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September 10, 2004

Representative Louis B. Maietta, Jr.
185 Elderberry Drive
South Portland, ME 04106

Dear Representative Maietta:

This is to respond to your letter dated August 31, 2004, which this Office received on September 2. In connection with the upcoming election on the property tax cap initiative, you ask for an opinion "dealing with the fundamental role of government, appointed officials as well as elected officials to use their position and tax dollars to influence the outcome of an election." You also ask that we "review and opine on the legal research and documentation accompanying this letter," referring to an accompanying letter from Eric Cianchette and Phil Harriman with numerous attachments, including a memorandum from Orlando Delogu ("the Cianchette/Harriman correspondence").

The terms of 5 M.R.S.A. § 195 guide this Office in the issuance of written legal opinions. This statute provides: "The Attorney General shall give his written opinion upon questions of law submitted to him by the Governor, by the head of any state department or any of the state agencies or by either branch of the Legislature *or any members of the Legislature on legislative matters*." (Emphasis added.)

The questions raised in the materials you have submitted do not appear to relate to a "legislative matter" as that term is used in § 195. Legal issues concerning the role of government officials in the public debate over the tax cap initiative do not relate to any bill or other matter that is currently before the Legislature. The initiated measure itself, although pending before the Legislature earlier this year, is now before the public for a vote at the next statewide election under the provisions of the Maine Constitution, Art. IV, Pt. 3, § 18(2).

While we do not believe that 5 M.R.S.A. § 195 requires a response to the specific issues raised by the Cianchette/Harriman correspondence,[1] we do believe it important to set out our understanding of the existing law on the major issues you have raised: whether state and local government officials can advocate for or against a citizen initiated ballot measure, and whether those officials can use public funds to further those efforts.

There is one Maine case that addresses these issues. In *Campaign for Sensible Transportation v. Maine Turnpike Authority*, Docket No. CV-91-952 (Me. Super. Ct., Cum. Cty., October 8, 1991) (Alexander, J.), 1991 Me. Super. LEXIS 228, *app. dism'd as moot* 658 A.2d 213 (Me. 1995), the Campaign for Sensible Transportation sought injunctive relief against the allegedly improper expenditure of highway toll revenues in an effort to defeat a referendum prohibiting widening of the Maine Turnpike. While the Superior Court denied the requested injunction because most of the activities alleged to be improper had been terminated, the Court did provide some useful legal guidance, drawing on the case law of other jurisdictions.

First, the Court cited favorably the standard applied by the California Supreme Court in *Stanson v. Mott*, 551 P.2d 1, 3 (Cal. 1976) that "at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." 1991 Me. Super. LEXIS, at 7. At the same time, the Court recognized an exception to this general prohibition for "dissemination of information" and "fair comment."[2] In drawing a line between fair comment and improper advocacy, the Court stated:

> Turnpike Authority board members may speak out on the issues of the day. Even plaintiffs conceded...that employees or board members may legitimately discuss the issue. They could also legitimately participate in debates where they are invited. All that could be prohibited are specific expenditures of turnpike funds whose sole purpose or primary purpose is to influence election results by going beyond fair comment.

Id. at 19. The ability of state officials to advocate on policy issues within the scope of their duties and responsibilities as state officers and employees is specifically recognized

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[1] In addition, many of the issues raised in the Cianchette/Harriman correspondence concern activities of municipal governments. The general principles discussed here do appear to apply to units of local government. However, as Orlando Delogu points out in his Memorandum (p. 3), Maine's Constitution protects the power of the inhabitants of any municipality to alter their charters on all matters of local and municipal character unless prohibited by statute or the Constitution (Art VIII, Pt. 2, § 1), thus creating a materially different analytical framework than that applicable to state agencies. This Office does not represent municipalities, nor do we have particular expertise in municipal law. Thus we decline to engage in analysis of the specific allegations about the conduct of municipal officials presented in the Cianchette/Harriman correspondence, resolution of which would require factual investigation as well as a more detailed analysis of municipal law.

[2] Here, the Maine Superior Court relied on decisions of the Supreme Courts of both California and New Jersey, which are the two most frequently cited judicial decisions on the propriety of government expenditures and advocacy in public election matters: *Stanson v. Mott, supra*, and *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 98 A.2d 673 (N.J. 1953).

by statute in Maine, 5 M.R.S.A. § 7056-A(7), and by courts in other states.[3] *See, e.g., Colorado Taxpayers Union, Inc. v. Romer,* 750 F.Supp. 1041, 1045 (D. Colo. 1990), *app. dism'd for lack of standing,* 963 F.2d 1394 (10th Cir. 1992), *cert. den.*, 507 U.S. 949, 113 S.Ct. 1360 (1993) ("The fundamental flaw in the plaintiffs' contentions is the failure to distinguish between governmental interference with an initiative and opposition to it from persons occupying positions in government. There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election.").[4]

In addition, the Court in *Campaign for Sensible Transportation, supra,* made a distinction between "prohibited electioneering activities" and "legitimate activities analyzing and planning for eventualities should the referendum be successful." 1991 Me. Super. LEXIS 228 at 19. In the instant matter, such planning activities may be necessitated by the effect of the proposed tax cap on the provision of services by certain municipalities in their next tax year. Regardless of whether one supports or opposes such a cap, the provision of services is part of the core mission of local government. Preparation and dissemination of information concerning the impact of the tax cap and alternatives for compliance with its limitations should the voters approve it would appear to be legally appropriate.

Indeed, it may be argued that municipal officials have an obligation to inform their constituents of the impact of the tax cap on their town's budget. By way of comparison, 30-A M.R.S.A. § 2528(5) requires that any article put to a referendum vote by secret ballot that requests an appropriation of money must be accompanied by a recommendation of municipal officers and, if the action affects the school budget, a recommendation by the school board. While § 2528 does not apply to a statewide referendum, it illustrates the existing role of municipal officials in local budget matters.

The vast majority of the cases in which government spending and advocacy activities have been challenged are resolved without reaching (though some discuss) the question of the extent to which such activities may infringe on citizens' First Amendment rights. While the discussion of constitutional concerns in these cases does not present a coherent standard or theory, it is clear that courts are concerned about the potential for government speech to infringe on the public's right to be free from a biased political process. Most courts that have found the expenditure of public funds for governmental advocacy to be improper have based their decisions on the lack of express authorization. Two courts have found advocacy by governmental bodies or public spending on such

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[3] 5 M.R.S.A. § 7056-A(5)&(6) also provide certain protections for state employees to express views on political issues and to participate in political activities.

[4] In *Romer*, the sponsors of a citizen initiated amendment to Colorado's Constitution asserted that the Governor had violated their First Amendment rights by using state resources and the power of his office to advocate for defeat of the initiative. While the bulk of the Governor's expenses were reimbursed by a private organization, the plaintiffs alleged that expenses incurred through use of a state car, airplane, and security personnel were inappropriate. The Federal District Court concluded that the Governor's campaign against the pending referendum did not violate First Amendment rights of the referendum's sponsors, and that the expenses complained of were incidental to the activities of the Governor's and were not improper.

advocacy to be in violation of state constitutional guarantees. *Stern v. Kramarsky,* 375 N.Y.S.2d 235, Fla. Dist. Ct. App. (N.Y. Sup. Ct. 1975); *Palm Beach County v. Hudspeth,* 540 So.2d 147 (Fla. Dist. Ct. App. 1989). In contrast, the court in *Alabama Libertarian Party v. City of Birmingham,* 694 F.Supp. 814 (N.D.Ala. 1988), concluded that spending by the city in support of proposed bond issues did not violate the First Amendment to the U.S. Constitution.[5]

The guiding principles of law are clearly stated in the Superior Court's decision in *Campaign for Sensible Transportation* in a manner that is consistent with the case law in other jurisdictions. Governmental bodies and officials may not expend public funds solely or primarily for purposes of partisan advocacy without express authorization, and even where authorized, these activities are subject to constitutional limits. They may disseminate information on matters such as citizen initiatives and may express their views as public officials. We have found no case concluding that public resources such as personnel time cannot be used in support of these allowable activities. However, the line between appropriate dissemination of relevant information and activities that constitute improper advocacy by government agencies and officials is not easy to define in the abstract.[6] Such determinations are fact-dependent and may be complex, particularly in situations such as this where the subject matter of the issue before the voters has a direct and substantial impact upon the duties and responsibilities of those government agencies and officials. Municipal officials should be guided by the advice of their legal counsel in determining the appropriateness of specific activities between now and the election.

I hope this information is helpful.

Sincerely,

G. STEVEN ROWE
Attorney General

[5] A useful discussion of the First Amendment considerations can be found in *Burt v. Blumenauer,* 699 P. 2d 168 (Or. 1985). A general discussion of the issues we address here can be found in Comment, *Contemplating the Dilemma of Government As Speaker: Judicially Identified Limits on Government Speech In the Context of Carter v. City of Las Cruces,* 27 N.M.L.Rev. 517 (Summer, 1997).

[6] "...[T]he determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." *Stanson v. Mott, supra* ,at 12.