

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1941--1942

1941, approved January 23, 1942 as an emergency Act, sets the age of the persons from whom the State Guard can be drawn as "such able bodied male(s) . . . who shall be more than 18 years of age".

There is no doubt in my mind that you have the authority to set up as many divisions or branches or different types of organization of the Maine State Guard as you see fit. These can include both regular and irregular bodies and may be equipped with any type of uniform that you wish to authorize. The State Guard Act does not require any particular type of armament and it does not require that the arms shall be furnished by the State.

As a matter of fact the extent of your authority in time of war, insofar as organizing and equipping the militia is concerned, can be carried to the fullest extent without any Legislative authority whatsoever.

Section 4, Article XL of the State Constitution provides in part as follows:

"It shall be the duty of the Governor to issue from time to time such orders and regulations and to adopt such other means of administration as shall maintain the prescribed standard of organization, armament and discipline; and such orders, regulations and means adopted shall have the full force and effect of law."

It is to be seen that the above Constitutional provision expressly authorizes you to perform all functions in connection with the militia except actual enlistment. Whether or not the power of enlistment or drafting is included among the necessary powers of the Governor in time of war is a question that we don't have to pass on at the present time because the amended State Guard Act covers the matter of enlistment.

In other words, the war-time powers for enlisting, organizing, training and equipping the State Militia which you, by virtue of constitutional and statutory provisions, possess as Governor, are sufficiently broad so that you can act as your judgment dictates in incorporating into the State Guard any added branches which you may desire, and the rules and regulations in regard to their equipment and training, as long as they do not directly conflict with the laws of the United States, are wholly discretionary with you.

Attorney General

May 1, 1942

William D. Hayes, Esquire
State Auditor
State House
Augusta, Maine

Dear Sir:

I have been giving further thought to the question you brought up for discussion yesterday in regard to your right or duty to with-

hold or disclose information obtained by you or your assistants in your auditing of the books of courts, counties, municipalities and other departments or agencies of the State Government.

Under Public Laws of 1931, Chapter 216, Section 4 (the Code Act) the State Auditor is required to report annually, setting forth the essential facts of his continuous post audit of the records of the departments and agencies of the State Government. It is further made mandatory on him that if he finds, in the course of his audit, evidence of improper transactions or incompetence in keeping accounts or handling funds "or of any other improper practice of financial administration", he shall report the same to the Governor immediately. "If he shall find evidences of illegal transactions he shall forthwith report such transactions both to the governor and to the attorney general." Said Section further provides "all such evidences shall be included in the annual reports of the state auditor, and *he may at his discretion*, make them public at any time during the fiscal year." The above language is sufficiently broad to disclose the intent of the Legislature that the State Auditor shall be the person in whom the people of the State repose a vast degree of confidence. He is carefully selected. He is a man whose character, so far as known, is above reproach and whose judgment is regarded as sound. In him is reposed the power of the State, through its Legislature, and its Executive and its Attorney General, to pry into the most closely guarded financial transactions of any department of the State or agency thereof, and to bring out into the open and scrutinize carefully any financial matters of public concern or any matters that may have a bearing on the financial transactions of the department or body under examination.

The discretion of the Auditor contained in the authority to make public certain information from time to time during the year is given to him so that if public officials having irregularities or evidence of criminality called to their attention, fail to take appropriate action, the people of the State may be informed of that fact. No public official should be exempt from the right of his employers who have placed him in a position of trust, to know exactly how he is handling their affairs and it is the State Auditor who is empowered by law to use his discretion in turning the white light of full publicity on any official who has failed in his duty to (1) properly administer the funds entrusted to him, or (2) properly to move in punishment, if such be his duty, of the dishonest or incompetent official.

The State Auditor himself is not exempt from investigation and criticism. The Legislature which created him, or either branch thereof, has the power at any time through order properly passed to examine the conduct of the State Auditor and ascertain if he has performed properly the duties that have been imposed upon him and has faithfully and with good judgment exercised the great powers and the confidence that have been reposed in him. The Attorney General has, of course, the power at any time to look into the conduct of any State official and it is not necessary that he shall have any expressed

reason for doing so. It is one of his duties to investigate any department or any branch of the State government whenever, in his opinion, conditions warrant it. The only restriction on his activity along that line is a financial one. His investigation activities are, of course, limited by the amount of money he has available for such purposes.

The Executive Department has the power, even without any express statement or statute, of requiring a report from the State Auditor on his activities and it is the duty of the Governor to require such report and call on the Attorney General or any other agency he may see fit to procure to assist him when, in his opinion, the best interests of the State and the people thereof require it. Thus, the State Auditor although endowed with such great authority and discretion, is not left without moral support. He is himself subject to the same possibility of having his acts scrutinized to determine whether or not he has fulfilled his obligations to the public as is any other public official.

As to how he shall interpret the word "discretion" in the last sentence of Section 4 of Chapter 216 is, of course, a question the answer to which must depend on the circumstances at the time.

Your query related specifically to what are and are not public documents or records and what is the meaning of the expression "public documents or records."

It is not every document compiled by a public official that the individual members of the public have a right to examine. A State is a governmental body and, as such, there must of necessity exist in the files of its various offices, information of a highly confidential nature. The State is empowered to inquire into the most minute details of the conduct of people, both in their private lives and in their businesses, and some records of the facts so learned must of necessity be in the documentary records of the offices obtaining the information. Such facts are, of course, highly confidential and it would be an act of tyranny for the State or any official thereof, to feel free to disclose them under any circumstances not necessary for the public welfare or under order of court. Such information, therefore, is to be regarded by you as highly confidential.

There is another type of information which you obtain from the examination of the public records and the acts of public officials in connection with the handling of financial transactions. It is your duty to examine thoroughly all such records when, in your opinion, it seems wise to do so. There is no limit on the extent or care that you shall use in your examination. The examination, however, is for the purpose of determining certain facts. When your examination discloses what appear to be irregularities, it is your duty to report those irregularities to the Governor and if there seem evidences of criminality, to report them also to the Attorney General. It is not your duty to disclose such irregularities immediately to the general public. It would be contrary to public policy for you to deliver such evidence for immediate publication under any circumstances. Such an act might

make it possible for a delinquent or dishonest official to make his escape before he could be apprehended. The expressed duty on your part to deliver evidence to the Governor and to the Attorney General shows that the Legislature had this fact in mind. It is only after you have disclosed the facts that you have found to the Governor and to the Attorney General that your discretion arises. You will note that Section 4 of Chapter 216 places this discretion in you at a later date than your report to the Governor and to the Attorney General, and it is obvious that the Legislature did not intend that you should exercise your right of giving full publication to the facts until after they have been so submitted. Even then it is not your duty to make them fully public unless, in your opinion, it is for the best interest of the State and of the people thereof that such publicity shall occur.

To get back to the question of the different kinds of public documents or records: Some records are kept for the express purpose of being available to all the world. The records in the Registries of Deeds and the Registries of Probate are typical examples. Here it is a matter of public policy that every individual shall be assumed to have such an interest in the records that he shall have the right to examine them himself or have them examined by a properly authorized representative. There are other public records that are available to the individual members of the public only when the courts shall so order, and then only to the extent that they are matters pertinent to the case before the court. In this class in general fall the records in your office.

Every individual in the State has a right to demand that you disclose facts learned by your office in connection with the financial transactions of any public official. It is not, however, your duty to conform to that demand. If there is no evidence of irregularity, impropriety or criminality you have, of course, the same right that is inherent in every one of us, to say you have no evidence on the subject. When, however, the records do disclose irregularity, incompetence or criminality, it is not only not your duty to disclose those facts to any one except the properly constituted authorities, but it is decidedly contrary to public policy for you to make such disclosures until such time, as in your opinion, the proper authorities are failing to take steps to correct the irregularities or take proper cognizance of the crime.

This is rather a rambling symposium on the subject. I haven't endeavored to put the thing into connected form. I have thought about your question deeply and have looked through the books somewhat to see what other people have thought and said about it. I believe that in what I have written above, you will find the answer that you want.

Sincerely yours,

FRANK I. COWAN

Attorney General