

MAINE STATE LEGISLATURE

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**STATE OF MAINE
122nd LEGISLATURE
SECOND REGULAR SESSION**

**Final Report
of the
FREEDOM OF ACCESS ADVISORY
COMMITTEE**

February 2006

Members:

**Sen. Margaret Rotundo, Chair
Rep. Theodore Koffman
Mr. Richard Flewelling
Mr. Harry Pringle
Mr. Lee Umphrey
Mr. Tony Cilluffo
Mr. Jeff Ham
Lt. Dale Lancaster
Mr. Gregg Lagerquist
Mr. Mal Leary
Mr. Chris Spruce
Ms. Linda Pistner
Mr. Ted Glessner
* Ms. Judy Meyer**

Staff:

**Margaret Reinsch, Esq., Senior Analyst
Office of Policy & Legal Analysis
Maine Legislature
(207) 287-1670**

* Invited to participate as a member.

EXECUTIVE SUMMARY

The Freedom of Access Advisory Committee was created by Resolve 2005, chapter 123. The Advisory Committee consists of the following 13 members:

- Richard Flewelling (representing municipal interests)
- Tony Cilluffo (representing county or regional interests)
- Harry Pringle (representing school interests)
- Lt. Dale Lancaster (representing law enforcement interests)
- Lee Umphrey (representing interests of State Government)
- Mal Leary (representing a statewide coalition of advocates of freedom of access)
- Jeff Ham (representing newspaper and other press interests)
- Gregg Lagerquist (representing broadcasting interests)
- Linda Pistner (representing the Attorney General)
- Chris Spruce (serving as a public member)
- Senator Margaret Rotundo, Senate Chair
- Representative Theodore Koffman, House Chair
- James T. Glessner (designated by the Chief Justice to represent the Judicial Branch)
- In addition, Judy Meyer, a member of the former Committee to Study Compliance with Maine's Freedom of Access Laws, joined the Advisory Committee as a representative of newspaper publishers.

Resolve 2005, chapter 123 established the duties of the Advisory Committee. The Advisory Committee was directed to:

1. Provide to the review committee under the Maine Revised Statutes, Title 1, chapter 13, subchapter 1-A information and advice concerning the review of exceptions to public records under subchapter 1-A and assist the review committee in ensuring that the schedule for review is maintained, that proposed exceptions are subject to the review process and that the criteria for review are appropriately applied;
2. Review the public's access to public proceedings and records; and
3. Make recommendations for changes in law and practice that are appropriate to maintain the integrity of the freedom of access laws and their underlying principles to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court, and local and regional governmental entities.

The Advisory Committee started its work later than anticipated, but received Legislative Council approval to complete the study. The first meeting was held on December 20, 2005. The Advisory Committee met again on January 6, 2006, and held its final meeting on January 26, 2006. All the meetings were held in the Judiciary Committee room of the State House in Augusta, and were open to the public. Each meeting was also accessible live through the audio link on the Legislature's webpage.

The Advisory Committee makes the following recommendations.

1. Establish a permanent advisory board (the Right To Know Advisory Committee) to:
 - A. Provide guidance in ensuring access to public records and proceedings;
 - B. Serve as the central source and coordinator of information about the Freedom of Access laws and the people's right to know;
 - C. Serve as the central resource for training and education about the Freedom of Access laws; and
 - D. Serve as a resource to Judiciary Committee in the review of public records exceptions.
2. Establish and fund a freedom of access Ombudsman in the Attorney General's Office.
3. Increase training and education for all public officials and employees; increase information available for the public to understand and efficiently access public records and proceedings.
4. Support the collaborative enterprise-wide effort now going on to resolve e-mail retention and access questions.

I. INTRODUCTION

The Freedom of Access Advisory Committee was created by Resolve 2005, c. 123 (Appendix A), which was the final version of LD 301, An Act to Implement the Recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws. The Advisory Committee was created to fill a gap between the Committee to Study Compliance with Maine's Freedom of Access Laws (created by Resolve 2003, chapter 83, and extended by Public Law 2003, chapter 709) and an envisioned permanent advisory board on Freedom of Access issues. The membership of the Advisory Committee is included as Appendix B.

The Advisory Committee started its work later than anticipated, but received Legislative Council approval to complete the study. The first meeting was held on December 20, 2005. The Advisory Committee met again on January 6, 2006, and held its final meeting on January 26, 2006. All the meetings were held in the Judiciary Committee room of the State House in Augusta, and were open to the public. Each meeting was also accessible live through the audio link on the Legislature's webpage. Summaries of the meetings are included as Appendix C. The Advisory Committee's recommendations are included in this report.

II. CHARGE AND DISCUSSION

The Advisory Committee's charge covered three main areas. First, the Advisory Committee was directed to provide support to the "review committee" (identified in the Maine Revised Statutes, Title 1, chapter 13, subchapter 1-A as the joint standing committee of the Legislature having jurisdiction over judiciary matters) in the public records exceptions review process. That support was to consist of: (a) Providing information and advice to the review committee concerning review of exceptions to public records; (b) Assisting the review committee in ensuring the schedule for reviewing existing exceptions is maintained; (c) Assisting the review committee in ensuring that proposed exceptions are subject to the review process; and (d) Assisting the review committee in ensuring that the criteria for review are properly applied. Because the role of the Advisory Committee as outlined here was developed to apply to an ongoing advisory board, and due to the timing of the Advisory Committee's formation and work, and the schedule for the review process adopted by the Judiciary Committee, the Advisory Committee was able to provide encouragement to the Judiciary Committee, but little substantive support to the review process so far. The Advisory Committee is cognizant of the fact that the Judiciary Committee has found the process of reviewing existing public records exceptions to be challenging.

The second prong of the Advisory Committee's charge was to review the public's access to public proceedings and records. Again, this assignment was originally envisioned as an ongoing duty of a permanent advisory board. In the short time available, however, the Advisory Committee directly received complaints asserting lack of cooperation on the part of government agencies in making available public records. The Advisory

Committee also received testimony and discussed burdens caused to agencies inundated with public records requests, especially when the requests are precursors to lawsuits or administrative licensing or other actions. The same information research, if carried out as discovery under the auspices of a court, would be limited by relevancy and would be subject to court oversight by shielding litigants from burdensome document requests. No such limits exist under the Freedom of Access laws. The Advisory Committee recognized that limiting access to public records because of the burden providing that access has on the public agency is not consistent with the principles underlying Maine's Freedom of Access laws. However, current law now authorizes public officials and agencies to charge for the work necessary to provide copies of public records. The ability to require payment is seen as a brake on frivolous as well as protracted requests.

Outside of the concern about discovery-like FOA requests, the Advisory Committee covered in some detail the provision of the law authorizing public officials and agencies to charge for the staff time necessary to compile the response to a public record request. After discussion about the interpretation of the language (e.g., who is "staff?"), that the law does not require the record custodian to create a new document or record in response to a request, and that the members have heard very few instances in which charges had actually been imposed, the Advisory Committee decided that the language of §408 should not be amended at this time.

One fact that arose from the discussion was that although the Freedom of Access laws require access to inspect and copy all public records, there is nothing explicit in the Freedom of Access laws that requires an official or public agency to keep records that fall into the category of public records. The Archives laws do cover this issue. Agencies, both at the state and local level, are required to work with the Archives Advisory Board and the State Archivist to develop "record retention schedules" in addition to specific requirements established by statute. See Title 5, chapter 6.

The Advisory Committee was requested to discuss e-mail as public records, specifically with regard to retaining and accessing e-mail. Some of the practical problems dealing with e-mail appear insurmountable. The first step is to educate public officials that e-mail is public in almost all cases. The Freedom of Access laws do not expressly require an agency or official to retain records. The Records Retention Schedules, adopted under the Archives laws, do establish schedules for keeping certain categories of records available. There are specific schedules adopted for each public agency, including those at the local and county levels. Failure to maintain records pursuant to the applicable Records Retention Schedule is a violation of the scheduling law. E-mail is particularly hard because of the various sources and recipients, as well as the varied purposes for which it is used. Issues of storage, indexing and retrieval are complex. This issue is being faced by public agencies all across the State, at both State and local levels. Aware that an e-mail retention project was underway, the Advisory Committee invited Secretary of State Matthew Dunlap to summarize the endeavor at the January 11, 2006 meeting.

Secretary of State Matthew Dunlap presented the Advisory Committee with an overview of the State Archives, which is part of his office, and discussed some of the issues facing

the Archives, including space limitations, the deterioration of paper records over time and how to preserve records that are “born digital.” The Maine Archives saves about 5% of everything, but not forever. It is hard to predict what history will find important.

With that as a backdrop, Secretary Dunlap described the digital archiving project that is underway, led by the Attorney General, the Governor (represented by the Chief Information Officer, in the Department of Administration and Financial Services) and himself. The goal of the current initiative is to implement a system for permanently archiving e-mail and electronic records and providing public access by FY 2008. The plan is to cover the records created and maintained by all three branches of the State Government, as well as local governmental entities.

Secretary Dunlap assured the committee that libraries are involved, and noted that 80% of our vital records are held by town offices, libraries and historical societies. He has not yet pushed for a parallel effort by agencies to update paper document retention schedules, but will do so. To digitize that which is not digital is where many costs lie. The State is looking at best practices in other states, including how to protect vital records in the face of disasters such as hurricanes.

The final duty the Advisory Committee was charged to fulfill was to report to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court, and local and regional governmental entities with recommendations for changes in law and practice that are appropriate to maintain the integrity of the freedom of access laws and their underlying principles. The next section of the report discusses those recommendations.

III. RECOMMENDATIONS

The Advisory Committee makes the following recommendations. Because Resolve 2005, chapter 123 authorizes the Joint Standing Committee on Judiciary to report out legislation after receiving the Advisory Committee’s report, rather than permitting the Advisory Committee to submit legislation directly, and because of the time constraints, the Advisory Committee is providing its recommendations in concept draft form, which allows the Judiciary Committee to develop the language as its members determine is appropriate.

1. Permanent advisory board

The Advisory Committee recommends the establishment of a permanent advisory board on public access to records and proceedings. The membership of the board should include representatives from all branches of state government as well as all levels of government. The Advisory Committee recommended that the board be named the Right To Know Advisory Committee to make it clear to everyone concerned, especially the public, what the purpose of the entity is. The main duties of the board should include at least the following.

A. To provide guidance in ensuring access to public records and proceedings. The advisory board will work with the Ombudsman (see recommendation 2) to address general compliance issues and respond to requests for interpretation and clarification of the laws. The advisory board may make recommendations for changes in the statute to improve the laws, and may make recommendations to agencies and public officials with regard to best practices in providing the public access to records and proceedings.

B. To serve as the central source and coordinator of information about the Freedom of Access laws and the people's right to know. Rather than each agency developing their own resources from square one, the advisory board will provide the basic information about the requirements of the law and the best practices for agencies and public officials. It will 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 board, with representation from all branches and levels of government, will coordinate the education efforts by providing information about the Freedom of Access laws and who to contact for specific inquiries.

The Advisory Committee envisions this role of the permanent advisory board to include establishing a website that states 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. It should include the contact information for agencies, as well as how to reach the Ombudsman with complaints and concerns. The website should also include, or be linked to, a list of statutory exceptions to the public records law.

C. To serve as the central resource for training and education about the Freedom of Access laws. Although each agency will want to tailor training for the specific records and meetings pertaining to that agency's mission, the advisory board can provide the core resources for the training, share best practices experiences and be responsible for establishing and maintaining on-line training as well as written question-and-answer summaries about specific topics.

D. To serve as a resource for the Judiciary Committee in its role as the review committee in examining public records exceptions in both existing laws and in proposed legislation. The review of the existing and proposed exceptions is a valuable tool in ensuring that the public's records are accessible, which is an essential factor in open government and in building and maintaining the public's trust in their government. The review process needs to be evaluated and perhaps revised to provide more information and guidance in a timely manner to the Judiciary Committee. The advisory board may choose to recommend more standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released.

It should be noted that the full range of the duties outlined here are somewhat dependent on the adoption of the Advisory Committee's recommendation to create a freedom of access Ombudsman. In order for the advisory board to function as envisioned, staff will be necessary. The Ombudsman may be able to at least partially address those needs. The Advisory Committee recommends that the Judiciary Committee not lose sight of the necessity of staffing resources.

2. Freedom of access Ombudsman

The Advisory Committee recommends the establishment of a freedom of access Ombudsman, a funded position within the Office of the Attorney General. The Ombudsman will be the link between the public and the governmental agency when there is misunderstanding, confusion or dispute over access to public records and proceedings. The Ombudsman will respond to questions, help determine what records or information must be accessible and help determine how agencies can best provide access to public records. The Ombudsman will be available to help information requestors narrow their requests to relevant and helpful documents, reducing unnecessary work and frustration on all sides of the question.

The Ombudsman will be in regular contact with the permanent advisory board (see recommendation 1 above) to help identify common misunderstandings and ambiguities in the laws. The Ombudsman will work with the advisory board to develop training and educational sessions and materials for agencies and public officials as well as the public. The Ombudsman will also collect data about the types of questions and complaints and report that information to both the advisory board and the Legislature for use in formulating proposed changes in law and practice.

The Advisory Committee recognizes the work the Attorney General's Office has devoted to filling the problem-solving role of the Ombudsman without any additional funding. Recent events and public interest make it clear that the complete Ombudsman responsibilities are deserving of full funding. Based on the anecdotal information provided about the Freedom of Access requests received by agencies and the concerns raised by advocates, the Advisory Committee believes that funding such a position will, in the long run, lead to greater efficiencies and cost savings. Conflicts will be resolved quickly and agencies will not need to spend hour upon hour figuring out how to respond to overly-broad requests.

The Advisory Committee strongly supports the creation and funding of the Ombudsman. The Advisory Committee does not, however, believe it would be appropriate to ask the Attorney General's Office to take on any of the Ombudsman's duties without sufficient funding; the Advisory Committee does not support expanding the role of the Attorney General without additional resources.

3. Training and support

The Advisory Committee believes that many of the conflicts and misunderstandings between information requestors and public officials and agencies over public records are due to lack of knowledge and lack of training. There is no single, good source of information for public consumption about the public's rights under the Freedom of Access laws, and the appropriate procedures for access records and proceedings. In addition, although different interest groups and organizations, such as the Maine Municipal Association and the Maine School Management Association, provide many opportunities for public officials to learn about the laws and their responsibilities, there is no central source for advice and basic instruction. The Advisory Committee recommends that the advisory board in recommendation 1 above fill that void and be the coordinating force for the different resources.

In addition to the role the permanent advisory board will fill in providing training and education, the Advisory Committee recommends that each Branch and level of government take on the responsibility of making sure all officials and employees are well-versed in the Freedom of Access laws, the public's rights under those laws, the responsibilities of employees in complying with the laws and procedures to carry out the requirements with as little conflict as possible. The Advisory Committee therefore recommends that training be implemented for all public employees. This recommendation is consistent with the recommendations of the Attorney General and the Governor. The State of Texas now requires all elected and appointed officials to complete at least minimal training in open meetings requirements and in open records requirements. Although the Advisory Committee has not reached the conclusion that such training be mandated, the Advisory Committee strongly recommends that all agency principals take the lead in ensuring that all employees receive appropriate training about the Freedom of Access laws.

The Advisory Committee recommends that the Legislative Council implement Freedom of Access training for all legislators, similar to what is required for ethics training. The training should include best practices for legislators to follow in complying with the laws concerning records and meetings. It should also cover the requirements that apply to agencies to ensure that legislators are sensitive to the obligations and workload of employees in the public sector.

4. E-mail and digitizing the Archives

The Advisory Committee supports the efforts of the Secretary of State, the Attorney General and the Governor to address concerns about retaining, indexing and accessing e-mail. The efforts of the working groups will be applicable to all public agencies and officials, and is especially timely as more and more communications and transactions are handled electronically. Currently, agencies and officials have very little guidance from a policy perspective as to how to categorize and retain e-mail. The working groups will also address the technology side of the equation. The Advisory Committee supports

these efforts, and recognizes that they are part of a large mission concerning the digitizing and preservation of the contents of the State Archives.

5. Consequences for violations

The Advisory Committee discussed consequences for violations of the Freedom of Access laws and was not able to reach consensus. Current law provides:

For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 may be adjudged. (1 MRSA §410)

There is no evidence of a prosecution under §410, although the Attorney General had an opportunity to address what a “willful” violation would likely entail in reviewing the Freedom of Access violations related to the Gulf Island Pond. (The Attorney General’s memo, finding no willful violation, is posted on the website: <http://www.maine.gov/ag/>)

The Advisory Committee was unanimous in its support of civil consequences, as opposed to criminal penalties, for violations. Proponents of higher fines argued that willful violations show a disregard for the public’s rights and should be appropriately punished to provide disincentive to withhold public documents. Proponents asserted that not a lot of cases alleging violations go forward because most people who are aggrieved do not have resources, and they are often too timid to press their case, but instead sit back and accept the denial. Stronger penalties, including the possibility of attorney’s fees, would provide protection for people who don’t have protection. Maine, it was noted, is in the minority of states with regard to criminal versus civil penalties. Opponents countered that it isn’t always clear what is a public record. Public officials may not know that they didn’t have a legitimate basis to withhold a particular record until the court makes the decision. The Attorney General’s office has taken calls and has, with the parties, resolved all the problems raised so far. There was reluctance to put into statute a resolution for a problem that some members state does not exist. In short, the Advisory Committee could not come to agreement on the need or any proposed solution. The Advisory Committee therefore makes no consensus recommendation concerning penalties or attorney’s fees, other than perhaps the advisory board should review the need for a more user-friendly enforcement mechanism should all the education and training not find their mark.

APPENDIX A

Resolve 2005, chapter 123

RESOLVE 2005

CHAPTER 123

H.P. 226 - L.D. 301

**Resolve, To Implement the Recommendations of the Committee
To Study Compliance with Maine's Freedom of Access Laws**

Sec. 1. Advisory committee established. Resolved: That the Freedom of Access Advisory Committee, referred to in this resolve as "the committee," is established to serve as a resource for ensuring compliance with the Maine Revised Statutes, Title 1, chapter 13, subchapters 1 and 1-A and upholding the integrity of the purposes underlying subchapter 1 as it applies to all public entities in the conduct of the public's business; and be it further

Sec. 2. Membership. Resolved: That the committee consists of the following 13 members:

1. One Senator, appointed by the President of the Senate, who serves as Senate chair;
2. One member of the House of Representatives, appointed by the Speaker of the House, who serves as House chair;
3. One representative of municipal interests, appointed by the Governor;
4. One representative of county or regional interests, appointed by the President of the Senate;
5. One representative of school interests, appointed by the Governor;
6. One representative of law enforcement interests, appointed by the President of the Senate;
7. One representative of the interests of State Government, appointed by the Governor;
8. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
9. One representative of newspaper and other press interests, appointed by the President of the Senate;

10. One representative of broadcasting interests, appointed by the Speaker of the House;
11. One representative of the public, appointed by the Speaker of the House;
12. The Attorney General or the Attorney General's designee; and
13. The 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; and be it further

Sec. 3. Appointments; convening first meeting. Resolved: That all appointments must be made no later than 15 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been completed. Within 15 days after appointment of all members the chairs shall call and convene the first meeting of the committee, which must be no later than October 1, 2005; and be it further

Sec. 4. Meetings. Resolved: That the committee may meet up to 3 times; and be it further

Sec. 5. Duties and powers. Resolved: That the committee:

1. Shall provide to the review committee under the Maine Revised Statutes, Title 1, chapter 13, subchapter 1-A information and advice concerning the review of exceptions to public records under subchapter 1-A and shall assist the review committee in ensuring that the schedule for review is maintained, that proposed exceptions are subject to the review process and that the criteria for review are appropriately applied;
2. Shall review the public's access to public proceedings and records; and
3. Shall make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities for changes in law and practice that are appropriate to maintain the integrity of the freedom of access laws and their underlying principles; and be it further

Sec. 6. Reimbursement for expenses. Resolved: That the legislative members of the committee are entitled to receive the legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for travel and other necessary expenses related to their attendance at authorized meetings of the 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 committee; and be it further

Sec. 7. Assistance. Resolved: That the committee may request from any public agency or official assistance and information to enable the committee to effectively carry out the responsibilities described in this section; and be it further

Sec. 8. Report. Resolved: That by December 7, 2005 the committee shall report 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 the freedom of access laws and the public's access to public proceedings and records. The joint standing committee may report out a bill to make necessary changes in law.

APPENDIX B

Members, Freedom of Access Advisory Committee

Freedom of Access Advisory Committee
Resolve 2005, Chapter 123

Appointment(s) by the Governor

Richard P. Flewelling Maine Municipal Association 60 Community Drive Augusta, ME 04330	Representing Municipal Interests
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Harry R. Pringle 245 Commercial Street Portland, ME 04101	Representing School Interests
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Lee Umphrey 126 Western Avenue Augusta, ME 04330	Representing Interests of State Government
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Appointment(s) by the President

Sen. Margaret Rotundo – Chair 446 College St. Lewiston, ME 04240 207-784-3259	Senate Member
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Tony Cilluffo 1253 Bragdon Road Wells, ME 04090	Representing County or Regional Interests
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Jeff Ham 26 Elmwood Road Cape Elizabeth, ME 04107	Representing Newspaper and Press Interests
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Lieutenant Dale Lancaster 251 West Ridge Road Cornville, ME 04976-6310	Representing Law Enforcement Interests
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Appointment(s) by the Speaker

Rep. Theodore Koffman 168 Mill Brook Road Bar Harbor, ME 04609 207-288-8930	House Member
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Mr. Gregg Lagerquist 18 Partridge Lane Scarborough, ME 04074	Representing Broadcasting Interests
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Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Representing Statewide Coalition of
Advocates of Freedom of Access

Chris Spruce
c/o Island Housing Trust
PO Box 851
Mount Desert, ME 04660

Representing the Public

Attorney General

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333
207-626-8800

Attorney General or Designee

Chief Justice

James T. Glessner
State Court Administrator
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Member of the Judicial Branch

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APPENDIX C

Meeting Summaries
Freedom of Access Advisory Committee

Freedom of Access Advisory Committee

January 26, 2006
Room 438, State House

Present:

Sen. Rotundo
Rep. Koffman
Richard Flewelling
Phyllis Gardiner (for Linda Pistner)
Ted Glessner
Jeff Ham
Mal Leary
Judy Meyer
Harry Pringle
Chris Spruce

Absent:

Tony Cilluffo
Gregg Lagerquist
Dale Lancaster
Lee Umphrey

Discussion of potential recommendations

Rep. Koffman convened the third meeting and directed the discussion to a review of potential recommendations.

Permanent advisory policy commission. The members by consensus supported a permanent board or commission to provide policy advice to all Branches and levels of government. They suggested it be named the Right To Know Advisory Committee to make clear the basis of its existence. The membership should equally represent the public and the government.

An important role would be to assist the Judiciary Committee in reviewing the public records exceptions. The review process has been difficult for the Judiciary Committee; part of the burden could be shared with the commission.

The commission should be the coordinator for Freedom of Access information for the public, as well as coordinator for general training resources for public employees. Supporting on-line training would be helpful and cost effective. The coordinated effort should include all three Branches of State Government, as well as the local levels of government.

Mal Leary provided proposed language based on LD 301, introduced in the First Regular Session of the 122nd Legislature.

Additional duties of the permanent advisory commission could include reviewing the enforcement mechanism for violations of the Freedom of Access laws and exploring whether a policy on the accessibility of databases would be appropriate.

Freedom of access Ombudsman. The members by consensus supported the establishment and funding of a freedom of access Ombudsman. Members of the public with a concern or conflict over public records or meetings would contact the Ombudsman, who would help to resolve the differences. The Ombudsman would be available to help frame requests to be no broader than the requestor needs, which would cut down on response time and costs, and reduce frustration. The Ombudsman would work with the advisory commission to identify subject matter for training and information sessions for public employees as well as for the public. The Ombudsman would also report to the advisory commission about trends in problems with access.

The Ombudsman should be housed in the Attorney General's Office, but must be supported with additional funds. In no event should the Attorney General be asked to take on any of these additional responsibilities without appropriate additional funding. The Attorney General's Office has done an excellent job resolving disputes and tracking complaints with no new resources.

Mr. Leary provided proposed language based on LD 301, introduced in the First Regular Session of the 122nd Legislature.

Education and training. The members by consensus supported education and training for all public employees. The permanent advisory commission should coordinate the effort and minimize unnecessary duplication.

The Legislative Council should add Freedom of Access training to the orientation for legislators for every biennium, and provide for refresher courses as necessary. The training should focus on legislators' responsibilities in providing access to records and meetings, as well as the need to understand agency Freedom of Access obligations, including the workload those obligations entail. Perhaps it should be in statute as required for ethics training.

On-line training resources for public employees in general should prove helpful to legislators, too.

E-mail retention and digitizing the State Archives. The members by consensus supported the collaborative efforts led by the Secretary of State, the Attorney General and the Governor to figure out the e-mail puzzle. Where are the lines delineating what is a public record? If a teacher sends e-mail from home, is it public? How are e-mails categorized and saved in order to ensure the ability to find them when needed or requested? E-mail is just one of a series of questions revolving around digitized records.

Consequences for violations of the Freedom of Access laws. Mr. Leary provided proposed language on attorney's fees, different from that included in LD 466, introduced in the First Regular Session of the 122nd Legislature. Judy Meyer maintained that some version of attorney's fees would be appropriate to support those without deep pockets to pursue cases in which they believe they have been wrongly denied access to records or proceedings. Many people are too timid to proceed on

their own. In addition to attorney's fees, a change in the penalties for violations could help enforce the law. Maine is in the minority of states by not providing for criminal penalties of willful violations. Harry Pringle opposed both suggestions, stating that very often a public employee doesn't know that the basis on which he or she is withholding a record from public disclosure is not sufficient until a judge makes that ruling. Richard Flewelling opposed the attorney's fees and criminalization proposals, and noted that the new suggestion on attorney's fees was not reciprocal. Phyllis Gardiner described the successful effort the Attorney General's Office has made in accepting complaints and working with the appropriate entities to resolve the disputes. She does not support a resolution in statute for a problem that doesn't exist. Ms. Meyer agreed that any attorney's fee provision should be reciprocal - an agency could obtain attorney's fees for vexatious or otherwise illegitimate requests and appeals, just as a member of the public could receive attorney's fees for documents willfully withheld. Although the Advisory Committee did not come to agreement on pursuing these potential changes, all agreed that better training and education will reduce the problems cause by inadvertence or ignorance of the requirements of the law. Jeff Ham suggested that one of the roles for the permanent advisory commission would be to look at the enforcement mechanism and make sure it is effective.

Study process

Advisory Committee staff will prepare a draft report that includes recommendations and circulate it among members. Members will copy all other members on comments to the report. If the chairs determine that an additional meeting is necessary to resolve any questions, the chairs will seek authorization from the Legislative Council to meet.

Because Resolve 2005, chapter 123 does not authorize the Advisory Committee to submit legislation directly to the Legislature, but instead authorizes the Judiciary Committee to report out legislation after receiving the report, the Advisory Committee agreed to provide narrative recommendations to the Judiciary Committee. The report can be prepared faster if draft legislation does not have to be prepared and reviewed by Advisory Committee members.

Advisory Committee staff will keep members apprised of progress with the report and opportunities to address and with the Judiciary Committee.

Sen. Rotundo and Rep. Koffman thanked all the members for their participation.

Prepared by Peggy Reinsch
Advisory Committee staff

Freedom of Access Advisory Committee

January 11, 2006

Room 438, State House

Present:

Sen. Rotundo
Rep. Koffman
Tony Cilluffo
Ted Glessner
Jeff Ham
Gregg Lagerquist
Lt. Dale Lancaster
Mal Leary
Judy Meyer
Linda Pistner
Chris Spruce

Absent:

Richard Flewelling
Harry Pringle
Lee Umphrey

E-mail retention project

Secretary of State Matthew Dunlap presented the Advisory Committee with an overview of the State Archives, which is part of his office, and discussed some of the issues facing the Archives, including space limitations, the deterioration of paper records over time and how to preserve records that are “born digital.” Government services are rapidly changing and InforME is a part of making that transition. He has appointed Donna Grant as the Deputy Secretary of State for Information Services, who will oversee many of the big information technology projects in the Office of the Secretary of State, including the migration of the motor vehicle records system, the Maine efforts under the Help America Vote Act and developing digital archives. What records are retained is a philosophical question – the Archives saves about 5% of everything, but not forever. But we don’t know what history will find important; the most sought after information in newspapers from the 1880’s is the advertisements.

With that as a backdrop, Secretary Dunlap described the digital archiving project that is underway, led by the Attorney General, the Governor (and the Chief Information Officer, in DAFS) and himself. The goal of the current initiative is to implement a system for permanently archiving e-mail and electronic records and provide public access by FY 2008.

Phase I

- Form committees to advise, prepare and oversee planning
- Develop a policy for archiving records (i.e., decide what kind of records must be kept permanently; what kind of records can be destroyed; what kind of records *must* be destroyed for privacy).

- Complete a set of business requirements.
- Use the business requirements to develop a technical plan
- Submit budget estimates

Phase II

- Issue RFP
- Implement system

Secretary Dunlap assured the committee that libraries are involved, and noted that 805 of records are held by small town libraries and historical societies. He has not yet pushed for a parallel effort by agencies to update paper document retention schedules, but will. To digitize that which is not digital is where many costs lie. The State is looking at best practices in other states, including how to protect vital records in the face of disasters such as hurricanes.

FOA requests

Pete Carney, Director of Enforcement and Procedures in the Commissioner's Office of the Department of Environmental Protection, wrote the Standard Operating Procedure for FOA requests, and was appointed the FOA officer for the DEP. He spoke to the Advisory Committee about his personal experiences in responding to FOA requests, and did not represent the DEP's official position. He spoke about the sheer volume of documents requested. He was clear that his comments weren't about abuse of the FOA request procedure, as the requestors were simply availing themselves of the process available to them under law. He summarized the requests received since early 2005: a total of 72 requests to date (plus 2 he received the day before he spoke), broken down as follows:

- 5 media
- 26 law
- 20 private
- 9 environmental groups
- 12 other business – e.g., “due diligence” investigations about real estate

About 1/3 of the requests are about enforcement – usually very focused requests. About 20 requests are on licensing activities; and about 20 are about regulatory issues. Another 8 he categorized as “due diligence” inquiries.

Mr. Carney estimated that he has spent 600-700 hours since June 3, 2005 on FOA requests on the Gulf Island Project alone. He has collected e-mail correspondence on the project, and has four binders full (does not include document production). The three bureaus are flat out doing Freedom of Access requests, and don't have time to write rules or procedures. He has 35 boxes of documents, consisting of between 7000 and 7500 documents. Mr. Carney has to comb through each document before it is released to make sure information contained in it is not information that is designation confidential and therefore an exception to the public records law. There should be some way to identify exceptions in the documents. In the licensing process, if a business wants certain

information that is submitted be kept confidential, the DEP requires the submitter to request confidential status and stamp each page as "CBI." Mr. Carney has an affirmative obligation to pull out confidential information, but he does not have the authority to waive someone else's confidentiality; he must contact the person whose information is protected and get their permission before he can release it. E-mail searches pull up a lot of confidential information, such as employee health information.

The most burdensome requests are in the context of department licensing or adjudication. FOA requests are on one time line while licensing (BEP) and court hearings are on a different time schedule. Some litigants are using the FOA process instead of discovery. Mr. Carney suggested that at least in those cases, the court should manage the information requests.

Sometimes requestors claim the DEP is withholding documents, but the truth is that the department just can't get through the process fast enough. The DEP could use a full-time FOA coordinator with not other duties. A faster copier would be very helpful, but there are several funding and resources issues.

The FOA law says to produce the requested information/documents in a reasonable amount of time. Can Mr. Carney look at what is reasonable in the context of all the requests? Currently, the DEP looks at each request in a vacuum. The department can charge copying costs and translation costs; the \$10 per hour is not nearly enough to recoup the employee costs of producing. The Gulf Island Project is definitely the biggest request so far, but they have three or four requests that will generate 30 boxes of documents.

Mr. Carney said the biggest problems for his office were twofold. One is the length of time that the Gulf Island Project is lasting (they have compliance data from 1979). The second is the difficulty in the review process, which is necessary to sort the privileged and confidential information from the public information. Mr. Carney stated that he wasn't sure that the aggregate effort would differ that much for production of documents under discovery versus production of documents under a freedom of access request. The main difference is that the court can issue a protective order in discovery, and can establish a reasonable schedule.

The typical request is 2-4 hours of staff time. Mr. Carney can go through about four boxes a day, flagging anything that is privileged or confidential. If we don't release a document, we have to explain why. The follow up can be massive; requestors will come in and review the collected documents, and will then come up with additional questions on their review. Two assistant attorneys general are probably putting in the same amount of time Mr. Carney is. If the request appears overbroad, Mr. Carney tries to go back to the requestor and narrow the focus.

All paper documents are retained at the DEP, and all electronic documents are saved on the central server.

There are many run-of-the-mill applications for which there are no FOA requests, but bigger or more controversial applications generate many requests.

Mr. Carney generally tells requestors that the documents provided in response to a request will be current through the date of the request. New information is collected in a separate compilation.

Juggling all the requests is definitely problematic. It is not always fair to apply the first come, first served rule. If huge request comes in, DEP will pull in more staff to respond. Mr. Carney has never had a formal request from a legislator.

Linda Pistner surveyed the attorneys in the Office of the Attorney General, looking for information about whether attorneys were spending a significant amount of time on FOA requests, and whether something like a protective order would be helpful. She collected a variety of responses. For example, one request was filed for information about 22 insurance companies. Several requests, including the work of the AG's Office on the Gulf Island Pond matter, required as much as 100 hours. One request involving a large number of interview reports required attorney review to redact confidential personnel information that took over 50 hours. Reviewing documents and redacting the nonpublic information is very time consuming.

Court discovery is guided by relevance to the matter in question; there is no similar factor under the Freedom of Access laws. But there is no way to address that without fundamentally changing the FOA laws. It comes down to resources questions; the committees of jurisdiction need to understand that it is very important to fund this aspect of public agencies. Requests by the public, the media and advocacy groups usually are not as broad.

Chris Spruce noted that a reduction in the number of public records exceptions ought to make review easier and faster.

Training

The training subcommittee of Sen. Rotundo, Rep. Koffman, Mal Leary and Linda Pistner met, and Mr. Leary reported the discussions. He stated that the National Freedom Foundation determined that most states require information about complying with freedom of access requirements be provided to, but that there is not enough training. Texas recently adopted a law that mandates training for public officials (a copy was provided). Problems can be reduced through training. Sen. Rotundo explained that FOA will be on the legislator training agenda, and described the potential training approaches, including panels, case studies, one-page summaries that legislators can retain and use later. She also mentioned the possibility of refresher courses as necessary. Rep. Koffman supported the idea of using case studies to teach, especially when the consequences for noncompliance are made clear. He suggested an Ombudsman for both ethics and freedom of access concerns, a "go-to person" when a legislator (or other public official) has questions about confidentiality and what is the appropriate next step. Mr.

Spruce voiced his concerns about the knowledge of agency officials in complying with the FOA laws.

Karla Black, Deputy Legal Counsel for the Governor's Office is now leading the Executive's effort on FOA. She is meeting with all the agency FOA coordinators on Friday (January 13, 2006) to find out what the issues are and what is needed. The Office of Information Technology has suggested online training for agency personnel. The idea looks promising and Ms. Black wants to explore that possibility. The needs vary from agency to agency, but the subject needs immediate attention.

The Advisory Committee discussed the fact that there is not information provided by the State on the website pertaining to Freedom of Access requirements and how a member of the public can request information or attend a meeting. Ms. Black encouraged the Advisory Committee to provide suggestions to the Governor's Office.

Penalties for noncompliance

James Moore had e-mailed the Advisory Committee with his complaint about incomplete responses to Freedom of Access complaints. Although he provided details about a specific series of requests, he raised the question of consequences for noncompliance with requests, especially when the partial information is provided and the requestor must continue to make additional requests for the same information.

The Advisory Committee voiced their concerns about language concerning noncompliance, discussing whether the criteria should include "persistent" or "willful" or cover any defiance of the required response process. The Advisory Committee agreed to look at more effective enforcement mechanisms. Ms. Pistner pointed to the Attorney General's report on the Gulf Island Project Freedom of Access question as a good examination of "willful" violations. (Mal Leary and Peggy Reinsch will collect information from other states for the next meeting.)

LD 1455, codification of public records exceptions

The Committee to Study Compliance with Maine's Freedom of Access Laws recommended that the Freedom of Access laws contain a list of all the statutes that created public records exceptions. LD 1455 is an attempt to put such a finding tool in the statutes. The Joint Standing Committee on Judiciary carried over the bill, and is sympathetic to the concerns that such a list in statute may result in unintended consequences in interpreting statutes, and would be fairly cumbersome to update. The Judiciary Committee is exploring a resource on the Legislature's website to provide the same information, linking to each statutory section that is listed.

Tony Cilluffo expressed his concern that sometimes the website is not easily navigable, and having the listing in writing may be a better tool. The discussion again focused on the lack of Freedom of Access information on the Legislature's website as well as the State's website (Maine.gov). There seems to be general support for a much more useful

provision of FOA information, to include procedure and possibly training as well as the law and exceptions. Ms. Black mentioned that the Governor's Office would be interested in pursuing that effort. Mr. Leary encouraged that it be designed from the public's perspective as to what would be useful.

Recommendations

The Advisory Committee will be finalizing recommendations at the third and final meeting. Mr. Leary mentioned that he will be urging for creation of a Public Access Ombudsman.

Next meeting

The Advisory Committee decided to meet on Thursday, January 26, 2006, starting at 11:30 a.m. (Note that Room 334 (Council Chambers) is not available, so the meeting will be held in Room 438 (Judiciary Committee Room).)

Prepared by Peggy Reinsch
Advisory Committee staff

Freedom of Access Advisory Committee

December 20, 2005
Room 438, State House

Present:

Sen. Peggy Rotundo
Rep. Ted Koffman
Tony Cilluffo
Richard Flewelling
Ted Glessner
Jeff Ham
Gregg Lagerquist
Dale Lancaster
Mal Leary
Linda Pistner
Harry Pringle

Absent:

Lee Umphrey
Chris Spruce

House Chair Koffman convened the meeting with a brief overview of the origins of the Advisory Committee and its precursor, the Committee to Study Compliance with Maine's Freedom of Access Laws, starting with the Public Records Audit, conducted by the Maine Freedom of Information Coalition. Rep. Koffman summarized the issues covered and the changes in law enacted. There was a description of the public records exception review process, for both proposed exceptions and existing exceptions. During the First Regular and Special Sessions the Judiciary Committee, which is charged with doing the reviews, worked through several bills that proposed new exceptions to the public records laws. The Judiciary Committee has not yet begun the review process for existing exceptions; exceptions contained in Titles 1 through 5 of the Maine Revised Statutes are scheduled to be reviewed this legislative session.

Because the Advisory Committee's charge is very broad, the members discussed the specific issues and concerns that should be the focus of the initial work of the Advisory Committee.

There was a discussion about the nonexistence of a formal freedom of access complaint process, and how the Attorney General's Office (really, Linda Pistner, Deputy AG) handles complaints in an informal manner through contacts with the Maine Municipal Association and the Maine School Management Association when the questions are municipal-related or school-related, respectively. The original proposal to create a Freedom of Access Ombudsman, which would handle these inquiries and more, was shelved earlier this year for lack of funding.

The Advisory Committee discussed the new provisions in Title 1, section 408 authorizing a public agency to charge up to \$10 an hour, after the first hour, for staff time involved in

compiling a requested public record. A distinction was drawn between doing research, and finding and providing public records. There was a discussion about whether “staff time” was a straightforward description of the onus placed on a public records custodian by a particularly voluminous request. Does “staff” cover all the people who may respond to the request, including senior or legal staff who review the documents for the purposes of redacting or ensuring that no confidential information is inappropriately released? Does it cover the time of municipal elected officers who do the actual document retrieval because there is no other municipal staff to do so? If the cost is \$10 per hour for every hour after the first, is the final bill for the requested public records prohibitively expensive? Does the fee waiver option provide enough flexibility to ensure that the public has access to public records at no more than a reasonable cost? If the agency requires a great deal of research and discussion time to establish a policy with regard to certain information or records, is it fair to charge the cost of those deliberations to the first requestor that triggered the policy-making? The Advisory Committee discussed clarifying the language, perhaps replacing “staff time” with “agency or official time” or simply changing the phrase to “after the first hour of time spent per request.”

The Advisory Committee discussed the concern that Freedom of Access requests are being used as a form of unlimited discovery either before litigation or as part of or as a preparation for administrative proceedings. If the same request for information and documents were made in the context of court discovery, the limitation of relevancy would apply, as would procedures for the recipient of the request to ask the court for relief from a burdensome request. Linda Pistner agreed to bring to the next meeting information about actual cases in which this was a problem. She also agreed to collect suggestions about appropriate ways to limit or reduce similar abuses of the FOA process without hampering the public’s ability to access public information and records.

The Advisory Committee agreed to talk about e-mail, although some of the practical problems appear insurmountable. The first step is to educate public officials that e-mail is public in almost all cases. The Freedom of Access laws do not require an agency or official to retain records. The Records Retention Schedules, adopted under the Archives laws, do establish schedules for keeping certain categories of records available. There are specific schedules adopted for each public agency, including those at the local and county levels. Failure to maintain records pursuant to the applicable Records Retention Schedule is a violation of the scheduling law. Failure to provide a public record consistent with the schedule is a violation of the Freedom of Access laws. E-mail is particularly hard because of the various sources and recipients, as well as the varied purposes for which it is used. Issues of storage, indexing and retrieval are complex. The Advisory Committee agreed to invite Jim Henderson, the State Archivist, as well other participants in the Executive Branch’s new undertaking in trying to tame e-mail enterprise-wide at the State level. What is needed is a good policy on what to keep and how long, and then training so all carry through with it.

The Advisory Committee was unanimous in supporting more education for public officials. Mal Leary reported that Florida and California require newly-elected officials to go through an educational program. Legislators should receive more training about how agencies work, and the agency staff need more training, especially with regard to making and keeping records of negotiations and transactions involving the public’s business. The cost of doing

the public's business is doing it in the public eye. A lot training is already being done; Maine Municipal Association has many resources and programs for municipal officials. Should municipalities consider "right to know" postings? Should someone in each town be required to having FOA training?

There was some discussion about databases maintained by public entities and to what extent the public has access to data vs. the database. If the database has been developed with a proprietary format, can the data be exported in a non-propriety format? What happens when the entity collects more data on paper than it enters in the more-readily available electronic database? Should the fact that the requestor will use the response in a commercial manner determine what is provided in response to the request?

The Advisory Committee was briefed about the proposal to codify a list of statutory public records exceptions. LD 1455 was printed in March 2005 and carried over by the Judiciary Committee after concerns were raised about the unintended inferences created by the listing. The Advisory Committee may be in the position to provide very helpful guidance to the Judiciary Committee. Does the Advisory Committee favor dropping the proposal to incorporate exceptions into the FOA law? If so, should a comprehensive, easy-to-use list be made available to the public? How?

The Advisory Committee agreed to invite Judy Meyer, a member of the former Committee to Study Compliance with Maine's Freedom of Access Laws, to attend and participate with the Advisory Committee.

The Advisory Committee discussed recommending to the Judiciary Committee that the Advisory Committee be made a standing, permanent advisory committee as originally envisioned by the Committee to Study Compliance with Maine's Freedom of Access Laws and the Judiciary Committee.

The Advisory Committee tentatively set the next meeting for Friday, January 6, 2006 at 1:00 p.m. in Room 438 of the State House. (Note that meetings of the Advisory Committee may need prior approval from the Legislative Council. The Legislative Council is scheduled to meet Tuesday, December 27, 2005. A request for such approval is being submitted.) The next meeting should include:

- Report from Linda Pistner: examples of burdensome litigation-like FOA requests; suggestions for addressing;
- Rep. Koffman and Mal Leary: training;
- Linda Pistner: databases issues; and
- Peggy Reinsch: Executive Branch e-mail policy working group.