RIGHT TO KNOW ADVISORY COMMITTEE
Penalties Subcommittee
April 3, 2018
Meeting Summary

Convened 1:07 p.m., Room 600, Cross State Office Building, Augusta

Present: Absent:
Judy Meyer, Chair   Rep. Chris Babbidge
Luke Rossignol   Chris Parr
Eric Stout   Linda Pistner

Staff:
Adam Bohanan

Welcome and introductions

      Ms. Meyer, Chair of the Subcommittee, called the meeting to order and all members
introduced themselves.

Discussion of penalty provisions

      Ms. Meyer opened the discussion by noting that the subject of penalties has been raised
in the full committee for each of the past ten years or more and led to the formation of the
subcommittee. It was further noted that while the training requirement has been very successful
in promoting good behavior with respect to fulfilling FOAA requests, changes to the current
statute governing penalties for violations might do more to modify behavior. Such changes could
include increasing the amount of the penalty, awarding the civil forfeiture to the requestor in
addition to or instead of the state general fund, or allowing a private right of action.

      Public Access Ombudsman Brenda Kielty then addressed the subcommittee and pointed
out that FOAA is fundamentally a remedial statute rather than a punitive one. There are civil
penalties, but the main recourse a requestor has is appealing a denial in court. However, she
noted that court costs can be a significant barrier for a requestor who wishes to challenge a
denial. Ms. Kielty encouraged the Subcommittee to consider unintended consequences of any
changes to the law. For instance, would increasing the penalty change behavior? Could making
attorney's fees more readily available lead to a flood of FOAA appeals led by plaintiff's
attorneys? Ms. Kielty further emphasized the need for more education and training regarding the
statute and renewed the recommendation to expand the list of public officials required to have
FOAA training to include appointed officials as well as elected officials.

      The discussion then turned to potential changes to law and an examination of approaches
taken in other states. (An updated staff analysis of penalty statutes and legal remedies in all fifty
states was distributed and is attached.) Mr. Rossignol expressed the opinion that allowing a

private right of action might be the only thing that would significantly alter behavior. He added that requiring that a requestor exhaust all administrative remedies or providing (or requiring) alternative dispute resolution (ADR) before a requestor could proceed to court could be a way to resolve disputes over records requests without resorting to costly litigation. Ms. Kielty added that while this could help resolve disputes, it could also delay the process of gaining access to records.

Mr. Stout suggested that holding state employees liable for fines in their individual capacities rather than as government employees could have a greater effect on behavior. He pointed out that this is more in line with how federal law addresses violations and noted that violations of the Federal Privacy Act, a companion to the Freedom of Information Act, levies a fine of up to $5,000 that is paid by the individual and not by the agency. Ms. Kielty stated that training would be crucial if state employees were to be held individually and personally liable for FOAA violations.

Next, the Subcommittee highlighted certain models from the fifty-state survey and asked staff to do additional research to be discussed at the next meeting. Particular types of measures taken in other states that were of interest include levying fines against individual state employees, awarding fines collected to the requestor as well as the state, lowering the legal standard necessary for a prevailing plaintiff to be awarded attorney's fees, and the availability of ADR before proceeding to court.

Next meeting

The Subcommittee will hold its next meeting on April 26, 2018 at 11:00 a.m. in Room 437 of the State House, Augusta.

Adjournment

Ms. Meyer adjourned the meeting at 3:15 p.m.

Respectfully submitted,

Adam Bohanan