

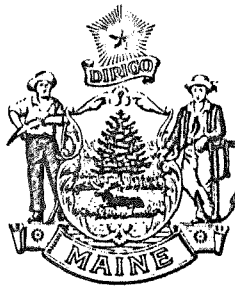
MAINE STATE LEGISLATURE

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June 15, 1979

Honorable Frank P. Wood
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Wood:

In your letter of May 24, 1979 and in a subsequent conversation, you have raised two questions concerning the provisions of 1 M.R.S.A. § 401, et seq (1979) (Maine's Freedom of Access Law) in connection with meetings held by boards of county commissioners. In particular, you have inquired whether a decision to expend public funds, made over the telephone and not at a public meeting but later approved (by means of an article in the warrant) by the commissioners at their next regularly scheduled meeting, complies with the Freedom of Access Law.¹ You have stated your inquiries as follows:

- "(1) Does an after the fact instrument such as a warrant fulfill the requirements of Maine's [Freedom of Access] Law?
- (2) Is voting over the phone allowed under the [Freedom of Access] Law and if it is under what circumstances can this practice occur?"²

As recently articulated by the Maine Supreme Judicial Court, the Legislature's purpose in enacting the Freedom of Access Law was to assure "that to a maximum extent the public's business must

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1. For the purposes of this opinion, I assume that these facts, as stated in your letter of May 24, 1979, are true.
 2. In your letter you refer to Maine's "Right to Know Law," which is more appropriately referred to as the "Freedom of Access Law."

Honorable Frank P. Wood
House of Representatives
June 15, 1979
Page two

be done in public." Moffett v. City of Portland, Me., 400 A.2d 340, 347-48 (1979). See also 1 M.R.S.A. §401 (1979).³ In furtherance of this declared purpose, the Legislature has statutorily mandated that, except as otherwise specifically provided,

"all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection."

1 M.R.S.A. §403(1979). The term "public proceedings" includes meetings of a board of county commissioners.⁴ See 1 M.R.S.A. §402(2)(c) (1979).⁵

3. 1 M.R.S.A. §401 (1979) provides in relevant part:

"The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly."

4. The commissioners for each county are statutorily required to conduct meetings at certain times each year. See 30 M.R.S.A. § 151 (1978).

5. 1 M.R.S.A. § 402(2)(c) (1979) provides in pertinent part:

"The term 'public proceedings' as used in this subchapter shall mean the transactions of any functions affecting any or all citizens of the State by any of the following:

* * *

C. Any board, commission, agency or authority of any county, municipality, school district or any other political or administrative subdivision." (emphasis supplied).

Honorable Frank P. Wood
House of Representatives
June 15, 1979
Page three

While the Freedom of Access Law mandates that public proceedings be open to the public, this legislative policy of openness in government business would be seriously compromised if the public remained ignorant of the time and place of such proceedings. Accordingly, 1 M.R.S.A. §406 (1979) provides that

"[p]ublic notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons and the body or agency will deal with the expenditure of public funds or taxation, or will adopt policy at the meeting. This notice shall be given in ample time to allow public attendance."⁶

Finally, although 1 M.R.S.A. §405(1979) permits governmental bodies or agencies falling within the scope of the Freedom of Access Law to conduct executive sessions under certain circumstances, "[n]o ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved at executive sessions." 1 M.R.S.A. § 405(2) (1979).

We now turn to a consideration of your specific inquiry, which is, whether a decision made over the telephone by a board of county commissioners, concerning the expenditure of public funds, complies with Maine's Freedom of Access Law. After a review of the relevant opinions from both the Maine Law Court and this office, it is our conclusion that such a telephone vote does not comply with the provisions of 1 M.R.S.A. §401 et seq. (1979).

A decision made by the members of a board of county commissioners concerning the expenditure of public funds is a "public proceeding" within the meaning of 1 M.R.S.A. §402(2)(1979) since it involves the transaction of a government function affecting citizens of this State. See note 5, supra. Consequently, that decision, being a "public proceeding," is subject to the provisions of the Freedom of Access Law, including the requirement that it be open to the public and that it be preceded by public notice sufficient to allow public attendance. See 1 M.R.S.A. §§ 402, 406 (1979).

6. The board of commissioners for each county consists of a chairman and two other commissioners. See 30 M.R.S.A. §101 (1978).

Honorable Frank P. Wood
House of Representatives
June 15, 1979
Page four

The practice, by public officials, of voting on the expenditure of public funds over the phone does not comply with the Freedom of Access Law. By the very nature of the practice, the public is not afforded the opportunity to observe and participate in the actions and deliberations of those who conduct public business. 1 M.R.S.A. § 401(1979). See also Op. Atty. Gen., July 3, 1974. The practice of conducting "public proceedings" over the telephone is inimical to the fundamental purpose embodied in the Freedom of Access Law that, except in those instances where executive sessions are authorized,⁷ all "public proceedings" are to be conducted openly and subject to the public's eye. See 1 M.R.S.A. §403 (1979). See also Op. Atty. Gen., May 17, 1977; Op. Atty. Gen., April 6, 1977; Op. Atty. Gen., March 25, 1977.

The Legislature recognized that circumstances may arise which necessitate the convening of emergency meetings by bodies and agencies subject to the Freedom of Access Law, and provided:

"In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding."

1 M.R.S.A. § 406(1979).

In such situations the Freedom of Access Law permits a relaxation of the notice requirements which must precede all public proceedings. However, the requirement that the meeting be public is not eliminated by its emergency nature. Thus, the practice of conducting a "public proceeding" by telephone cannot be justified, under the Freedom of Access Law, on the ground that an emergency exists. Cf. Op. Atty. Gen. July 3, 1974 (telephone poll of commission members held to violate statute governing Lottery Commission).

7. It should be observed that there are very stringent restrictions on the authority of a body or agency to convene in executive session. See 1 M.R.S.A. §405(1979). Among other limitations, an executive session "may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies." 1 M.R.S.A. §405(3) (1979).

Honorable Frank P. Wood
House of Representatives
June 15, 1979
Page five

The subsequent approval by a board of county commissioners at their next regularly scheduled meeting⁸ of a prior decision made during the course of a private telephone conversation, does not alter the fact that the initial telephone decision did not comply with the "open meeting" and "notice" requirements of the Freedom of Access Law. The underlying purpose of the Freedom of Access Law is to permit and encourage the citizens of this State to attend those meetings at which the public's business will be discussed and to provide an opportunity for them to present their views, on particular matters, to those officials charged with the responsibility of conducting the "people's business." To the maximum extent possible, the Freedom of Access Law contemplates that the public's business will not be discussed or conducted without public notice and the opportunity to be heard. See Moffett v. City of Portland, *supra*. As stated in the Legislature's declaration of policy appearing in 1 M.R.S.A. §401(1979)

"[i]t is... the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter."

This principle has been emphasized in numerous opinions from this office. See, e.g., Op. Atty. Gen., May 17, 1977; Op. Atty. Gen., April 6, 1977; Op. Atty. Gen., March 25, 1977; Op. Atty. Gen., November 23, 1976. Stated simply, the subsequent ratification or approval by a board of county commissioners, of a decision previously reached over the telephone, cannot make public a "telephone vote" which was, in fact, private.⁹

8. For the purposes of this opinion, I assume that the regularly scheduled commissioner's meeting referred to above, was conducted in accordance with the Freedom of Access Law.

9. I wish to emphasize that I intimate no opinion as to the legal validity of the decision ultimately approved by the county commissioners at a meeting which, I assume, complied with the requirements of the Freedom of Access Law. See, e.g., 1 M.R.S.A. § 409(2)(1979).

Honorable Frank P. Wood
House of Representatives
June 15, 1979
Page six

I hope this information is helpful. Please feel free to call upon me if I can be of further assistance.

Sincerely,

STEPHEN L. DIAMOND
Deputy Attorney General

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