

**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**

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* 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.

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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.