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**Fourteenth Annual Report
of the
Right to Know Advisory
Committee**

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Office of Policy and Legal Analysis



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Right to Know Advisory Committee**

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Executive Summary

This is the fourteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2019 recommendations and a summary of relevant Maine court decisions from 2019 on the freedom of access laws. This report also summarizes several topics discussed by the Advisory Committee that did not result in a recommendation or further action.

For its fourteenth annual report, the Advisory Committee makes the following recommendations:

- Amend certain provisions of law in Titles 1 through 7-A relating to previously-enacted public records exceptions;**
- Direct legislative staff to help identify nonstandard language concerning existing public records exceptions;**
- Enact legislation to provide parameters on the use of remote participation by members of public bodies;**
- Enact legislation to cap copying fees;**
- Enact legislation to require planning boards, specific school district officials and additional municipal officials and their deputies to complete Freedom of Access Act training, and to clarify the application of existing training requirements;**
- Request that the Public Access Ombudsman develop suggestions to enhance and improve FOAA training for public officials, and develop methods for gathering data on FOAA requests and requesters related to unfulfilled requests and costs;**
- Request that the Joint Standing Committee on Judiciary establish a study group to examine the use of emerging technologies with regard to making and keeping records and to examine the use of communications technology during public proceedings;**
- Enact legislation to improve the review of public records exceptions by including consideration of access to information that will assist in making informed decisions about health and safety;**
- Enact legislation to expand the membership of the Right to Know Advisory Committee to include a member with experience and expertise in data and personal privacy issues;**

- Enact legislation to revise the membership of the Archives Advisory Board to include a public member and two members representing journalistic and news perspectives;**
- Request that the Archives Advisory Board emphasize the publicizing of information about its meetings to enhance public awareness and participation given the importance of records retention schedules;**
- Send a letter to the Joint Standing Committee on Judiciary expressing issues that should be considered when dealing with surveillance videos; and**
- Defer to the Joint Standing Committee on Judiciary as to whether to require the collection and reporting of aggregate information concerning certain search warrants.**

In 2020, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including a review of the fees charged for copies of public records and the waiver for requests made in the public interest, as well as whether the FOAA request reporting requirements applicable to agencies should be revised. The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

I. INTRODUCTION

This is the fourteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in **Appendix A**.

More information on the Advisory Committee, including meeting agendas, meeting materials and summaries of meetings and its previous annual reports can be found on the Advisory Committee's webpage at <http://legislature.maine.gov/right-to-know-advisory-committee>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee when the Legislature is not in regular or special session.

The Right to Know Advisory Committee has 17 members. Currently there are two vacancies. The chair of the Advisory Committee is elected every two years by the members. Current Advisory Committee members are:

Senator Mike Carpenter	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Representative Thom Harnett, Chair	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
James Campbell	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Lynda Clancy	<i>Representing newspaper and other press interests, appointed by the President of the Senate</i>
Amy Beveridge	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
<i>vacant</i>	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
<i>vacant</i>	<i>Representing school interests, appointed by the Governor</i>
Julie Finn	<i>Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court</i>

Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Paul Nicklas	<i>Representing municipal interests, appointed by the Governor</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>
Phyllis Gardiner	<i>Attorney General's designee</i>
Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>
William Shorey	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Eric Stout	<i>A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor</i>
Taylor Asen	<i>Representing the public, appointed by the Speaker of the House</i>

The complete membership list of the Advisory Committee, including contact information, is included in **Appendix B**.

By law, the Advisory Committee must meet at least four times per year. During 2019, the Advisory Committee met four times: on September 5th, November 13th, December 4th and December 18th. Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

II. COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- ❑ Providing guidance in ensuring access to public records and public proceedings;
- ❑ Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- ❑ Supporting the provision of information about public access to records and proceedings via the Internet;

- ❑ Serving as a resource to support training and education about Maine’s freedom of access laws;
- ❑ Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine’s freedom of access laws and the public’s access to public proceedings and records;
- ❑ Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- ❑ Examining inconsistencies in statutory language and proposing clarifying standard language; and
- ❑ Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to work with the Public Access Ombudsman, Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

Dubois v. Arundel, 2019 ME 21

Dubois Livestock submitted an application to the Town of Arundel Planning Board to renew a conditional use permit. Neither Marcel Dubois nor Sol Fedder were listed as the applicants for the renewal permit, as the property owners or as authorized agents for Dubois Livestock. The Planning Board denied the application during a public hearing that was not attended by any representative of Dubois Livestock, and Dubois and Fedder did not participate in the public hearing in any capacity. Dubois and Fedder subsequently filed a complaint against the Town of Arundel, individual members of the Planning Board and the Arundel Town Planner, alleging that a memorandum drafted by the town planner and distributed to the members of the planning board led to one or more illegal executive sessions. Following submission of briefs pursuant to a Rule 80B Notice and Briefing Schedule, the Town of Arundel moved to dismiss the complaint

on several grounds, including for failure to state a claim. The Superior Court granted the motion and awarded the town reasonable attorney's fees and expenses. Dubois and Fedder appealed.

The Law Court held that Rule 80B is not the proper mechanism to assert a FOAA claim, Dubois and Fedder lacked standing to pursue a Rule 80B complaint and the complaint failed to state a claim upon which relief can be granted under the FOAA.

The Law Court found that Dubois and Fedder failed to allege that any action was taken during the alleged executive session or sessions which would entitle them to relief under the appeals section of the Freedom of Access Act, Title 1 section 409, subsection 2. Rather, their complaint alleged only that the Planning Board members received a memo from the town planner that led to an executive session or sessions and the Planning Board subsequently held a public hearing where the Planning Board denied Dubois Livestock's application. They failed to allege that any action was taken during the alleged executive session or sessions which would entitle them to relief.

The Law Court had ruled in 2018 that Rule 80C is not the appropriate vehicle to bring FOAA claims. The Law Court upheld the dismissal of the complaint, but remanded the case to the Superior Court on the issues of fees and expenses.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Public Records Exceptions Subcommittee

The focus of the Public Records Exceptions Subcommittee is to review and evaluate public records exceptions as required of the Advisory Committee pursuant to 1 MRSA §433, sub-§2-A. The guidelines in the law require the Advisory Committee to review all public records exceptions in Titles 1 to 7-A no later than 2019. In accordance with 1 MRSA §433, sub-§2-A, the Advisory Committee is charged with the review of more than 90 exceptions in Titles 1 to 7-A. As a first step, the subcommittee reached out to state and local bodies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. The subcommittee met three times in 2019 to review the responses, discuss whether each public record exception was appropriate or should be amended or repealed and submitted all its recommendations to the Advisory Committee at the December 18, 2019 meeting.

Lynda Clancy, Julie Finn, Paul Nicklas and Christopher Parr serve as members of the subcommittee, and Christopher Parr serves as subcommittee Chair.

The public records exceptions changes recommended by the Advisory Committee in its 13th Annual Report presented in January 2019 were printed as LD 1511 as a Joint Standing Committee on Judiciary (referred hereafter as the "Judiciary Committee") bill considered during the First Regular Session of the 129th Legislature. Although the Judiciary Committee unanimously supported the contents of the original bill, a majority of the committee supported the remote participation language added to the bill in Committee Amendment "A" and the bill as amended died in nonconcurrence between the House and the Senate. The subcommittee is

therefore recommending that the public records exceptions amendments proposed in the last report be supported again as recommendations.

The subcommittee noted that existing language establishing public records exceptions varies throughout the statutes. Recognizing that consistent language will help the public as well as agencies and public officials understand what records are accessible, the subcommittee recommends draft unallocated language directing legislative staff, in consultation with the Advisory Committee, to examine inconsistencies in statutory language related to the designation of information and records as confidential or not subject to public disclosure and recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released.

The subcommittee will continue to discuss whether to add Title 4, section 7 to provisions reviewed by the Advisory Committee. 4 MRSA §7 is a statutory provision that authorizes the Court to have control over its record and is cited by the Judicial Branch as legal authority that exempts the application of the FOAA to the Judicial Branch.

Improve the FOAA Subcommittee

The Improve the FOAA Subcommittee was charged with exploring several issues, including reviewing all of LD 1575, which was carried over to the Second Regular Session by the Judiciary Committee. The subcommittee also looked at FOAA training for public officials, remote participation, appropriate costs and fees charged by government agencies when responding to public records requests and several other suggestions offered by Advisory Committee members. The subcommittee met four times: October 9th, November 13th, December 4th and December 18th.

Representative Thom Harnett, Amy Beveridge, Jim Campbell, Lynda Clancy, Julie Finn, Phyllis Gardiner, Judy Meyer, Chris Parr, Luke Rossignol and Eric Stout serve as Subcommittee members. Amy Beveridge serves as the Chair, although Chris Parr chaired a meeting in her absence.

Warrants

The Judiciary Committee directed the Right to Know Advisory Committee to review the laws governing certain warrants, and report back to the Judiciary Committee any recommendations for providing public access to aggregate information about the warrants and whether there was a waiver of notice. Public Law 2019, chapter 489, section 18. The warrants subject to the review authorize the installation and monitoring of tracking devices, access to electronic device content and access to electronic device location information. The subcommittee reviewed a memo from the Judicial Branch presented by Julie Finn that outlined the search warrant process, and included information about the numbers of search warrants issued in 2017, 2018 and so far in 2019. The numbers were collected by requesting court clerks in each court location to report the data, as search warrants data are collected on paper at each court location, but not in a centralized database. The current process does not track whether a waiver of the notice requirement was

requested or approved. The Judicial Branch is transitioning to an electronic court record system which, presumably, could be adjusted to include search warrant tracking.

The subcommittee reviewed draft language reporting to the Judiciary Committee pursuant to Public Law 2019, chapter 489, section 18, explaining that aggregate information about the specific search warrants is not available. The subcommittee recommends noting the value in the aggregate information, but recommends that the Advisory Committee defer to the Judiciary Committee to determine whether it is appropriate to impose the additional obligation of tracking the search warrant information on the Judicial Branch.

Expand who must participate in FOAA training

Public Access Ombudsman Brenda Kielty suggested including Planning Boards and other local entities in the training required by statute, based on questions and concerns she has received from members of the public. The subcommittee discussed that the required training is not onerous and, although supported by the Maine Municipal Association, may be considered a municipal mandate, requiring state funding or, to avoid the funding obligation, passage by 2/3 of the House and the Senate. The subcommittee reviewed information provided by staff outlining the 233 State boards and commissions established in law and information provided by the Maine Municipal Association outlining the positions in local government required by statute. While several members expressed an interest in expanding training requirements for all members of boards and commissions and local government employees, Public Access Ombudsman Kielty suggested that, initially, the subcommittee focus on those positions that have generated concerns: members of local planning boards; code enforcement officers; and town managers and/or town administrators who are not already trained in FOAA. Ms. Kielty also noted that questions have been asked about the definition of “officials of school administrative units” when determining who is required to complete training; she suggested that the statute be clarified to specify that elected and appointed school board members and school superintendents and assistant superintendents complete FOAA training. Finally, Ms. Kielty also asked that the law be amended to clarify the timing of when training must be completed for those appointed to their positions as the current law only refers to when an appointed official takes the oath of office.

The subcommittee recommends the statutory changes suggested by Ms. Kielty: 1) expand training to planning board members, code enforcement officers and town or city managers or administrators; 2) clarify which school officials are required to complete training; and 3) clarify the timeline for completing the training for those in appointed positions. Ms. Kielty also brought an additional issue to the subcommittee’s attention raised in a question from the Maine Municipal Association about whether deputy clerks and deputy treasurers are required by law to complete the training. Ms. Kielty suggested that the subcommittee clarify the training statute to include deputies in those positions. The subcommittee unanimously agreed to amend the draft proposal to include the deputy for any municipal position required to complete the training. The subcommittee also supports directing the Public Access Ombudsman to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the University of Maine Law School Extern and to report back to the Advisory Committee in 2020. After discussion of the tiered fee schedule proposal, the subcommittee also supports requesting that the

Ombudsman develop methods for gathering data and research on FOAA requests and requesters related to unfulfilled requests and costs.

Joint Select or Joint Standing Committee of the Legislature

Mr. Parr suggested that the Advisory Committee recommend that the Legislature create a Joint Standing or Joint Select Committee to review legislation and public policy issues relating to public access to, and privacy protection of, government records and data, as well as the retention and appropriate disposition of such records and data. The idea behind the suggestion is to ensure more legislators are well-versed in freedom of access and privacy issues to understand the complexities and nuances involved, and that there would be a legislative forum beyond the Advisory Committee to discuss and resolve legislative issues on a comprehensive basis. The subcommittee discussed the fact that reference of bills to committees is not always predictable, and that legislators are already stretched pretty thin so that membership on an additional legislative committee may not have the intended positive result. The subcommittee split on whether to have a recommendation drafted, 3-4.

Application of FOAA to Councils of Government

(Suggested by a member of the public) The subcommittee discussed whether councils of governments (COGs) are or should be subject to the FOAA. They are not specifically listed in the description of “public proceedings” in FOAA, §402, sub-§2. There is concern that trying to establish an exhaustive list in statute will inevitably leave out appropriate entities. Public Access Ombudsman Kielty reminded the members that the Law Court has interpreted when the FOAA applies in specific cases. In *Moore v. Abbott*, 952 A.2d 980 (2008), the Law Court established a four-prong test to determine if an entity is subject to the FOAA: (1) whether the entity is performing a governmental function; (2) whether the funding of the entity is governmental; (3) the extent of governmental involvement or control; and (4) whether the entity was created by private or legislative action. These factors must be applied on a case by case basis. Although the statutes include enabling legislation for COGs, because of the multiple options available in the formation and operation of COGs, each one would need to be evaluated separately to determine if it is governed by the FOAA. The subcommittee agreed that current law and practice are sufficient, and no change in the law is necessary.

Responding to requests

Mr. Parr suggested legislation to allow the prioritization of fulfilling FOAA requests based on whether the requester is a Maine resident and the purpose for which the request is made. The suggested legislation would give first priority to requests to further the public’s understanding of the activities or actions of a government official or agency; a request for journalistic purposes is presumed to be made to further the public’s understanding of government activities. Second priority is given to requests made for academic or research purposes; then requests made by individuals who have an alleged grievance against an agency or official. Lowest priority would be given to requests made for a commercial or for-profit purpose. In order to apply this order, the official or agency would be able to require the requester to state his or her residence as well as the purpose of the request. Establishing this priority of fulfillment of requests would allow the FOAA to return to its central purpose: making it possible for the people to know what their

government is doing, not being a source of data. Mr. Parr noted that data has surpassed oil in value as a commodity.

The subcommittee discussed the proposal, and explored whether tiered response times would be appropriate, and whether it would be permitted to say “no” to a lowest priority request. Members raised concerns about “FOAA mills” – entities that use freedom of access laws to collect volumes of information about, for example, all of certain computer equipment used in state government, and then use the information for marketing purposes. Current law allows the agency to challenge abusive requests now. Some members expressed discomfort with putting in statute that the government determines the appropriate priority: The point should not be who is requesting or why, but the nature of the request – how difficult and disruptive is it to collect the information to respond.

The subcommittee discussed whether it would be appropriate to impose an additional charge - \$25? – when the requester is not from Maine. State and local government workers who respond to FOAA requests are paid by the taxpayers of Maine to do their jobs, and out-of-state requests place costs on Maine taxpayers. The subcommittee reiterated that the purpose of the FOAA is to ensure government is open and transparent, and “public records” is a broad concept, covering everything in possession of the agency or official. Representative Harnett noted that it was never intended to provide, for example, GIS mapping data. He expressed his sympathy for the burden on State and local government when requests are made for a commercial purpose.

Public Access Ombudsman Kielty noted that there are many policy decisions involved in these discussions. The current law provides for requests by anyone for any purpose. The law is wide open and lets the facts determine each case. She compared the FOAA with the federal Freedom of Information Act (FOIA), which does include tiered responses and costs based on the purpose of the requests. But she noted that the FOIA is a very sophisticated system, and strongly recommended that any changes to the Maine FOAA be done on a systemic basis. She admits there are a large number of commercial requests, but most of them are narrow because the law says the agency does not have to create a new record to respond. The courts are clear that the fact a request is burdensome is not by itself a reason to say no.

Subcommittee members noted that it is often the case that the actual costs of complying with FOAA requests are far beyond the limits set out in the statute, capping staff time at \$15 per hour after the first hour. Eric Stout provided the example of the FOAA request related to the bear referendum that, even after negotiation to narrow the request, resulted in more than 900 hours of agency staff time and more than 240 hours of his time, produced more than 65,000 emails and resulted in a FOAA fee of about \$15,000, although the actual labor cost to the agency was much higher. The subcommittee asked staff to survey State agencies to see if there are common issues affecting agencies related to burdensome FOAA requests or requests for commercial purposes.

The subcommittee reviewed information about the fees and costs structures other states employ when responding to public records requests. The subcommittee also reviewed the response information reported to the Public Access Ombudsman listed in the 2018 annual report, especially the data on the number of requests, hours spent and fees collected, keeping in mind that the data is self-reported by State agencies and may not include all requests and responses.

The Maine Municipal Association conducted a survey at the request of the subcommittee, and provided very helpful information. The responses to the MMA survey particularly pointed out the frustration of municipal officials in providing information for data miners (who then make a profit on the information). The subcommittee also noted that the respondents reported the fact that some requests for public records are made in bad faith as a way to spite those in office. The subcommittee discussed various aspects of the responsibilities and the resultant burdens that officials and agencies face in responding to requests for public records.

Recognizing that changing the fee structure does not solve all concerns, the subcommittee discussed whether to recommend that the statute be amended to establish a three-tiered fee for an agency's costs, other than translation, copying and mailing costs. Current law provides that the first hour of searching for, retrieving and compiling the requested public record must be provided for free. After that, current law allows the agency to charge up to \$15 an hour. The subcommittee proposed that the first three hours of labor be provided for free, that the agency may charge up to \$25 an hour for the next three hours, and that the agency can charge up to the "actual costs" of any labor conducted after those six hours. The subcommittee proposed to define "actual costs" to cover the personnel or labor costs, not to include overhead or other expenses of the agency. Staff prepared a draft incorporating those suggestions.

The subcommittee continued to discuss the fee issue to try to address the complaint that agencies, especially on the state level, do not waive fees when the request can be considered to be in the public interest. Agencies have discretion under 1 MRSA §408-A, sub-§11, as to whether to grant such a waiver: "the request can be considered to be in the public interest because releasing the information would likely contribute to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester." The result is that journalists and news media believe that most of their requests are not given the benefit of a whole or partial fee waiver, despite the fact that the requests appear to meet the description of "in the public interest" as expressed in sub-§11.

Mr. Campbell shared a letter from the Maine Freedom of Information Coalition articulating the Coalition's concerns with the proposal as drafted, particularly the difficulty with identifying "actual costs". While there is interest in designing a proposal, Mr. Campbell explained that the Coalition members are concerned about the potential inequities in how different agencies might determine "actual costs" and the impact of those increased costs on requesters. Ms. Meyer, Representative Harnett and Ms. Clancy agreed that additional time for discussion seemed warranted. Mr. Parr thought more time would be helpful to discuss how to define "actual costs", but asked if members would consider moving forward with a modified proposal to provide the first three hours of staff time for free and increase the cap on the charge for additional staff time at \$25 for requests that take more than three hours to complete.

The subcommittee discussed the draft and Mr. Parr's proposal, and agreed to table the issue for consideration in 2020. While the subcommittee recognizes that changing the fee structure is worthy of discussion, members did not feel that they had enough information or time to fully understand the potential problems a change in costs would address and what consequences could result from any changes. The subcommittee believed it would be prudent to take more time and asked that the Public Ombudsman help with gathering additional data and information on who

makes FOAA requests, the time it takes to respond to FOAA requests and the impact of costs on FOAA requests and responses.

LD 1575, An Act To Improve the Freedom of Access Laws of Maine

The Judiciary Committee requested the Advisory Committee to review LD 1575, An Act to Improve the Freedom of Access Laws of Maine, sponsored by Representative Harnett and cosponsored by Senator Breen. The bill has been carried over to the Second Regular Session.

The purpose of the bill is to enhance access to public records without imposing undue burdens on the efficient and effective functioning of government. Representative Harnett explained the provisions of the bill: define “public or governmental business,” require that a requester provide more specifics about what is requested and establish deadlines for governmental entities to respond. There was also an amendment to limit the cost of copies. Ms. Kielty reminded the subcommittee that the Ombudsman does not have authority to compel production. Ms. Meyer noted the information provided by the Maine Freedom of Information Coalition to the Judiciary Committee.

- *Define “public or governmental business”*

The subcommittee considered whether to support the suggested definition of “public or government business” included in LD 1575. Ms. Gardiner stated her belief that the current definition of “public record” works in practice and allows an agency to distinguish between public and personal communications. A majority of the subcommittee does not support the change.

- *Describe minimum requirements for a “request”*

Ms. Meyer suggested that adding the new language as suggested in LD 1575 would be redundant and, if adopted, may allow an agency to ignore a request. Ms. Kielty pointed out that the 5-day time limit under the law to deny or acknowledge a request does not begin to run until an agency has a “sufficient description” of the record being requested; she believes that language is adequate and does not need further change. The subcommittee agreed not to support the change.

- *Change “reasonable time” for responses to specific time periods with deadlines*

Ms. Meyer expressed her preference for the word “reasonable” in current law and would not support changing to a specific deadline of 30 days as responses would regularly be delayed until close to that deadline. Information provided to the subcommittee shows that more than 95% of FOAA requests are responded to within 30 days already. The subcommittee agreed not to support this amendment.

- *Cap on copying costs*

The subcommittee reviewed the amendment to LD 1575 that was proposed to the Judiciary Committee that sets an upper limit on per page copying costs. The subcommittee supports the amendment.

- *How to preserve communications using new and emerging technologies to ensure public access to those communications and prohibit use of electronic devices during public proceeding by member of body/agency*

LD 1575 proposed directing the Right to Know Advisory Committee to conduct a study focusing on the question of making and preserving records when emerging technologies, such as Snapchat, are used for governmental communications. Transparency in governmental activities includes the public's access to communications and other records of government officials, so when technology that by design does not create and retain a record of the communication is used, one of the underlying principles of the Freedom of Access Act is thwarted. The subcommittee agreed that it is important to understand the technology landscape and develop recommendations effectively supporting transparency, but does not believe that the Advisory Committee has the expertise to successfully carry out the study. The subcommittee therefore recommends that the Advisory Committee support the establishment of a study that includes stakeholders with a better collection of skills and experiences. It also supports including in the study the consideration and development of best practices and guiding principles on the use of all communication technologies by public body officials during public proceedings.

Remote participation

The subcommittee discussed remote participation and reviewed the language adopted by the majority of the Judiciary Committee as a committee amendment to LD 1511 (which was not finally enacted). Members noted that there appears to be a philosophical position of some members of the Legislature opposing the legislation, focusing mainly on the proposition that hard votes by policy makers need to be taken personally and physically in front of their constituents. Ms. Gardiner noted that the Attorney General opinion cited as the basis for the interpretation that the FOAA does not permit remote participation is 40 years old and was about a specific situation in which members of a board voted on the phone without any members of the public being able to hear the conversation. It did not address situations in which one or more members of a public body are joining a public meeting by speaker phone or video connection where members of the public can hear, or see and hear all of the participants. Subcommittee members wondered what more could be done to move this issue forward as last year's language represents the Advisory Committee's best effort to recommend legislation. The subcommittee agreed to add a preamble to the proposal to further explain the rationale for why the Advisory Committee believes the legislation is needed.

Add to criteria considered in evaluating public records exceptions

The subcommittee reviewed proposed language that directs the Judiciary Committee, when considering new public records exceptions, to weigh the fact that public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions. (The same criteria apply to the existing public records exceptions review conducted by the Right to Know Advisory Committee.) The members discussed whether the proposed consideration is currently covered, or could be easily worked into existing criteria, and decided a stand-alone paragraph is appropriate.

Eliminate agency FOAA request reporting requirement

Mr. Parr requested that the subcommittee consider repealing the requirement that agencies report information about public records requests and response efforts to the Public Access Ombudsman. His concerns stem from the fact that it takes significant time and effort, which are not always available. The resulting data, therefore, may not be accurate. The subcommittee discussed the concerns and also recognized that the information agencies reported had played a significant role in the discussion on responses, including appropriate fees. The subcommittee agreed to table the discussion on the proposal.

Add to RTKAC membership

The subcommittee briefly discussed a proposal made by Mr. Parr to recommend adding a member to the Advisory Committee who has legal or professional expertise in the field of data or personal privacy. Ms. Meyer suggested that the proposal should be brought to the Issues Subcommittee for discussion since that part of that subcommittee's focus is on privacy. The subcommittee agreed that the Issues Subcommittee should have the opportunity to discuss before consideration by the full Advisory Committee.

Issues Subcommittee

The Issues Subcommittee was tasked with examining privacy issues, including surveillance videos and the overarching topic of a State Privacy Act, as well as looking at records retention schedules and how they intersect with the Freedom of Access Act. The subcommittee met three times, October 9th, October 21st and December 18th.

Representative Thom Harnett, Amy Beveridge, Jim Campbell, Lynda Clancy, Julie Finn, Phyllis Gardiner, Judy Meyer, Paul Nicklas, Chris Parr, Luke Rossignol and Eric Stout serve as Subcommittee members. Luke Rossignol serves as the Subcommittee Chair.

Record retention schedules, Archives Advisory Board

Advisory Committee members raised the issue of records retention schedules, noting that recent changes in the local government retention schedule appear to restrict the public's access to records. The Advisory Committee agreed that it should learn more about the process used by the State Archives to develop these retention schedules. The subcommittee invited Tammy Marks, Director of the Maine State Archives, and Felicia Kennedy, Records Management Analyst, to provide information about record retention schedules and to answer questions. They provided a handout with information about the State Records Center (state agencies still own the records even though they are stored in a central location) and the State Archives, located in the Cultural Building. Records that are sent to the State Archives have historical value and will stay with the Archives permanently.

A "Records Retention Schedule" is a policy document that defines the minimum time a record must be retained and contains disposition instructions on how the record must be handled when no longer needed for agency business. Records retention schedules are based on the following

four-part criteria: (1) administrative use; (2) legal requirements; (3) fiscal requirements; and (4) historical/archival value. All records retention schedules apply to records regardless of their physical format. There are three types of schedules: State General Schedules; State Agency Schedules; and Local Government Schedules.

The subcommittee was most interested in understanding how the records retention schedules are developed. Ms. Marks, Ms. Kennedy and Ms. Gardiner assured the subcommittee that the statutes govern confidentiality of records, not the schedules, and that the Archives Advisory Board – which recommends records retention schedules to the State Archivist for adoption – never attempts (and does not have authority) to revise the public status of records. The Legislature significantly amended the Archives Advisory Board composition in Public Law 2019, chapter 50, and the new board has not yet been appointed. In addition, the post of State Archivist is currently vacant. Although the process to develop records retention schedules has always been public, the subcommittee was concerned that not enough is publicly known about the entire process, and recommended that the membership of the Archives Advisory Board be expanded to include two individuals representing journalistic/press interests and a member to advocate for privacy interests. The subcommittee was satisfied that the records retention schedule development process is flexible enough to allow public participation and questions without creating a formal judicial review or other method of challenging the State Archivist’s decisions when there is a concern about an adopted schedule.

The subcommittee also recommended that the Advisory Committee send a letter to the Archives Advisory Board to emphasize the importance of providing public notice of the board’s meetings, recognizing that the development of records retention schedules is an important element ensuring public access to public records at all levels of government. Recognizing that the Board has not yet been appointed, the subcommittee recommends addressing the letter to Director Marks. The subcommittee will suggest including the ability for interested parties to subscribe to an email distribution list to facilitate the sharing of meeting notices.

Surveillance videos

LD 639, An Act To Protect Student Privacy, referred to the Judiciary Committee, provides that video and audio recordings made by security or surveillance camera on school grounds or in school vehicles are not public records. A similar bill, LD 296, was also considered by the Education Committee. Because proposed amendments and discussions of both bills suggested broader issues related to the Freedom of Access Act, the Legislature retained one bill, LD 639, through which the policy issues could be explored and carried the bill over to next session. The Judiciary Committee asked the Advisory Committee to explore the topic of public accessibility of surveillance recordings made by public entities, including schools, and start with the premise that the recordings are a type of public record subject to the Freedom of Access Act, and then determine if there are appropriate exceptions – weighing privacy and other interests supporting confidentiality against the public’s interest in the disclosure of a record collected and maintained by a governmental entity.

Staff identified three factors in considering the public records status of surveillance and safety videos – purpose, scope and exceptions – and prepared draft legislation to create an exception to

the definition of “public records” for surveillance and security videos, including different options with regard to privacy concerns. Some subcommittee members suggested that the default should be that the videos are public unless there is a reason to make it confidential completely or to redact identifying information. The subcommittee agreed it is a tricky issue, balancing why we have a FOIA to begin with and how to deal with this security information that never existed before, and many people don’t know it exists now. There is still a concern about children, employees and people in general who have no idea they are being recorded.

The subcommittee wrestled with the idea that there is no expectation of privacy on a public street, with the countervailing argument that there is also no expectation that the government will create a public governmental record, accessible to the public, of all public spaces. There is a difference between being in a public place and the government making a public record of your being in that public place. Under the federal Privacy Act, an agency cannot create or collect a record with personally identifying information without providing the appropriate Privacy Act disclosures.

The subcommittee discussed the importance of making the existence of a video record publicly-known even if the content cannot be shared. The subcommittee discussed how to make the existence of the record – and the fact that it is being used in an investigation – public without revealing how it is being used. Can an electronic redaction policy be developed and applied to ensure the protection of the identity of minors? Although such a system might be helpful, there could be significant cost considerations, and it would not address security concerns, such as where cameras are focused. Does the price of running government include having a video editor on staff? Redaction can be a difficult process in many situations, and working with videos can be more complex.

In personnel investigations, all records are confidential until there is a final decision imposing discipline. Under the Intelligence and Investigative Information Act, there are circumstances in which a criminal justice agency may not confirm the existence or nonexistence of confidential intelligence and investigative record information. Ms. Kielty raised the issue of “intelligent transportation” – there are cameras on highways, all major bridges in Maine and in many parking lots. She noted she was confused about the existence question – there is no requirement that any governmental entity create a list of all records in its possession; requiring an agency to list all videos would be imposing a new obligation.

Mr. Nicklas explained that recreation programs sometimes have surveillance cameras on the buses they use, and there was at least one instance of a person requesting access to the video of a child captured on a library camera. Public Law 2019, chapter 318 limits the public accessibility of videos from cameras placed on school bus stop arms. The members discussed many issues involved with the surveillance videos, including who owns the video when the school district contracts with a private bus company, and what about adults on the bus or others on the street that are captured on the video? Some subcommittee members suggested that the key is to focus on the governmental function for the surveillance videos. Who reviews, and for what purpose? The public has a right to review governmental activities, but on the other hand, someone could want the videos for nefarious purposes. There are legitimate purposes for accessing the videos, such as in student discipline cases, but the privacy interests of others captured on the video must

be considered. If videos are made confidential, there must be a safety valve to allow access in appropriate situations.

The subcommittee decided to not focus on the stop arm video cameras, as that is currently in law, and several states have similar enabling legislation. The chances of misuse are small as the videos are not to be kept for more than 30 days unless being used in an investigation.

If the purpose is to encourage good behavior, then just the appearance of a video camera on a school bus will have that effect, even if it is not recording. That is a different purpose than security. A member raised concerns about facial recognition, and how that can affect the autonomy of the individual. Another member noted that public access to video footage will provide information about where cameras are, and, therefore, where they are not, revealing information about the vulnerabilities of security systems.

Public records exemptions in many states include exemptions of records, including surveillance videos, that are created and maintained for security purposes. Maine's law is narrowly focused on anti-terrorism activities. 1 MRSA §402, sub-§3, ¶L. Some states specifically address invasion of privacy concerns as the reason for the protection.

At the December 18th meeting, Mr. Rossignol asked Vicki Wallack, Director of Communications and Government Relations for the Maine School Management Association to provide input. Ms. Wallack indicated that there was a need for this type of legislation to protect kids. The subcommittee then began discussing the pros and cons of moving forward with legislation.

The subcommittee discussed protecting children and children's privacy rights and including not only schools but also recreation areas, parks and city halls. Ms. Wallack noted that this isn't about reporters requesting records, but about possible bad actors. But there was also concern from some members of the subcommittee that this wouldn't protect children but would actually protect adults who hurt children – for example, the recent video of a school security guard slamming a child in a school hallway.

The subcommittee discussed whether the proposed language provides avenues to address a problem if it arises, such as disclosure to appropriate officials, and expressed concern that there was no exception for a victim or a parent to obtain a recording. Members also discussed the need to strike the right balance between what is a public record and privacy interests and whether the default for surveillance video recordings should be public or confidential. The subcommittee discussed that the government function is in educating children, and the fact that a public record is only created if a school makes the record – sometimes video is more about controlling behavior than creating a government record. Members noted that there has not been presentation of data as to whether this is a problem, that this legislation is proactive, and that this had been the first time the subcommittee had heard from someone in the education field (the Advisory Committee seat representing education interests is currently vacant).

The subcommittee also discussed how technology is changing and creating more records, and that videos on school buses did not even exist before. The committee discussed whether it is

feasible to mandate video redaction, and what that would cost in terms of the technology, editing software, time and money.

Members of the subcommittee indicated how complex the issue is and how passionate they are about the issue on all sides. The subcommittee recognized that they are unlikely to come to consensus at this time, but that the Judiciary Committee still has a carryover bill in front of it and therefore the Advisory Committee should at least advise the Judiciary Committee as to the issues it has been wrestling with. Ms. Beveridge asked whether the Advisory Committee could include in its report that this is a serious issue, that every side needs to be examined, and that the Judiciary Committee should consider these points before moving forward. Some subcommittee members asked whether this could be a letter separate from the report so that it wouldn't get lost in the report.

A majority of the subcommittee voted to write a letter to the Judiciary Committee advising the Judiciary Committee of the issues that should be considered prior to moving forward with the bill that is pending in committee. The two members in opposition, indicated that their minority report would be to send the same letter and attach the draft language as an option/starting point for the Judiciary Committee.

Privacy

The subcommittee discussed the development of a State Privacy Act to complement the FOAA in a similar way as in federal law as well as to consider adding a specific member to the Advisory Committee representing personal privacy interests.

Staff provided an outline of the elements in the federal and other states' privacy acts. One element – giving the subject of the data an opportunity to review it and ask for corrections of the data about that person – could cause the government to track citizens more, since under current records practice there would be no way for most governmental entities in Maine to be able to tell someone what information was collected and maintained about that person. Subcommittee members queried whether any members were hearing from their constituents or the public that there is a need for statutory privacy protections that should be addressed? Is the topic appropriate for the RTKAC, or should it be sent to another entity to work on?

After much discussion, the subcommittee was divided in its support for making a recommendation to the full Advisory Committee: five members supported the RTKAC recommending to the Judiciary Committee that a separate committee, like RTKAC, be established to look at privacy and related issues, and to look at developing a privacy act, while four members opposed the recommendation. At the subsequent meeting, however, additional members were present and the proposal was not supported by a vote of 6 against and 4 in favor.

The Advisory Committee discussed the majority and minority positions of the subcommittee on whether to recommend the creation of a separate committee to study whether the State should adopt its own Privacy Act, as well as to consider the establishment of a permanent committee to review privacy and privacy-related concerns. A majority of the subcommittee did not support the creation of such a committee because those members do not believe the subject is in the jurisdiction of the

Right to Know Advisory Committee. A majority of the Advisory Committee does not support recommending the creating of such a committee, but some of the opposing members made clear that it was because they did not think it was part of the role of the Advisory Committee to do so, not because a focus on privacy issues is unimportant. Some members expressed their concern that such involvement in privacy issues could fundamentally change the focus of the Right to Know Advisory Committee. Members who supported the creation of the privacy committee believe the action is within the jurisdiction of the Advisory Committee, and expressed the view that access and privacy are two sides of the same coin. The final vote was 5-7 (the motion was to adopt the recommendation to create the study committee). Members supporting the motion: Mr. Campbell, Ms. Finn, Mr. Parr, Ms. Goucher and Mr. Stout; members opposing the motion: Representative Harnett, Ms. Beveridge, Ms. Clancy, Ms. Gardiner, Ms. Meyer, Mr. Nicklas and Mr. Rossignol. The Advisory Committee further discussed whether Mr. Parr's proposed draft of a Maine Privacy Act should be included in the report as an Appendix, and the members agreed to not include the text of the proposal, noting that all the documents from the meetings are posted on the Advisory Committee's website.

V. COMMITTEE PROCESS

The Advisory Committee held four meetings, the Public Records Exceptions Subcommittee met three times, the Improve the FOAA Subcommittee met four times and the Issues Subcommittee met three times. Each subcommittee explained their discussions and recommendations to the full Advisory Committee. The Advisory Committee engaged in robust discussions and finalized its recommendations at the December 18th meeting. Part VII of this report contains the specific recommendations approved by the Advisory Committee. The Advisory Committee also discussed the issues described below, but does not make recommendations on these issues at this time.

The Judiciary Committee requested that Advisory Committee review all of LD 1575, An Act to Improve the Freedom of Access Laws of Maine. The Improve the FOAA Subcommittee reviewed each section of the bill, as well as an amendment proposed by one of the cosponsors on limiting copying fees. The Advisory Committee supports the proposal to cap copying fess (see Recommendations in Part VII), and recommends that a separate study committee be established to look at the emerging technology issues referenced in Section 4 of LD 1575 (see Recommendations in Part VII). The Advisory Committee does not support the remaining proposals in LD 1575, and recommends that they not be enacted.

The Advisory Committee discussed the majority and minority positions of the Issues Subcommittee on whether to recommend the creation of a separate committee to study whether the State should adopt its own Privacy Act, as well as to consider the establishment of a permanent committee to review privacy and privacy-related concerns. A majority of the subcommittee did not support the creation of such a committee because those members do not believe the subject is in the jurisdiction of the Right to Know Advisory Committee. A majority of the Advisory Committee does not support recommending the creating of such a committee, but some of the opposing members made clear that it was because they did not think it was part of the role of the Advisory Committee to do so, not because a focus on privacy issues is unimportant. Some members expressed their concern

that such involvement in privacy issues could fundamentally change the focus of the Right to Know Advisory Committee. Members who supported the creation of the privacy committee believe the action is within the jurisdiction of the Advisory Committee, and expressed the view that access and privacy are two sides of the same coin. The final vote was 5-7 (the motion was to adopt the recommendation to create the study committee). Members supporting the motion: Mr. Campbell, Ms. Finn, Mr. Parr, Ms. Goucher and Mr. Stout; members opposing the motion: Representative Harnett, Ms. Beveridge, Ms. Clancy, Ms. Gardiner, Ms. Meyer, Mr. Nicklas and Mr. Rossignol. The Advisory Committee further discussed whether Mr. Parr’s proposed draft of a Maine Privacy Act should be included in the report as an Appendix, and the members agreed to not include the text of the proposal, noting that all the documents from the meetings are posted on the Advisory Committee’s website.

The Advisory Committee members agreed that more time is needed to thoroughly research and discuss a few topics that were on the agenda before making recommendations, and therefore tabled them until 2020.

- Responding to requests – The Advisory Committee tabled suggestions about changing the fee structure, noting the need for additional information about existing fees, and how the current system affects requesters as well as state and local officials. The Advisory Committee anticipates assistance from the Public Access Ombudsman and the Law School Extern in developing information that will be helpful to the discussion. Concerns about whether the waiver of fees for requests made in the public interest will be included in those deliberations.
- FOAA request reporting requirements – Current law requires State agencies to report their FOAA experiences to the Public Access Ombudsman, and those statistics are included in the annual report. At least one member noted that the obligation can be very burdensome and detract from the actual responsiveness of the agency. Responses may not be complete, especially when multiple requests are pending at the same time. The Advisory Committee will discuss the benefits of the reporting (the Advisory Committee used reported statistics in its discussions) with the concerns about accuracy and collection and reporting process.

VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN THIRTEENTH ANNUAL REPORT

The Right to Know Advisory Committee made the following recommendations in its Thirteenth Annual Report. The legislative actions taken in 2019 as a result of those recommendations are summarized below.

Recommendation:	Action:
Amend certain existing public records exceptions as	LD 1511, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records

<p>recommended by the Public Records Exceptions Subcommittee</p>	<p>Exceptions – died in nonconcurrency because of the remote participation provisions included in Committee Amendment “A.”</p>
<p>Recommendation:</p> <p>Amend the Freedom of Access Act to establish a tiered schedule of fines for repeated willful violations within a four-year period</p>	<p>Action:</p> <p>LD 1414, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Penalties for Violations of the Freedom of Access Act – enacted, now Public Law 2019, Chapter 247, codified in Title 1, section 410.</p>
<p>Recommendation:</p> <p>Amend the Freedom of Access Act training requirements to include officials who are appointed to the offices for which elected official must complete training</p>	<p>Action:</p> <p>LD 1416, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials – enacted, now Public Law 2019, Chapter 300, codified in Title 1, section 412.</p>
<p>Recommendation:</p> <p>Enact legislation that creates a legislative study on the use of remote participation by public bodies at the state, regional and local level</p>	<p>Action:</p> <p>LD 1183, Resolve, To Implement the Recommendations of the Right To Know Advisory Committee Concerning Remote Participation by Members of Public Bodies – voted ONTP, but statutory language to implement the parameters on the use of remote participation by members of public bodies was included in Committee Amendment “A” (majority report) of LD 1511, which subsequently died between the House and Senate.</p>

VII. RECOMMENDATIONS

The Advisory Committee makes the following recommendations.

☐ **Amend certain existing public records exceptions as recommended by the Public Records Exceptions Subcommittee**

The following recommendations were made in 2018 and included in LD 1511, which did not pass, so they are recommended again.

- Title 1, section 402, subsection 3, paragraph C-1, relating to information contained in a communication between a constituent and an elected official if the information is of a personal nature as specified in the paragraph, is an individual's social security number, or would be confidential if it were in the possession of a public agency or official (amend to remove the listing of Social Security numbers as to what is confidential in communications with constituents because SSNs are already not public records)
- Title 1, section 402, subsection 3, paragraph K, relating to personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure (amend to delete requirement that a municipality adopt an ordinance in order to protect personally identifying information about minors that is obtained and maintained in the process of providing recreational or nonmandatory recreational programs or services)
- Title 1, section 402, subsection 3, paragraph M, relating to architecture, design, access authentication, encryption and security of information technology infrastructure and systems (amend to add "including records or information maintained to ensure government operations and technology continuity and disaster recovery"; ¶M provides a public records exception for records and information about public agency technology infrastructure, systems and software)
- Title 3, section 997, subsection 1 and subsection 3, relating to program evaluation reports transmitted by OPEGA to the GOC prior to the report's formal presentation and to papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of OPEGA or other entity charged with the preparation of a program evaluation report (amend to remove duplicative language from draft provided; OPEGA confidentiality of working papers)
- Title 5, section 4572, subsection 2, relating to medical information or history of an applicant in an employment discrimination complaint (amend to clarify terminology about medical and disability information; Maine Human Rights Act description of unlawful employment discrimination against a qualified individual with a disability)
- Title 5, section 4573, subsection 2, relating to records of mental or physical disability (amend to clarify terminology about describing physical or mental disabilities; Maine

Human Rights Act description of employer actions that are not unlawful employment discrimination)

The following recommendations provide for amendments to existing public records exceptions that were reviewed in 2019.

- Title 1, section 402, subsection 3, paragraph E, relating to records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System (amend to clarify that records, working papers and interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees are confidential when the subject matter is confidential or otherwise protected from disclosure by statute, other law or legal precedent, or evidentiary privilege)
- Title 1, section 402, subsection 3, paragraph J, relating to working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization (amend scope of exception to clarify that working papers become public records once distributed in a public meeting of an advisory organization and not when distributed by an individual member of an advisory organization)
- Title 1, section 402, subsection 3, paragraph O relating to personal contact information concerning public employees other than elected officials (amend to provide that personal contact information concerning public employees protected as confidential includes a person's username, password and uniform resource location for a personal social media account)
- Title 5, section 244-E, subsection 2, relating to the contents of a complaint alleging fraud, waste, inefficiency or abuse (amend to permit the State Auditor to share confidential information related to a complaint alleging fraud, waste, inefficiency or abuse to a department or agency that is the subject of a complaint to ensure that the department or agency responds appropriately to the complaint)
- Title 7, subsection 2992-A, subsection 1, paragraph C, subparagraph (2), relating to records and meetings of Maine Dairy Promotion Board which may be closed to the public when disclosure would adversely affect competitive position of milk industry (amend scope of exception to remove references to a particular segment or segments of the milk industry)
- Title 7, section 2998-B, subsection 1, paragraph C, subparagraph (2), relating to records and meetings of Maine Dairy and Nutrition Council which may be closed to the public when disclosure would adversely affect competitive position of milk industry (amend scope of exception to remove references to a particular segment or segments of the milk industry)

- Title 1, section 402, subsection 3, paragraph U, relating to related to records of railroad companies concerning hazardous materials shipments (amend scope to authorize disclosure of records subject to public disclosure after a discharge that poses a threat to public health, safety and welfare)

*See recommended legislation in **Appendix C**, and the list of public records exceptions for which no amendments are recommended in **Appendix D**.*

Direct legislative staff to help identify nonstandard language concerning existing public records exceptions

The Public Records Exceptions Subcommittee reported to the Advisory Committee that existing language establishing public records exceptions varies throughout the statutes. Recognizing that consistent language will help the public as well as agencies and public officials understand what records are accessible, the Advisory Committee recommends draft unallocated language directing legislative staff, in consultation with the Advisory Committee, to examine inconsistencies in statutory language related to the designation of information and records as confidential or not subject to public disclosure and recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released.

*See recommended legislation in **part of Appendix C**.*

Enact legislation to provide parameters on the use of remote participation by public bodies

The Advisory Committee recommends the legislation on remote participation put forward last session, with the addition of a detailed preamble to further explain the rationale for why the Advisory Committee believes the legislation is needed.

*See recommended legislation in **Appendix E**.*

Enact legislation to cap copying fees

The Advisory Committee approved the amendment to LD 1575 that was proposed to the Judiciary Committee that sets an upper limit on per page copying costs (10¢ per standard 8½” x 11” black and white page). The language also prohibits a per page copy fee for electronic records.

*See recommended legislation in **Appendix F**.*

Enact legislation to require planning boards, specific school district officials and additional municipal officials and their deputies to complete Freedom of Access Act training, and to clarify the application of existing training requirements

The Advisory Committee recommends statutory changes to: 1) expand training to planning board members, code enforcement officers and town and city managers or administrators, and their deputies; 2) clarify which school officials are required to complete the training; and 3) clarify the timeline for completing the training for those in appointed positions.

See recommended legislation in Appendix F.

☐ Request that the Public Access Ombudsman develop suggestions to enhance and improve FOAA training for public officials, and develop methods for gathering data on FOAA requests and requesters related to unfulfilled requests and costs

The Advisory Committee supports directing the Public Access Ombudsman to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the University of Maine Law School Extern and to report back to the Advisory Committee in 2020. Because the Advisory Committee could not reach consensus on changing the fee statute until more information about current practices and experiences were collected and reviewed, and the members recommend that the Ombudsman, with help from the Law School Extern, develop methods for gathering data and research on FOAA requests and requesters related to unfulfilled requests and costs.

☐ Request that the Joint Standing Committee on Judiciary establish a study group to examine the use of emerging technologies with regard to making and keeping records and examine the use of communications technology during public proceedings

The Advisory Committee recommends the establishment of a study committee to examine the specific challenges emerging technologies create for governmental entities and the public under the Freedom of Access Act. The study committee should include stakeholders with an appropriate collection of skills and experiences, and should include at least one person who is also a member of the Right to Know Advisory Committee to ensure continuity and coordination.

☐ Enact legislation to improve the review of public records exceptions by including consideration of access to information that will assist in making informed decisions about health and safety

The Advisory Committee recommends language that directs the Judiciary Committee, when considering new public records exceptions, to weigh the fact that public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions. This new consideration would be included in the Right to Know Advisory Committee's review of existing public records exceptions, as well.

See recommended legislation in Appendix F.

❑ Enact legislation to expand the membership of the Right to Know Advisory Committee to include a member with experience and expertise in data and personal privacy issues

The Advisory Committee recommends expanding the membership of the Right to Know Advisory Committee to include a member who has legal or professional expertise in the field of data and personal privacy, to be appointed by the Governor. (The Issues Subcommittee and the Advisory Committee as a whole did not support the recommendation that the Legislature create a study committee on privacy.)

See recommended legislation in Appendix F.

❑ Enact legislation to revise the membership of the Archives Advisory Board to include a public member and two members representing journalistic and news perspectives

The Advisory Committee recommends changing the membership of the Archives Advisory Board to include two members representing journalists, newspapers, broadcasters and other news media interests and one member representing the protection of personal privacy interests.

See recommended legislation in Appendix G.

❑ Request that the Archives Advisory Board emphasize the publicizing of information about its meetings to enhance public awareness and participation given the importance of records retention schedules

The Advisory Committee recognizes that the development of records retention schedules is an important element ensuring public access to public records at all levels of government. The Advisory Committee agreed to send a letter to Tammy Marks, Director of the Maine State Archives, who will be working with the reconstituted Archives Advisory Board, to emphasize the importance of providing public notice of the board's meetings.

See correspondence in Appendix G.

❑ Send a letter to the Joint Standing Committee on Judiciary expressing issues that should be considered when dealing with surveillance videos

The Advisory Committee adopted the Issues Subcommittee's majority recommendation to write a letter to the Judiciary Committee, separate from the report, advising the legislators of the issues that the Judiciary Committee should consider prior to moving forward LD 639. The two members of the subcommittee in opposition agreed to support sending the letter to the Judiciary Committee, if the letter includes the fact that they support going forward with legislation now while broader concerns remain under consideration.

☐ Defer to the Joint Standing Committee on Judiciary as to whether to require the collection and reporting of aggregate information concerning certain search warrants

Public Law 2019, chapter 489, section 18, directed the Right to Know Advisory Committee to identify the information that could be provided about the records kept by the courts related to warrants that authorize the installation and monitoring of tracking devices, access to electronic device content and access to electronic device location information. Aggregate information about the specific search warrants is not available. The Advisory Committee recognizes the value in the aggregate information, but defers to the Judiciary Committee to determine whether it is appropriate to impose the additional obligation of tracking the search warrant information on the Judicial Branch.

VIII. FUTURE PLANS

In 2020, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including a review of the fees charged for copies of public records and the waiver for requests made in the public interest, as well as whether the FOAA request reporting requirements applicable to agencies should be revised. The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

APPENDIX A

Authorizing legislation: 1 MRSA §411

AUTHORIZING LEGISLATION

TITLE 1 GENERAL PROVISIONS

CHAPTER 13 PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1 FREEDOM OF ACCESS

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House;

- M. The Attorney General or the Attorney General's designee; and
- N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.
- B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.
- C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

- A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;
- B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;
- C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to

contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making that information publicly available;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's

activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

APPENDIX B

Membership list

MEMBERSHIP OF RIGHT TO KNOW ADVISORY COMMITTEE

As of January 1, 2020

Appointments by the Governor

Paul Nicklas
67 Pine Street, Apt. 2
Bangor, ME 04401

Representing Municipal Interests

Christopher Parr
Department of Public Safety
104 State House Station
August, ME 04333

Representing State Government
Interests

Eric Stout
15 S. Ridge Dr.
Winslow, ME 04901

Member with Experience in Information
Technology Issues and Costs in Multiple
Areas

Vacant

Representing School Interests

Appointments by the President of the Senate

Senator Michael E. Carpenter
P.O. Box 1406
Houlton, ME 04730

Senate Member of the Judiciary
Committee

Amy Beveridge
10 Stonewall Lane
Saco, ME 04072

Representing Broadcasting Interests

Lynda Clancy
156 Main Street
Rockport, ME 04856

Representing the Press

Luke Rossignol
1019 State Road
Mapleton, ME 04757

Representing the Public

Vacant

Representing Law Enforcement Interests

Appointments by the Speaker of the House of Representatives

Representative Thomas Harnett
52 Marston Road
Gardiner, ME 04345

House Member of the Judiciary
Committee

Taylor Asen
126 William Street
Portland, ME 04101

Representing the Public

Suzanne Goucher
Maine Association of Broadcasters
69 Sewell Street, Suite 2
Augusta, ME 04330

Representing Broadcasting Interests

James Campbell
Maine Freedom of Information Coalition
Monroe Road
Searsport, ME 04974

Representing a Statewide Coalition of
Advocates of Freedom of Access

Judy Meyer
Lewiston Sun Journal
104 Park Street
Lewiston, ME 04243-4400

Representing Newspaper Publishers

Attorney General or Designee

Phyllis Gardiner
Office of the Attorney General
6 State House Station
Augusta, ME 04333

Designee

Chief Justice or Designee

Julia Finn
Maine Judicial Branch
P.O. Box 4820
Portland, ME 04112

Member of the Judicial Branch

APPENDIX C

**Recommended legislation to amend certain provisions of law in Titles 1 through 7-A
relating to previously-enacted public records exceptions**

RECOMMENDED LEGISLATION: EXCEPTIONS INITIALLY INCLUDED IN LD 1511

Sec. 1. 1 MRSA §402, sub-§3, ¶C-1, as enacted by PL 2011, c. 264, §1, is amended to read:

C-1. Information contained in a communication between a constituent and an elected official if the information:

(1) Is of a personal nature, consisting of:

(a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;

(b) Credit or financial information;

(c) Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family; or

(d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or

~~(e) An individual's social security number; or~~

(2) Would be confidential if it were in the possession of another public agency or official;

Sec. 2. 1 MRSA §402, sub-§3, ¶K, as amended by PL 2003, c. 392, §1, is further amended to read:

K. Personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, ~~if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure.~~ This paragraph does not apply to records governed by Title 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;

Sec. 3. 1 MRSA §402, sub-§3, ¶M, as amended by PL 2011, c. 662, §2, is further amended to read:

M. Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software, including records or information maintained to ensure government operations and technology continuity and to enable disaster recovery. Records or information covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure;

Sec. 4. 3 MRSA §997, sub-§§1 and 3, as enacted by PL 2001, c. 702, §2, are amended to read:

1. Review and response. Prior to the presentation of a program evaluation under this chapter to the committee by the office, the director of the evaluated state agency or other entity must have an opportunity to review a draft of the program evaluation report. Within 15 calendar days of receipt of

the draft report, the director of the evaluated state agency or other entity may provide to the office comments on the draft report. If provided to the office by the comment deadline, the comments must be included in the final report when it is presented to the committee. Failure by the director of an evaluated agency or other entity to submit its comments on the draft report by the comment deadline may not delay the submission of a report to the committee or its release to the public.

All documents, writings, drafts, electronic communications and information transmitted pursuant to this subsection are confidential and may not be released to the public ~~prior to the time the office issues its program evaluation report pursuant to subsection 3.~~ A person violating the provisions of this subsection regarding confidentiality is guilty of a Class E crime.

3. Confidentiality. ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working~~ Working papers in the possession of the director or other entity charged with the preparation of a program evaluation report an entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 are confidential and exempt from disclosure pursuant to Title 1, chapter 13, including disclosure to the Legislative Council or an agent or representative of the Legislative Council. All other records or materials in the possession of the director or ~~other entity charged with the preparation of a program evaluation report under this chapter~~ an entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. ~~Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council.~~ This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

Sec. 5. 5 MRSA §4572, sub-§2, ¶C, as enacted by PL 1995, c. 393, §13, is amended to read:

C. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, if:

(1) All entering employees are subjected to the same examination regardless of disability;

(2) Information obtained regarding the medical ~~condition or~~ and disability information and history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(c) Government officials investigating compliance with this Act are provided relevant information on request; and

(3) The results of the examination are used only in accordance with this Act.

Sec. 6. 5 MRSA §4572, sub-§2, ¶E, as enacted by PL 1995, c. 393, §13, is amended to read:

E. A covered entity may conduct voluntary medical examinations, including voluntary medical ~~histories~~ and disability information and history, that are part of an employee health or wellness program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. Information obtained under this paragraph regarding the medical ~~condition~~ and disability information and history of an employee is subject to the requirements of paragraph C, subparagraphs (2) and (3).

Sec. 7. 5 MRSA §4573, sub-§2, as amended by PL 1995, c. 393, §16, is further amended to read:

2. Records. After employment or admission to membership, to make a record of such features of an individual as are needed in good faith for the purpose of identifying them, provided the record is intended and used in good faith solely for identification, and not for the purpose of discrimination in violation of this Act. ~~Records of features~~ regarding physical or mental disability that are collected must be collected and maintained on separate forms and in separate files and be treated as confidential records;

SUMMARY

This draft implements statutory changes initially recommended by the Right To Know Advisory Committee in 2019 pursuant to its responsibility to review existing public records exceptions and included in L.D. 1511. An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions.

The draft eliminates specific protection for social security numbers in the context of constituent communications because social security numbers are designated as not public records for all contexts.

Current law provides that personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services is not a public record as long as the municipality has adopted an ordinance that protects the information from disclosure. The draft repeals the requirement that a municipality adopt such an ordinance in order to protect the information about minors.

Current law provides a public record exception for records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software. The draft amends the provision to specifically include records or information maintained to ensure government operations and technology continuity and to enable disaster recovery.

The draft amends the statutes governing the confidentiality of the working papers of the Office of Program Evaluation and Government Accountability to clarify that the working papers, whether in the possession of the office or an entity with which the office director has contracted, remain confidential even after the report is released to the public. It removes duplicative language that is already captured in the definition of "working papers."

The draft amends the Maine Human Rights Act to update and clarify the language describing medical history and information about disabilities, as well as to update a reference to employee health and wellness programs.

RECOMMENDED LEGISLATION TO AMEND EXISTING PUBLIC RECORDS EXCEPTIONS
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Sec. ____ . **1 MRSA §402, sub-§3, ¶ E** is amended as follows:

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System **when the subject matter is confidential or otherwise protected from disclosure by statute, other law or legal precedent, or evidentiary privilege.** The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B;

Summary

This language amends the scope of the public records exception to clarify that records, working papers and interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System are confidential when the subject matter is confidential or otherwise protected from disclosure by statute, other law or legal precedent, or evidentiary privilege.

Sec. ____ . **1 MRSA §402, sub-§3, ¶ J** is amended as follows:

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or

after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

J. Working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization. Working papers are public records if distributed ~~by a member or~~ in a public meeting of the advisory organization;

Summary

This language amends the scope of the public records exceptions to clarify that working papers become public records once distributed in a public meeting of an advisory organization and not when distributed by an individual member of an advisory organization.

Sec. ____ . **1 MRSA §402, sub-§3, ¶ O** is amended as follows:

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

O. Personal contact information concerning public employees, except when that information is public pursuant to other law. For the purposes of this paragraph:

(1) "Personal contact information" means ~~home personal~~ address, ~~home~~ telephone number, ~~home~~ facsimile number, ~~home~~ e-mail address, ~~and personal~~ cellular telephone number, ~~and personal~~ pager number, ~~and~~ username, password and uniform resource locator for a personal social media account; and

(2) "Public employee" means an employee as defined in Title 14, section 8102, subsection 1, except that "public employee" does not include elected officials;

Summary

This language amends the public records exception to provide that personal contact information concerning public employees protected as confidential includes a person's username, password and uniform resource location for a personal social media account.

Sec. ____ . 5 MRSA §244-E, sub-§§ 2, 3 and 4 are amended as follows:

2. Contents of complaint confidential. A complaint alleging fraud, waste, inefficiency or abuse made through a hotline or other referral service established by the State Auditor for the confidential reporting of fraud, waste, inefficiency and abuse in State Government and any resulting investigation is confidential and may not be disclosed except as provided in subsections 3 and 4.

3. Coordination with Office of Program Evaluation and Government Accountability and Attorney General and state agencies. The State Auditor may disclose information that is confidential under this section to the Director of the Office of Program Evaluation and Government Accountability and the Attorney General to ensure appropriate agency referral or coordination between agencies to respond appropriately to all complaints made under this section. The State Auditor may disclose information that is confidential under this section related to a complaint alleging fraud, waste, inefficiency or abuse to a department or agency that is the subject of a complaint to ensure that the department or agency responds appropriately to the complaint. The department or agency shall maintain as confidential any information related to a complaint furnished by the State Auditor.

4. Reports. For each complaint under this section, the State Auditor shall submit a written report to the Governor and publish the report on the auditor's publicly accessible website. The report must include a detailed description of the nature of the complaint, the office, bureau or division within the department or any agency that is the subject of the complaint, the determination of potential cost savings, if any, any recommended action and a statement indicating the degree to which the complaint has been substantiated. The report must be submitted no later than 120 days after the State Auditor receives the complaint. In addition, the State Auditor shall publish a semiannual report to the Governor and Legislature of the complaints received by the hotline or other referral service, which may be electronically published. The report must include the following information:

- A. The total number of complaints received;
- B. The number of referrals of fraud or other criminal conduct to the Attorney General;
- C. The number of referrals of agency performance issues to the Office of Program Evaluation and Government Accountability; and
- D. The number of investigations by the State Auditor by current status whether opened, pending, completed or closed.

Summary

This language amends the public records exception to permit the State Auditor to share confidential information related to a complaint alleging fraud, waste, inefficiency or abuse to a department or agency that is the subject of a complaint to ensure that the department or agency responds appropriately to the complaint. The language requires the department or agency to maintain the confidentiality of any information related to a complaint furnished by the State Auditor.

Sec. __. **7 MRSA §2992-A, sub-§1, paragraph ¶C** is amended as follows:

C. Notwithstanding paragraphs A and B:

(1) Employees of the board, including employees hired after July 1, 1996, are state employees for the purposes of the state retirement provisions of Title 5, Part 20 and the state employee health insurance program under Title 5, chapter 13, subchapter 2;

(2) All meetings and records of the board are subject to the provisions of Title 1, chapter 13, subchapter 1, except that, by majority vote of those members present recorded in a public session, records and meetings of the board may be closed to the public when public disclosure of the subject matter of the records or meetings would adversely affect the competitive position of the milk industry of the State ~~or segments of that industry~~. The Commissioner of Agriculture, Conservation and Forestry and those members of the Legislature appointed to serve on the joint standing committee of the Legislature having jurisdiction over agricultural, conservation and forestry matters have access to all material designated confidential by the board;

(3) For the purposes of the Maine Tort Claims Act, the board is a governmental entity and its employees are employees as those terms are defined in Title 14, section 8102;

(4) Funds received by the board pursuant to chapter 611 must be allocated to the board by the Legislature in accordance with Title 5, section 1673; and

(5) Except for representation of specific interests required by subsection 2, members of the board are governed by the conflict of interest provisions set forth in Title 5, section 18.

Summary

This language amends the scope of the public records exceptions to remove references to a particular segment or segments of the milk industry.

Sec. __. **7 MRSA §2998-B, sub-§1, paragraph ¶C** is amended to read:

C. Notwithstanding paragraphs A and B:

(1) Employees of the council, including employees hired after July 1, 1996, are state employees for the purposes of the state retirement provisions of Title 5, Part 20 and the state employee health insurance program under Title 5, chapter 13, subchapter 2;

(2) All meetings and records of the council are subject to the provisions of Title 1, chapter 13, subchapter 1, except that, by majority vote of those members present recorded in a public session, records and meetings of the council may be closed to the public when public

disclosure of the subject matter of the records or meetings would adversely affect the competitive position of the milk industry of the State ~~or segments of that industry~~. The Commissioner of

Agriculture, Conservation and Forestry and those members of the Legislature appointed to serve on the joint standing committee of the Legislature having jurisdiction over agricultural, conservation and forestry matters have access to all material designated confidential by the council;

(3) For the purposes of the Maine Tort Claims Act, the council is a governmental entity and its employees are employees as those terms are defined in Title 14, section 8102;

(4) Funds received by the council pursuant to chapters 603 and 611 must be allocated to the board by the Legislature in accordance with Title 5, section 1673; and

(5) Except for representation of specific interests required by subsection 2, members of the council are governed by the conflict of interest provisions set forth in Title 5, section 18.

Summary

This language amends the scope of the public records exceptions to remove references to a particular segment or segments of the milk industry.

Sec. ____ . 1 MRSA §402, sub-§3, ¶ U is amended as follows:

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

U. Records provided by a railroad company describing hazardous materials transported by the railroad company in this State, the routes of hazardous materials shipments and the frequency of hazardous materials operations on those routes that are in the possession of a state or local emergency management entity or law enforcement agency, a fire department or other first responder-; ~~except that such records~~ ***related to a discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare are subject to public disclosure after that discharge*** ~~may be disclosed after any discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare.~~ For the purposes of this paragraph, "hazardous material" has the same meaning as set forth in 49 Code of Federal Regulations, Section 105.5; and

Summary

This language amends the scope of the public records exception to ~~permit the~~ *make records related to a discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare are subject to public disclosure* ~~subject to public disclosure~~ *after that discharge* of records after any discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare.

UNALLOCATED LANGUAGE TO DEVELOP DRAFTING STANDARDS AND REDUCE INCONSISTENCIES (Amend 2-0 on 9/20; approved 12/4)

Sec. ____. **Public records exceptions and confidential records; drafting templates.** The Office of Policy and Legal Analysis, in consultation with the Office of the Revisor of Statutes and the Right to Know Advisory Committee, shall examine inconsistencies in statutory language related to the designation of information and records received or prepared for use in connection with the transaction of public or governmental business or containing information relating to the transaction of public or governmental business that is designated as confidential or not subject to public disclosure and shall recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released. On or before ____, the Office of Policy and Legal Analysis shall submit a report with its recommendations to the Legislature.

Summary

This language directs the Office of Policy and Legal Analysis, in consultation with the Office of the Revisor of Statutes and the Right to Know Advisory Committee, to examine inconsistencies in statutory language related to the designation of information and records as confidential or not subject to public disclosure and to recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released.

APPENDIX D

Public records exceptions reviewed in 2019 for which no statutory change is recommended

<p style="text-align: center;">Public records exceptions reviewed in 2018-2019 Recommended to be Continued without Change</p>

The following public records exceptions should remain in law as written:

- Title 1, section 402, subsection 3, paragraph E, relating to records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System
- Title 1, section 538, subsection 3, relating to InforME subscriber information
- Title 1, section 1013, subsection 3-A, relating to a complaint alleging a violation of legislative ethics
- Title 4, section 17, subsection 15, relating to State Court security records
- Title 5, section 7070, subsection 2, relating to state employees' personal information
- Title 7, section 4204, subsection 10, relating to nutrient management plans
- Title 7, section 4205, subsection 2, relating to livestock operation permits and nutrient management plans
- Title 7, section 306-A, subsection 3, relating to agricultural development grant program, market research or development activities
- Title 7, section 951-A, relating to minimum standards for planting potatoes

APPENDIX E

Recommended legislation on remote participation

RECOMMENDED LEGISLATION TO ADDRESS REMOTE PARTICIPATION

Whereas, the Freedom of Access Act makes clear that public proceedings exist to aid in the conduct of the people's business, and that government actions are to be taken openly and that deliberations be conducted openly;

Whereas, the Freedom of Access Act expresses Legislative intent that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of Act;

Whereas, the Freedom of Access Act explicitly states that the Act is to be liberally construed and applied to promote its underlying purposes and policies;

Whereas, because the Freedom of Access Act does not specifically mention whether remote participation in a public proceeding by members of a public body supports the underlying purposes and policies of government transparency;

Whereas, there are multiple opportunities for abuse of remote participation but there are situations in which participation by a member of a public body in a public proceeding from a remote location is appropriate, beneficial and effective;

Whereas, the Freedom of Access Act was enacted years before technology supporting effective remote participation was created, and that technology has improved the ability for expansive access, and continues to advance;

Whereas, many in the private sector have embraced remote participation technology to improve participation in meetings and discussions that would not otherwise be as effective because of geographic diversity and other reasons for which the ability to be physically present is limited, as well as to improve efficiency and reduce costs;

Whereas, without clear guidance in the statute, remote participation can be misused in circumstances in which it should not be employed, and not used out of caution in situations in which the participation of the member remotely would benefit the public proceeding while still ensuring complete openness of the proceeding to the public;

Whereas, enactment of the legislation provides clear guidance, and will ensure that if municipal, county and State public bodies engage in remote participation, these reasonable limitations will apply to ensure public access to the whole of each public proceeding;

Whereas, the use of remote participation by public bodies at the State level should be governed by statute and major substantive rules;

Whereas, the use of remote participation by municipalities, counties, school boards and other non-state public bodies should be governed by the constituents the public bodies serve,

Whereas, this legislation establishes a process to approve or reject the use of remote participation by members of public bodies which must be followed if remote participation is exercised, unless the statute provides an alternative process,

Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

It is the intent of the Legislature that actions of public bodies subject to this subchapter be taken openly and their deliberations be conducted openly. This section governs participation in a public proceeding of such a public body by a member of that public body when the member is not physically present. Remote participation, which means participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401. The Legislature may not allow its members to participate remotely in public proceedings of the Legislature.

1. Remote participation; requirements. Except as provided in subsection 5, a public body subject to this subchapter may not allow a member of the public body to participate remotely in any of its public proceedings unless the participation is in accordance with this subchapter and:

A. After notice and public hearing, the public body has adopted a written policy or rule that authorizes a member of the public body who is not physically present to participate in a public proceeding of that public body in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the notice required by section 406 to hear all members of the public body. The policy may not allow remote participation in executive sessions. The policy must prohibit a member who is participating remotely from voting on an issue that was discussed in an executive session if the executive session immediately precedes the proceeding in which the vote is taken;

B. For public bodies consisting of 3 or fewer members, at least one member is physically present at the location identified in the notice required by section 406; and, for public bodies of more than 3 members, a quorum is physically present at the location identified in the notice required by section 406, unless immediate action is imperative and physical presence of a quorum is not reasonably practicable

within the period of time in which action must be taken. The determination that a quorum is not required under this paragraph must be made by the presiding officer of the public body and the facts supporting that determination must be included in the record of the meeting. A public body of 3 or more members may not consider matters other than those requiring immediate action in a public proceeding held pursuant to this subsection when a quorum is not physically present. Every member must be physically present for at least one proceeding each year;

C. Each member of the public body who is participating in the public proceeding remotely identifies for the record all persons present at the location from which the member is participating. The member shall note for the record when any person enters or leaves the location throughout the course of the public proceeding;

D. All votes taken during the public proceeding are taken by roll call;

E. A member of the public body who is not physically present at the location identified in the notice required by section 406 does not participate and does not vote in an adjudicatory proceeding; and

F. Each member of the public body who is participating in the public proceeding remotely receives any documents or other materials presented or discussed at the public proceeding in advance or when made available at the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action of the body.

2. State public bodies. The policy under subsection 1 applicable to a state public body must be adopted by the public body as a major substantive rule under the Maine Administrative Procedure Act.

3. County and municipal public bodies. A county or municipality may by ordinance require stricter requirements than those set out in this section and may prohibit remote participation by any public body under its jurisdiction.

4. Elected public bodies. A public body consisting of elected members may adopt a policy under subsection 1 only after the constituents of the public body have voted to authorize the public body to adopt the remote participation policy. The public body must provide notice and hold a hearing before adopting the remote participation policy.

5. Exceptions. The following public bodies are exempt from the provisions of this section and a member of the following bodies may participate in a public proceeding of the public body when the member is not physically present:

A. The Finance Authority of Maine, as provided in Title 10, section 971;

B. The Commission on Governmental Ethics and Election Practices, as provided in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as provided in Title 22, section 2054, subsection 4;

D. The Maine State Housing Authority, as provided in Title 30-A, section 4723, subsection 2, paragraph B;

E. The Maine Municipal Bond Bank, as provided in Title 30-A, section 5951, subsection 4;

F. The Emergency Medical Services' Board, as provided in Title 32, section 88, subsection 1, paragraph D; and

G. The Workers' Compensation Board, as provided in Title 39-A, section 151, subsection 5.

PART B

Sec. B-1. 1 MRSA §431, sub-§4 is enacted to read:

4. Remote participation. "Remote participation" means participation in a public proceeding by a member of the body that is holding or conducting the public proceeding while the member is not physically present at the location of the public proceeding identified in the notice required by section 406.

Sec. B-2. 1 MRSA §435 is enacted to read:

§435. Review of proposed remote participation authorization

1. Procedures before legislative committees. Whenever a legislative measure containing a new remote participation authorization or a change that affects the accessibility of a public proceeding is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed remote participation authorization or proposed change that affects the accessibility of a public proceeding may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed remote participation authorization or proposed limitation on accessibility from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct

a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed remote participation authorization should be enacted:

A. Geographic distribution of members;

B. Demonstrated need based on emergency nature of action;

C. Demonstrated need based on exigent circumstances, such as a natural disaster or an emergency declaration by the Governor directly related to the activities of the body; and

D. Any other criteria that assist the review committee in determining the value of the proposed remote participation authorization as compared to the public's interest in all members participating.

3. Report. The review committee shall report its findings and recommendations on whether the proposed remote participation authorization or proposed limitation on accessibility to public proceedings should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

SUMMARY

This bill clarifies when members of public bodies may participate remotely in public proceedings of those bodies. It prohibits a body subject to the Freedom of Access Act from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication unless 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 public proceeding and allows members of the public attending the public proceeding at the location identified in the meeting notice to hear all members of the body.

It prohibits remote participation in executive session. It also prohibits a member who is participating remotely in a proceeding from voting on an issue that was discussed in executive session that immediately preceded the vote in the public proceeding.

It requires a quorum of the body to be physically present at the location identified in the meeting notice unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time requiring action, or, for public bodies that consist of 3 or fewer members, at least one member of the public body must be physically present at the location identified in the meeting notice.

It requires that each member of a public body subject to the Freedom of Access Act be physically present in at least one public proceeding each year.

It requires that each member participating remotely identify all persons present at the remote location, that all votes be taken by roll call and that members participating remotely receive documents or other materials presented or discussed at the public proceeding in advance or when made available at the meeting, if the technology is

available. The bill prohibits members who are not physically present at the meeting location from participating and voting in adjudicatory proceedings.

It requires that a state public body adopt its remote participation policy as a major substantive rule under the Maine Administrative Procedure Act.

It authorizes municipalities and counties to impose stricter requirements than are provided in this bill and allows municipalities and counties to prohibit the use of remote participation by any public body under their jurisdictions. The stricter requirements or the prohibition must be imposed through the adoption of an ordinance by the municipality or the county.

It provides that an elected public body may adopt a remote participation policy only after the constituency of the elected public body has voted to authorize the body to adopt the policy.

It prohibits the Legislature from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication, but allows the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority, the Maine Municipal Bond Bank, the Emergency Medical Services' Board and the Workers' Compensation Board to continue allowing remote participation at their public proceedings as currently authorized in law.

Part B of the bill amends law to require the joint standing committee of the Legislature having jurisdiction over judiciary matters to conduct a review of any proposed statutory authorization of remote participation or change in accessibility with respect to public proceedings.

APPENDIX F

Additional legislation recommended by the Improve the FOIA Subcommittee

RECOMMENDED LEGISLATION TO AMEND FOAA TRAINING LAW

Sec. 1. 1 MRSA §412 is amended to read:

§412. Public records and proceedings training for certain elected officials and public access officers

1. Training required. A public access officer and an official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or public access officer shall complete the training not later than the 120th day after the date the official ~~takes the oath of office to assume~~ assumes the person's duties as an ~~elected~~ official or the person is designated as a public access officer pursuant to section 413, subsection 1.

2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings;
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and
- C. Penalties and other consequences for failure to comply with this chapter.

An official or a public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The official shall keep the record or file it with the public entity to which the official was elected or appointed. A public access officer shall file the record with the agency or official that designated the public access officer.

4. Application. This section applies to a public access officer and the following officials:

- A. The Governor;
- B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;
- C. Members of the Legislature elected after November 1, 2008;

D.

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, municipal clerks, treasurers, managers or administrators, assessors, code enforcement officers and deputies for those positions; planning board members and budget committee members of municipal governments;

G. ~~Officials~~ Superintendents, assistant superintendents and school board members of school administrative units; and

H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

SUMMARY

This draft makes the following changes to the requirements for training.

1. It clarifies that an official must complete training within 120 days of assuming the duties of the position.
2. It expands the municipal officials required to completed training to include code enforcement officers, town managers and administrators and planning board members and clarifies that deputies of municipal clerks, treasurers, managers or administrators, assessors and code enforcement officers must also complete the training.
3. It clarifies that school superintendents, assistant superintendents and school board members are required to complete training.

RECOMMENDED LEGISLATION TO CAP COPYING COSTS

Sec. 1. 1 MRSA §408-A, sub-§8, ¶A is amended to read:

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8½" x 11" black and white copy of a record. A per page copy fee may not be charged for records provided electronically.

Summary

This draft caps the fee to cover the cost of copying at no more than 10¢ per page for a standard 8½” x 11” black and white copy of a record and clarifies that a per page copy fee may not be charged for records provided electronically.

RECOMMENDED LEGISLATION TO ADD TO REVIEW CRITERIA

Sec. 1. 1 MRSA §432, sub-§2, ¶G-1 is enacted to read:

G-1. Whether public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions;

Sec. 2. 1 MRSA §434, sub-§2, ¶G-1 is enacted to read:

G-1. Whether public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions;

SUMMARY

This draft adds to the list of criteria considered by the Right to Know Advisory Committee when reviewing existing public records exceptions and by the Judiciary Committee when evaluating proposed public records exceptions. The new criterion is whether the providing access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions.

RECOMMENDED LEGISLATION TO AMEND RTKAC MEMBERSHIP

The Advisory Committee agreed to include one more recommendation discussed briefly by the subcommittee: to expand the membership of the Right to Know Advisory Committee to include a member who has legal or professional expertise in the field of data and personal privacy, to be appointed by the Governor.

Sec. 1. 1 MRSA. §411, sub-§2, ¶M, as amended by PL 2015, c. 250, Pt. A, §1, is further amended to read:

M. The Attorney General or the Attorney General's designee; ~~and~~

Sec. 2. 1 MRSA §411, sub-§2, ¶N, as enacted by PL 2015, c. 250, Pt. A, §2, is amended to read:

N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor; and

Sec. 3. 1 MR.S.A. § 411, sub-§ 2, ¶ O is enacted to read:

O. One representative having legal or professional expertise in the field of data and personal privacy, appointed by the Governor.

SUMMARY

This draft adds a member to the Right to Know Advisory Committee who has legal or professional experience in the field of data and personal privacy, to be appointed by the Governor.

APPENDIX G

Legislation and correspondence recommended by the Issues Subcommittee

**RECOMMENDED LEGISLATION TO CHANGE MEMBERSHIP OF THE
ARCHIVES ADVISORY BOARD**

Sec. 1. 5 MRSA §96, sub-§2 is amended to read:

§96. Archives Advisory Board

1. Established. The Archives Advisory Board, established by section 12004-I, subsection 8, shall serve to advise the State Archivist in administration of this chapter and to perform such other duties as may be prescribed by law.

2. Members. The Archives Advisory Board consists of ~~9~~ 12 voting members with expertise in the administrative, fiscal, legal and historical value of records. Voting members of the board must represent the spectrum of records in the State and are appointed by the Secretary of State as follows:

- A. Two public members representing the interests of public access to government records, recommended by a public interest group;
- B. Two members from municipal or county government with expertise in local government records, recommended by local or county government entities;
- C. One member representing a state or local historical society, recommended by a state or local historical society;
- D. One member with expertise in the legal requirements of records retention and public records law, recommended by the Attorney General;
- E. One member with expertise in the State's fiscal requirements of records retention, recommended by the Governor;
- F. One member from the executive branch with expertise in executive branch records, recommended by the Governor; ~~and~~
- G. One member from the Department of Administrative and Financial Services, Office of Information Technology with expertise in electronic records, electronic records management systems and emerging technology related to electronic records, recommended by the Governor;
- H. Two members representing journalists, newspapers, broadcasters and other news media interests; and
- I. One member representing the protection of personal privacy interests.

The State Archivist serves as a nonvoting member.

3. Terms; chair; compensation. The voting members under subsection 2 serve a 3-year term and continue serving until either reappointed or replaced. In case of the termination of a member's service during that member's term, the Secretary of State shall appoint a successor for the unexpired term. The voting members shall elect a chair. Voting members must be compensated as provided in chapter 379.

SUMMARY

This bill adds three additional members to the Archives Advisory Board to ensure that journalists, newspapers, broadcasters and other news media as well as personal privacy protection advocates are part of the expertise involved in the development of records retention schedules.

Senator Michael Carpenter
Representative Thomas Harnett, Chair
Taylor Asen
Amy Beveridge
James Campbell
Lynda Clancy
Julia Finn
Phyllis Gardiner



Suzanne Goucher
Judy Meyer
Paul Nicklas
Christopher Parr
Luke Rossignol
William D. Shorey
Eric Stout

STATE OF MAINE
ONE HUNDRED AND TWENTY-NINTH LEGISLATURE
RIGHT TO KNOW ADVISORY COMMITTEE

January 8, 2020

Tammy Marks, Director
Maine State Archives
84 State House Station
Augusta, Maine 04333

Re: Archives Advisory Board activities

Dear Ms. Marks:


Thank you for your assistance to the Right to Know Advisory Committee to enhance our understanding of the important role the State Archives play in preserving the historical records of the State as well as helping to identify resources to manage all public records. Keeping track of records is a difficult task for all public entities, and the records retention schedules are an important piece in the overall records management puzzle. The development of those records retention schedules is key to ensuring that the public has a complete opportunity to know what their government is doing and how it carries out its responsibilities.

We are encouraged to know that the Secretary of State's Office is involved in updating the process and in ensuring that essential perspectives will be included in the development of records retention schedules going forward. Although the process has always been open, we write to request that the new Archives Advisory Board, with support from the State Archivist, take extra steps to ensure that notice of meetings is readily available, and information about the work of the Advisory Board is shared as widely as possible. We encourage the use of email distribution lists to support public knowledge and participation in the development process.

As you already know, the Advisory Committee is recommending legislation to expand the membership of the Archives Advisory Board to include representatives who can provide the perspective of journalists and news media. We also think it is important to include a member who is concerned with protecting individual's privacy interests. We will be making those recommendations to the Judiciary Committee with the expectation that the changes will be considered in the upcoming Second Regular Session.

Thank you again for your continued attention to our concerns.

Sincerely,


Representative Thom Harnett, Chair
Right to Know Advisory Committee

Senator Michael Carpenter
Representative Thomas Harnett, Chair
Taylor Asen
Amy Beveridge
James Campbell
Lynda Clancy
Julia Finn
Phyllis Gardiner

Suzanne Goucher
Judy Meyer
Paul Nicklas
Christopher Parr
Luke Rossignol
William D. Shorey
Eric Stout



**STATE OF MAINE
ONE HUNDRED AND TWENTY-NINTH LEGISLATURE
RIGHT TO KNOW ADVISORY COMMITTEE**

January 8, 2020

Senator Michael Carpenter, Senate Chair
Representative Donna Bailey, House Chair
Members
Joint Standing Committee on Judiciary
129th Legislature

Re: Surveillance videos

Dear Senator Carpenter, Representative Bailey, and members of the Joint Standing Committee on Judiciary:

During the First Regular Session of the 129th Legislature, the Joint Standing Committee on Judiciary heard and began working on LD 639, An Act to Protect Student Privacy, which provides that video and audio recordings made by security or surveillance cameras on school grounds or in school vehicles are not public records. This bill is similar to LD 296, An Act Regarding Student Privacy with Respect to Video Recordings, which had been referred to the Joint Standing Committee on Education and Cultural Affairs.¹ At the end of the First Regular Session, the Joint Standing Committee on Judiciary voted to carryover LD 639, and requested that the Right to Know Advisory Committee explore the topic of public accessibility of surveillance recordings made by public entities, including schools, and start with the premise that the recordings are a type of public records subject to the Freedom of Access Act, and then determine if there are appropriate exceptions – weighing privacy and other interests supporting confidentiality against the public’s interest in the disclosure of a record collected and maintained by a governmental entity.

This interim, the Right to Know Advisory Committee formed a subcommittee to explore, among other things, the topic of public accessibility of surveillance recordings made by public entities. Over the course of three subcommittee meetings and four full Advisory Committee meetings, the Advisory Committee discussed this topic at length. Members of the committee feel that this is a very important and serious issue and members of the Advisory Committee are passionate about the issues that are at stake on both sides.

The Advisory Committee was unable to come to a consensus on how to move forward, although some members feel that it is important to move forward on this matter quickly. Nevertheless, the

¹ The Joint Standing Committee on Education and Cultural Affairs voted Ought Not to Pass on LD 296, with the understanding that the broader issues raised at the public hearing on LD 296 would be better addressed by the Judiciary Committee in LD 639.

Advisory Committee recognizes that the Judiciary Committee has LD 639 in committee and the Advisory Committee did not want to conclude its work without identifying the issues that the Judiciary Committee should consider before making any decisions on LD 639. These considerations, summarized below, represent the difficult, in-depth discussions that the Advisory Committee has engaged in and demonstrates the complexity of the issue before the Judiciary Committee.

As the Judiciary Committee knows, the premise of the Freedom of Access Act is that records that are in the possession or custody of an agency or public official in this State are public records unless the State has created an exception or designated that type of record confidential. The Advisory Committee wrestled over whether video and audio surveillance recordings should by default be public records, with limited exceptions, or whether these types of records, because of the privacy interests involved, should by default be confidential, with limited exceptions.

The Advisory Committee examined how to balance privacy and public interests in the context of an exception to the Freedom of Access Act. The Advisory Committee explored what a broad exception would look like and what its impact would be. The Advisory Committee recognized that with a broad exception there would probably need to be exceptions to the exception to allow for disclosure to certain people or in certain situations and that it could create conflicts with other confidentiality provisions already in law, such as exceptions for security or surveillance plans, law enforcement recordings, and other public surveillance (for example, surveillance on bridges and at tollbooths). The Advisory Committee also considered how to balance privacy and public interests with a narrower exception by designating specific records confidential rather than creating a broad exception in the Freedom of Access Act. For example, legislation could focus on just video and audio surveillance on school grounds as originally proposed. However, there was still concern that public disclosure may be necessary in some situations, and that this would not address some broader concerns about surveillance in other public places.

If there is an exception for video and audio surveillance, the Advisory Committee also wrestled with the appropriate process that should be in place, recognizing that there may be difficulty in applying an exception that requires a balancing test of privacy and public interests in each case and for each request. Members expressed concern about creating a balancing test for these specific kinds of records that would, in effect, create a different process than the process currently in place for all other Freedom of Access Act requests.

Much of the discussions centered on the question of the scope of an exception for video and audio surveillance. The bills before the legislature initially sought to keep video and audio recordings on school grounds confidential, but it had also been suggested to expand the exception to security and surveillance videos of municipal and state buildings. Members of the Advisory Committee feel that children, in particular, have important privacy interests while they are on school grounds. However, privacy interests are also implicated for children involved in non-school related activities that may take place at municipal or state-owned parks and recreation facilities, including buses run by recreational programs. Members of the Advisory Committee are very concerned about bad actors requesting videos of children and that keeping such videos confidential is important to protecting children from people who have bad intentions. Some members of the Advisory Committee feel that the protection and privacy interests of children outweigh the public interest in disclosure.


However, other members of the Advisory Committee expressed concern that keeping these video and audio recordings confidential could have the opposite, unintended consequence of protecting bad actors who endanger children in settings where the video and audio recordings are confidential. If such video and audio recordings are confidential, the public would not have access to video or audio recordings showing, for example, mistreatment of a child on school grounds. Those members of the

Advisory Committee feel that public disclosure is necessary to protect children from these bad actors, and this weighs heavily in favor of public interest in disclosure over privacy interests.

The Advisory Committee also discussed how new technologies are making this an even more pressing issue. Public records only exist if they are created, and the increased use of video and audio surveillance, and the ability to retain greater amounts of digital records instead of, for example, re-recording over previous footage, creates a situation where far more public records are being created than in the past. The Advisory Committee discussed ways to address this, including retention times for videos and the feasibility of redaction technology. The Advisory Committee discussed at length whether video editing software would be useful in balancing privacy interests and public interests in disclosure. Members of the Advisory Committee were divided as to whether the costs, not only in the technology, but also the time, would be prohibitive. Some members feel that with new editing software, redaction policies would not be expensive, but others were not sure, especially considering the time and training that could be involved beyond the technology itself, and felt that more data and information is necessary. More input from schools and stakeholders would be necessary and helpful in ascertaining these costs.

Ultimately, the Advisory Committee was unable to come to consensus on how to move forward on LD 639, which is in the Judiciary Committee. However, the Advisory Committee is unanimous in its opinion that this is a serious issue that needs in-depth, thoughtful consideration before any action is taken on LD 639. Members of the Advisory Committee intend to follow the progress of LD 639 in the Judiciary Committee and will be available if the Judiciary Committee has additional questions.

Sincerely,



Representative Thom Harnett, Chair
Right to Know Advisory Committee

