

LD 217



**STATE OF MAINE
126TH LEGISLATURE**

**Seventh Annual Report
of the
RIGHT TO KNOW ADVISORY COMMITTEE**

January 2013

Members:

- Sen. David R. Hastings III**
- Rep. Joan M. Nass**
- Perry Antone Sr.**
- Shenna Bellows**
- Percy Brown Jr.**
- Michael Cianchette**
- Richard Flewelling**
- A. J. Higgins**
- Mal Leary**
- William Logan**
- Mary Ann Lynch**
- Judy Meyer**
- Kelly Morgan**
- Linda Pistner**
- Harry Pringle**
- Mike Violette**

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Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act

The "Community Right-to-Know Act" was enacted in 1985 to give individuals more control over exposure to hazardous substances in their communities. The confidentiality provisions of the Act are broad and ambiguous about the public's right to access information collected by the Department. Trade secrets are completely protected.

The Right to Know Advisory Committee asked for guidance from two joint standing committees of the Legislature: Environment and Natural Resources (which oversees other toxic and hazardous substances programs) and Health and Human Services (which oversees the Department of Health and Human Services). HHS responded by deferring to ENR, which did not respond before the 125th Legislature, Second Regular Session adjourned.

The Subcommittee studied this issue and worked through different draft proposals, resulting in a unanimous recommendation. The members agreed that rather than allowing the claim of a "trade secret" to prohibit access, the burden should be on the entity using or storing the toxic or hazardous substance to show that it would be subject to confidentiality under the general provisions of the Freedom of Access Act, e.g. records within the scope of a privilege protected from discovery. The members also voted to remove the 50-mile radius residency restriction on access to the information collected by DHHS under this program.

Title 22, section 3188, related to the Maine Managed Care Insurance Plan

Title 22, section 3192, related to the Community Health Access Program

Two programs that were enacted and never implemented are the Maine Managed Care Insurance Plan and the Community Health Access Program. The Right to Know Advisory Committee requested assistance from the Health and Human Services Committee on both of these programs. In a letter to the Advisory Committee in January 2012, HHS recommended that both programs be repealed. The Judiciary Committee chose not to include the repeal in LD 1804, An Act to Implement the Recommendations of the right to Know Advisory Committee Concerning Public Records Exceptions because the proposed repeals had not had a public hearing.

The Subcommittee voted 5-0 to keep the confidentiality provision, while sending a letter to the Department of Health and Human Services with the suggestion that if the Department believes the statutory language is not necessary, then the Department could propose repeal in departmental legislation.

→ Public-private partnership projects under Title 23, section 4251

Subcommittee

At the July 16 meeting, the Subcommittee heard concerns expressed by members of the public about the confidentiality provision related to public-private projects in Title 23, Section 4251. The Natural Resources Council of Maine also expressed opposition to the confidentiality provision in current law, noting that one of the criteria that the MaineDOT must consider before approving a project – which then makes the information public – is that the project is in the public interest. How would the Department be able to make that decision without any public input?

In response, the Subcommittee agreed to review the provision. The Subcommittee reiterated that the Subcommittee's mission is not to examine or be involved in the East-West Highway study, but to weigh whether the confidentiality provision in Section 4251, which may eventually be applicable if and when a private entity submits a proposal for a qualifying project, appropriately balances the interests involved.

The Subcommittee invited the Department of Transportation to update the questionnaire on Section 4251 (last reviewed the year it was enacted in 2010). In its updated questionnaire, the Department still believes that the confidentiality provision is appropriate, and reported that it has received no documents from any entity making a proposal covered by the new statute.

There was some interest in modifying the public records exception, but the Subcommittee initially voted three in favor of leaving the language as is and two in favor of repealing subsection 10.

After the initial Subcommittee vote, Linda Pistner provided a rough draft (labeled Minority Report B) for the purpose of discussing options for making at least some information about public-private partnerships projects public before the current law allows release. Her concern about the current law is that by the time the plan is released and it goes to the Legislature, the opportunity for changes has passed and the only options are up or down. The draft was an attempt to find a middle ground between the current law and Minority Report A, which proposes to delete the confidentiality completely. Because Ms. Pistner believed the proposal needed fine-tuning, Minority Report B was withdrawn as an official proposal to the Subcommittee before it was voted on.

After reviewing both proposed minority reports, the MaineDOT took the position that, although there is an appreciation for the issues raised, any weakening of the confidentiality provision would stifle the chance of proposals. MaineDOT reiterated that the Department has not had any proposals yet. Representatives of the MaineDOT said it is not that the Department opposes changes, but that the real world consequences of removing confidentiality must be part of the discussion. MaineDOT is happy to consider anything. A representative of the Natural Resources Council of Maine expressed concerns that the public reporting requirement proposed in the second minority report could be avoided easily, and continued to support the repeal of blanket confidentiality.

The three Subcommittee members who initially voted to keep the current law as is remained opposed to any changes to the confidentiality provision. The members expressed confidence in the ability of the MaineDOT and the Legislature to appropriately handle the process under the current law. Members also recognized that, while some information about large projects should be available to the public, supporting free enterprise means allowing the development of plans without revealing trade secrets and other information to competitors. A business should have the ability to develop what it wants to do until an agreement or just before an agreement is entered into with the State.

Two members of the Subcommittee supported an amendment to Section 4251 that would repeal the confidentiality provision and make clear that information and records submitted to the Department of Transportation about public-private partnerships are public pursuant to the freedom of access laws. These members contended that the amendment provides for transparency and for consistency across agencies. Members also expressed concern about the confidentiality for potential projects being used to the detriment of landowners or homeowners.

Ms. Pistner said she did not want to open all of the records completely as proposed in Minority Report A, but believed that every process needs a range of views earlier in the process than the current law allows for these public-private partnership projects.

The Subcommittee voted 3-2 in favor of no change, with one abstention. (Representative Nass, Chief Antone and Commissioner Brown voting in the majority; Ms. Bellows and Mr. Higgins supporting Minority Report A; Ms. Pistner abstaining.) Mr. Higgins noted that if there is support for a middle ground in the full Advisory Committee, he may support that rather than repealing the confidentiality completely.

Review of Existing Exceptions –Titles 26 through 39-A

During 2012, the Public Records Exception Subcommittee reviewed over 90 existing public records exceptions found in Titles 26 through 39-A. The subcommittee completed review of 64 existing public records exceptions, and tabled the remainder for continued analysis and discussion in 2013. In its review, the Subcommittee sought input from the State agencies responsible for administering the public records exceptions and a number of interested parties affected by specific exceptions, including the Department of Labor, the Bureau of Human Resources within the Department of Administrative and Financial Services, the State Board of Arbitration and Conciliation, the Maine State Library, the Maine Historic Preservation Commission, the Bureau of Motor Vehicles of the Department of the Secretary of State, the Department of Health and Human Services, the Bureau of Insurance, the Maine Department of Transportation, the Maine Emergency Medical Services Board, the Nursing Board, the Bureau of Consumer Credit Protection, the Department of Public Safety, the Bureau of Securities Regulation of the Department of Professional and Financial Regulation, the Board of Licensure in Medicine, the Maine Real Estate Commission, the State Treasurer, the Department of Corrections, the Judicial Branch, the Public Utilities Commission, Maine Revenue Services, the Department of Conservation, the Wild Blueberry Commission, the Bureau of Veterans' Affairs and the Maine Emergency Management Agency within the Department of Veterans and Emergency Management, the Department of Environmental Protection, the Board of Environmental Protection, the Workers' Compensation Board, the Maine Hospital Association, the Maine Trial Lawyers' Association and the Medical Mutual Insurance Company of Maine. Many municipalities also provided the Subcommittee with quantitative and practical information and recommendations.

See discussion of Advisory Committee's recommendations in Section VI.

based on technology. Mr. Leary noted several other states allow this practice and four state agencies are currently authorized by law as well. Ms. Lynch thought the draft should move forward to the Legislature as amended and the Legislature could determine whether additional changes are needed. Senator Hastings noted that the Legislature has already made exceptions on a case-by-case basis for certain agencies and suggested that that practice should be continued. Commissioner Brown reiterated his opinion that the draft should not apply to elected bodies. Mr. Flewelling understood the concern, but pointed out that, at the local level, many elected boards would already be prohibited from using the provision under subsection 2 because the proceedings are judicial or quasi-judicial.

The Advisory Committee voted 8-5 to include the amended draft as a recommendation to the Judiciary Committee, but as a stand-alone piece of legislation. (In favor: Representative Nass, Chief Antone, Ms. Bellows, Mr. Flewelling, Mr. Higgins, Mr. Leary, Ms. Lynch and Mr. Pringle; Opposed: Senator Hastings, Commissioner Brown, Ms. Meyer, Ms. Morgan and Ms. Pistner).

See draft legislation in Appendix E.

Full Advisory Comm.

- Enact legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a transportation project (divided report);**

A majority of the Advisory Committee recommends enactment of legislation requiring the Department of Transportation to give public notice at least 30 days prior to submitting a bill to the Legislature that authorizes an agreement implementing a public-private partnership for a transportation project in accordance with Title 23, section 4251. Under current law, all information that the Department of Transportation has about a public-private partnership project is confidential until the Department determines whether the plan meets the statutory standards. Approved projects are then submitted to the Legislature for approval. At several meetings, the Public Records Exception Subcommittee discussed whether documents associated with public-private partnership projects should be open to the public and at what point in the process those documents should be made available. The majority view of the Public Records Exceptions Subcommittee was that there should be no changes to the law because trade secrets and business ideas need to be protected as preliminary proposals go through the process. The minority view of the Subcommittee was that the confidentiality provision regarding these projects should be repealed entirely.

During its discussions, some Advisory Committee members felt the public did not have adequate time to review proposals, because once the Department of Transportation determines a private entity meets certain standards its proposal is turned into a bill for submission to the Legislature. Others stressed the importance of public-private projects and cautioned that the Advisory Committee should not propose anything that might deter private entities from participating in those projects. The Department of Transportation expressed concern to the Advisory Committee that if the confidentiality provision is repealed, no

private entity would submit a proposal for consideration because information in the proposal would be available to its competitors. Similarly, opening proposals up sooner to the public would likely discourage private entities from submitting proposals to the department. In the Department's view, the current law strikes a good balance between protecting proprietary information and the public's interest in an open process.

Ms. Bellows moved that the Advisory Committee accept the Public Records Exceptions Subcommittee's minority report to repeal the provision that makes information provided to the Department of Transportation confidential until the project proposal is complete. While there was some support among the Advisory Committee for the motion, others felt an outright repeal of the confidentiality provision went too far and would deter private parties from participating in the process. By a vote of 5 to 8, the Advisory Committee failed to support full repeal of the confidentiality provision. (In favor: Ms. Bellows, Mr. Higgins, Mr. Leary, Ms. Meyer and Ms. Morgan; Opposed: Senator Hastings, Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette, Mr. Flewelling, Mr. Logan and Mr. Pringle.)

Mr. Pringle recommended amending the law to add a provision that would require the Department of Transportation to give notice of the project at least 30 days prior to introducing a bill to the Legislature. During discussion, it was noted that, as a practical matter, this may already occur but requiring a specific time period would ensure some "breathing room" to give the public an opportunity to comment on the agreement before it goes to the Legislature. Some members suggested increasing the waiting period to 60 days because 30 days may not allow enough time. Others thought 60 days was going too far because the public would have an additional chance to comment when the bill proposing the agreement is given a public hearing before the appropriate legislative committee. The Department's representative indicated his belief that the proposed 30-day waiting period would not negatively affect public-private partnerships.

The Advisory Committee voted 7-6 to recommend draft legislation to the Judiciary Committee as a separate piece of legislation. (In favor: Senator Hastings, Ms. Bellows, Mr. Flewelling, Mr. Leary, Ms. Meyer, Ms. Morgan and Mr. Pringle; Opposed: Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette, Mr. Higgins and Mr. Logan.)

Representative Nass, Chief Antone, Commissioner Brown, Mr. Cianchette and Mr. Logan stated that they supported making no changes to the law. Ms. Bellows stated that she preferred to repeal the entire confidentiality provision.

See draft legislation in Appendix F.

VII. FUTURE PLANS

In 2013, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 26 through 39-A.