessions. The Advisory Committee agreed that the limiting language in the draft legislation is intended to prohibit the Legislature from conducting meetings away from public view and from permitting elected members from participating in proceedings when not physically present.

After further discussion of the proposal and suggested changes, the Advisory Committee decided to make refinements to:

- Amend the first paragraph to affirmatively state that remote participation is prohibited unless the requirements laid out in Section 403-A are met;
- Add language to reinforce the purposes of the Freedom of Access Act and to reaffirm that the remote participation requirements may not be used to defeat the purposes of FOAA;
- Require that a body adopt a policy on remote participation "after public notice and hearing";
- Clarify that a body may adopt a written policy or rule related to remote participation;
- Add a provision to prohibit remote participation in adjudicatory proceedings;
- Clarify that, if a body conducts a proceeding without a physical quorum present, that the body may take action at that proceeding only on the matters for which immediate action is imperative;
- Require that a member participating remotely must identify all persons for the record that are present at the location from which the member is participating and clarify that the obligation to disclosure is continuous throughout the proceeding;

- Add specific references to state agencies that are already authorized to use remote-access technology to conduct meetings exempting those agencies from the remote participation requirements in the new proposed Section 403-A and remove Part B of the draft bill.

The Advisory Committee unanimously voted (9-0 of members present) to recommend the draft legislation related to remote participation for consideration by the Judiciary Committee with the changes summarized above.

Discussion of access to records and personal information related to licensed professionals and state and local government employees

Staff reviewed a discussion draft that could be used as a template by the Legislature when considering legislation addressing access to records and personal information related to licensed professionals. The discussion draft, based in part on draft amendments suggested to LD 1267, would protect as confidential certain categories of personal information and allow limited disclosure of that confidential information under certain conditions and to certain authorized entities. The draft would also clarify that disclosure of personal information designated as confidential should be permitted in the aggregate as long as an individual could not be identified.

The Advisory Committee agreed that it had not had sufficient time to consider this issue and make recommendations to the Judiciary Committee. The Advisory Committee took no further action.

Draft report

Staff distributed a preliminary draft report and then discussed the process for reviewing the final draft report before submission and submitting any recommendations for revision. No additional meetings are planned before the Advisory Committee's annual reporting deadline of January 15, 2018. The final draft report will be distributed via e-mail. Minor technical suggestions and edits may be made over email, but if there are any substantive concerns or concerns that the report does not reflect the Advisory Committee's recommendations, such discussions would have to be held in a public meeting.

The meeting was adjourned at 3:11 p.m.