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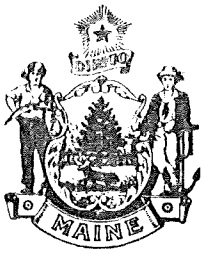
JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 6, 1981

Michael Povich
District Attorney, District VII
60 State Street
Ellsworth, Maine 04605

Dear District Attorney Povich:

In your letter of July 29, 1981, you have raised two questions concerning the provisions of 1 M.R.S.A. §§ 401, et seq. (1979) (Maine's Freedom of Access Law). Those questions are:

> "(1) Can a public body in an open meeting vote by means of written and secret ballot and not be in violation of the freedom of access law?; and
>
> "(2) Under the circumstances of this case,[1/] was there a violation of law by not preparing and disseminating an agenda?"

With respect to your initial inquiry, it is our conclusion that when a public body is required by the Freedom of Access Law to hold an open meeting, it may not vote by secret ballot.[2/]

1/ You have advised us that your questions are prompted by complaints arising from a meeting of the Flanders Bay Community School District.

2/ The only exceptions would be for those cases where vote by secret ballot is authorized by a constitutional or statutory provision. We suspect that such exceptions are very rare.

Maine's Freedom of Access Law is intended to insure "that to a maximum extent the public's business must be done in public." Moffett v. City of Portland, 400 A.2d 340, 347-48 (Me. 1979). The statute provides, in relevant part, that "[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 records of their actions be open to public inspection and their deliberations be conducted openly." 1 M.R.S.A. § 401 (1979) (Emphasis added). Thus, the use of a secret ballot, a device designed to insure privacy and anonymity, is antithetical to the express purposes of the statute.

Although there are no Maine decisions addressing your specific question, a Michigan appellate court has observed that "a secret ballot effectively closes part of a meeting to the public, since the balloting withdraws from public view an essential part of the meeting." Esperance v. Chesterfield Township of Macomb County, Mich. App., 280 N.W.2d 559, 563 (1979). The Michigan court also stated that,

> "[it] can hardly be contended that a vote by secret ballot at an open meeting is any more open than a vote at a closed meeting. In either case the public official has shielded his stand from public scrutiny and accountability.
>
> "It should also be recognized that because the act requires all meetings to be opened to the public it implicitly requires that all parts of the meeting (unless specifically excluded by the act) also be open to the public." Esperance v. Chesterfield Township of Macomb County, supra, at 563.

It is our conclusion, therefore, that a secret ballot is not a permissible means of voting in a meeting required to be open by the provisions of the Freedom of Access Law. Such a method of voting defeats the intent of the Legislature and fails to promote the underlying purposes and policies of the Act, namely, openness and accountability.3/

3/ Since our opinion on this question may lead to the conclusion that the Flanders Bay Community School District violated the law, we think it appropriate to briefly explain our approach to the enforcement of this statute. Particularly in light of the fact that the criminal provision requires a "willful" violation, see 1 M.R.S.A. § 410, it has been our policy not to treat as criminal those deviations from the law which result from an honest belief that the action is proper. This approach seems particularly appropriate when the disputed action raises a question of statutory interpretation which, at the time of the action, had not been addressed either by the courts or by this office.

Turning to your second question, we do not believe the Freedom of Access Law can be read as requiring the preparation and dissemination of an agenda prior to a public meeting. This issue is governed by the Access Law's "public notice" provision, 1 M.R.S.A. § 406, which reads as follows:

> "Public 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. 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."

As is readily apparent, § 406 is silent on the question of whether, and to what extent, the notice must specify the subject matter of the meeting.

In our view, it is possible to argue that inherent in the concept of public notice is a requirement that the public be given some indication of the subject matter of the meeting. Interpreting a statute similar to § 406, a New York court concluded that "[t]he minimum criteria for a meeting which would meet these statutory requirements would include a general notice of the nature of the meeting adequate to inform the public and the officials involved. . . . " Orange Cty. etc. v. Council of City of Newburgh, 393 N.Y.S.2d 298, 300 (S.Ct. 1977). While § 406 might thus be construed as mandating some indication of the general purpose of the meeting, we see no basis for reading the statutory language to require the preparation and dissemination of an agenda.

Having concluded that an agenda is not required, we would nonetheless add that a public agency would be well advised to insure that its notice contains information adequate to inform the public of the general subject matter of the meeting.[4/] Since the Legislature has directed that the Access Law is to be

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4/ What is needed to adequately inform the public will vary from case to case and thus is not susceptible of an easily applied, general rule. Furthermore, we recognize that the notice of an emergency meeting may, as a matter of necessity, have to be less complete.

liberally construed in favor of open meetings, 1 M.R.S.A. § 401, this approach not only comports with the obvious spirit of the law, but also minimizes the possibility of a violation.

Sincerely,

JAMES E. TIERNEY
Attorney General

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