

# MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

February 27, 1980

Honorable Walter W. Hichens  
Maine Senate  
State House  
Augusta, Maine 04333

Dear Senator Hichens:

You have asked whether the Freedom of Access Law, 1 M.R.S.A. § 401, et seq., applies to the Legislature when its members meet in joint convention to elect the State's constitutional officers. The Maine Constitution provides that the Secretary of State, the Treasurer, and the Attorney General shall be selected biennially "by joint ballot of the Senators and Representatives in convention." See Me. Const., art. V, pt. 3, § 1; art. V, pt. 4, § 1; art. IX, § 11.

The Freedom of Access Law (hereinafter "the Access Law") enunciates a general policy that the deliberations of governmental agencies be conducted openly, and the Law is intended to be "liberally construed and applied to promote its underlying purposes and policies." 1 M.R.S.A. § 401. The Legislature is expressly referenced as a body subject to the Access Law, 1 M.R.S.A. § 402(2)(A), and it is apparent that most official legislative activities are open to public disclosure. However, the Access Law exempts certain kinds of information from its scope. One such exemption applies to the following:

Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records on inspection thereof were sought in the course of a court proceeding. 1 M.R.S.A. § 402(3)(B).

Thus our inquiry focuses on whether the votes of legislators in the election of constitutional officers are privileged from disclosure in Maine courts and therefore exempt from the Access Law. Evidentiary privileges are recognized only if provided by either the Maine Constitution, the United States Constitution, Maine statutes, or rules promulgated by the Supreme Judicial Court. Rule 501, Maine Rules of Evidence. However the Law Court has emphasized that this exemption to the Access Law does not depend for its viability on any particular label:

The term "privilege against discovery or use as evidence" is at once precise and comprehensive. With care, the legislative draftsmen spelled out the way of determining whether particular records fall within the privileged records exception; that determination is to be made by considering whether by reason of a privilege they would be inadmissible as evidence in a court proceeding in the State of Maine. . . . To lawyers and nonlawyers alike, the word "privilege" selected by the Legislature has a plain and all-encompassing meaning. The word carries not the slightest suggestion that only certain privileges are meant to be referred to by Exception B. Moffett v. City of Portland, 400 A.2d 340, 346 (Me. 1979).

The Constitution mandates that the constitutional officers be selected "by joint ballot" of the legislators. The term "ballot" has been defined as "the action or system of secret voting. . . ." Webster's Third New International Dictionary (1963). Use of the word "ballot" as a synonym of secret voting has been acknowledged in many jurisdictions. See, for example, Norris v. Baltimore, 172 Md. 667, 192 A. 531 (1937); Day v. Walker, 124 Neb. 500, 247 N.W. 350 (1933); State ex rel. Automatic Registering Machine Company v. Green, 121 Ohio 301, 168 N.E. 131 (1929); Spickerman v. Goddard, 182 Ind. 523, 107 N.E. 2 (1914); State v. Shaw, 9 S.Car. 94 (1877).

While the cases cited above are illustrative of general usage, they are not determinative of the existence of a privilege in Maine. There appear to be no reported decisions dealing with the meaning of "ballot" as applied to the election of constitutional officers. However, the Law Court has defined "ballot" in an analogous situation. Article II, § 1 of the Maine Constitution states that popular elections "shall be by written ballot." In Opinion of the Justices, 7 Me. 492 (1831), the Court stated:

The word "ballot" may be considered as opposed to a vote by words or by signs; as, for instance, a vote by yeas and nays, or the common mode of voting by holding up the hand, or by rising and standing till counted. 7 Me. at 495.

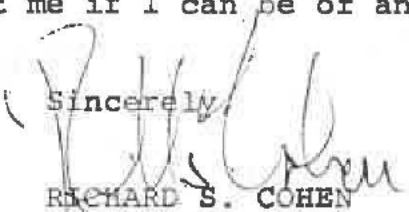
In concluding that "ballot" involves, by definition, a secret vote, the Court emphasized the importance of the constitutional right to such a vote:

. . . it secures a greater degree of independence than any other [method] in the exercise of the elective franchise, by enabling every elector to express and give operation to his opinion, without subjecting that opinion to the control, influence, or knowledge of any other person. 7 Me. at 495.

There is no reason to believe that the framers of the Constitution intended that "ballot" have a narrower meaning when applied to legislators in joint convention.<sup>1/</sup> Therefore, the Maine Constitution gives legislators the right to a secret vote in electing constitutional officers. A consequence of this right is that the manner in which a legislator votes in these elections is "privileged" for purposes of the Access Law. See Moffett v. City of Portland, supra. Accordingly, it is our opinion that the Access Law cannot be utilized to compel legislators to disclose their votes for constitutional officers.<sup>2/</sup>

Please feel free to contact me if I can be of any further service.

Sincerely,

  
RICHARD S. COHEN  
Attorney General

RSC/ec

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<sup>1/</sup> Rule 506 of the Maine Rules of Evidence provides an explicit privilege for voters at a "political election." We express no opinion as to the applicability of Rule 506 to the election of constitutional officers.

<sup>2/</sup> Because we find that a ballot is secret and therefore privileged from disclosure, we did not consider alternative theories concerning the inapplicability of the Access Law to this situation.