MEMORANDUM

TO: Town Council of Cape Elizabeth and it boards and commissions

FROM: Thomas G. Leahy and John J. Wall, III, Town Attorneys

RE: ***Freedom of Access Act/Conflict of Interest/Bias***

DATE: December 16, 2018

RIGHT TO KNOW LAW

Maine's "Freedom of Access" law is set forth in 1 M.R.S.A. §401 *et seq.* ("**FOAA**" or "**the Act**"). In its Declaration of Public Policy our Legislature declared that *"public proceedings exist to aid in the conduct of the people's business,"* that "*actions be taken openly,*" that the records of their actions be open to public inspection, that their deliberations be conducted openly, and that the law *"shall be liberally construed and applied to promote its underlying purposes and policies."* 1 M.R.S.A. §401. In *Citizens Communications Co. v. Attorney General, et al.*, 931 A.2d 503 (Me. 2007), and in later cases through this date, our highest court relied upon this Legislative Policy Statement that the Act was to be construed liberally in denying the claim that attorney-client privilege prevented disclosure of certain settlement negotiation documents. Therefore, both the Legislature and the Law Court have indicated that the Act should be given a broad, liberal construction and a correspondingly narrow interpretation of exceptions.

There are two principal aspects of FOAA: "public proceedings" and "public records."

Public Proceedings

"Public proceedings" is defined as "*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 regional or other political or administrative subdivision….*" 1 M.R.S.A. §402(2). This definition would encompass the functions of the Cape Elizabeth Town Council under its Charter and Ordinances, and those of its boards and commissions, whether by elected or appointed public officials. The FOAA goes on to provide 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.*" 1 M.R.S.A. §406. In our view, the above reference to 3 or more persons is to the number of members of the board or commission, not the number of attendees at the meeting.

Some have argued that meetings by less than a quorum of a particular board or commission may take place without adherence to the public notice requirements of FOAA. They argue that otherwise all meetings of less than a quorum of members of a given board would be subject to the FOAA public notice provision, further arguing that because there is no quorum present, no vote could be taken and, hence, such meetings should not be deemed the "*transaction of any of the functions of that board or commission….*" Those taking this position usually then condition their view with statements like, "*…so long as the actual meeting is not a rubber stamp of a deal done outside of the meeting and is not the result of a series of individual meetings addressed to a quorum to reach a foregone conclusion.*" Further, they look to the 2011 amendment to the Declaration of Public Policy of FOAA that reads: "*This subchapter does not prohibit communications outside of public proceedings*

between members of a public body unless those communications are used to defeat the purposes of this subchapter." 1 M.R.S.A. §401. In our opinion, this takes too narrow a view of FOAA.

Our Legislature and our highest court have told us to construe its provisions liberally. The law specifically states, *"[i]t is further 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 purpose of this subchapter."* 1 M.R.S.A. §401. We believe this is directed precisely at the meetings of less than a quorum of the board or commission IF those attending are transacting the functions of the board or commission.

Giving the Act a liberal interpretation – as directed by the Legislature and our highest court – it seems unlikely that the test for permissible communications turns simply on whether a vote is or could be taken at such informal meetings. Otherwise, carried to the extreme, all of the "people's business" could be carried out in such meetings, so long as the actual vote was held later at the properly noticed meeting of the board or commission. This eventuality would not only prevent non-attending board members from participating in a meaningful way in the decision-making process, it would also prevent those non-attending members and the public generally from hearing and engaging in a robust and meaningful exchange of ideas. One could plausibly argue that the open discussion of matters before a board and the exchange of competing views on such matters are the very "function" of that board. This would seem to be the Legislature's intent in enacting the "public proceedings" provisions of the Act. Moreover, we feel that the reference to "functions" of the board or commission connotes a range of activities broader than simply votes by a board or commission.

If we are correct in summarizing the intent of FOAA, what can be discussed under FOAA at such private meetings, or in electronic or other communications? Clearly, communicating as to scheduling meetings would be exempt. Transmitting reports or other information gathered by one member to the full board or commission would likely be exempt, but the discussion of materials upon which the board or commission is to make its decision or recommendation, in our opinion, may in many circumstances amount to "*transacting the functions"* of that board or commission, and should only take place in a properly noticed public proceeding. This may not be seen by some as the most convenient or efficient way to conduct the business before the board or commission, but the FOAA's purpose is not to make carrying out the peoples' business easier, but rather, ensuring that the functions are conducted openly for all interested persons to see, hear and, where appropriate, participate.

As stated in the Maine Municipal Association's "*Municipal Officers Manual,*" June 2010 revised edition: *"a Public Proceeding is defined as 'the transaction of any function by any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision.' Public proceedings, except where exempted, must be 'open to the public' (1 M.R.S.A. §402, §403). By use of the term 'transaction of any function,' as that term might refer to a meeting of municipal officers, it is clear that the law is not limited to meetings or proceedings of any special level of formality. Except for the specifically exempted activities, virtually every discussion, activity or action undertaken by municipal officers (formally or informally) as a board is subject to open view and attendance by the general public."*

As with most laws, the FOAA is subject to differing interpretations. One debated issue is whether the FOAA restricts or prohibits one-on-one meetings – or any meetings of less than a quorum – where the business before that board or commission is the topic of discussion. When construing a statute, Maine courts strive to give effect to the Legislature's intent. *See Maine Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 34, 923 A.2d 918, 928. When a court determines that a statute

is ambiguous in some respect, it frequently examines "the Legislature's stated goals and objectives regarding the statutory provision at issue" in an effort to discern the Legislative intent. *Home Builders Ass'n of Me., Inc. v. Town of Eliot*, 2000 ME 82, ¶ 14, 750 A.2d 566, 571. In the context of the FOAA, the Legislature's stated goals appear to favor transparency in local government. See 1 M.R.S.A. §401 ("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. It is further 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."). It is our view that when these canons of construction are applied to the FOAA, they militate against discussion of board or commission business in one-on-one meetings between members of those boards or commissions. For this reason, we recommend in any "gray area," that the boards and commissions of Cape Elizabeth should defer to the Legislature's stated public policy that FOAA *"be liberally construed and applied to promote its underlying purposes and policies."*

Some municipal lawyers have suggested that this view of FOAA is too narrow and they emphasize the 2011 amendment to the Act's policy to allow communications among members of a council or board so long as not used to defeat the purposes of the Act. They argue that our position may be accurate when the municipal body is evaluating an application for a permit or a waiver of some sort, but not accurate when the council or board is considering policy matters. The drawback to this argument is that the inquiry devolves into an examination of whether particular communications between individual board or commission members were used to defeat the purposes of the Act.

Until we have more clarification by the courts, we believe we will always have some gray area. To avoid an appearance of "clandestine meetings, conferences or meetings" – and to insulate the Town and individual board or commission members from accusations that their communications were intended to defeat the purposes of the Act – we still gravitate toward a more liberal interpretation of the Act, as called for by the Legislature and as applied by the courts. We emphasize that it is the transaction of the functions of the pertinent Town body that is the test. Not all dialogue among members will satisfy that criteria, and the communications that do not may be carried out without a properly noticed public meeting. But when the dialogue turns into a discussion of the precise matter pending before the council or board and all that is left is a vote at the public meeting, the line will have been crossed.

Public Records

With limited exceptions, the term "public records" is defined to include "*…any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained… that is in the possession or custody of an agency or public official… and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.…*" 1 M.R.S.A. §402(3). Many of the FOAA cases arise out of requests made to a public body for inspection or copying of a public record under 1 M.R.S.A. §408-A. Each municipality is required to designate an existing employee as a contact person, called a "*public access officer*," with regard to requests for public records under FOAA. 1 M.R.S.A. §413. Debra Lane, Assistant Town Manager, has been designated by the Town of Cape Elizabeth to act in that capacity. The public access officer is responsible for ensuring that each public record request is properly acknowledged and also serves as a resource concerning freedom of access questions and complaints. This same subchapter provision requires all "elected officials" to receive a FOAA training course.

Examples of documents that fall within the limited exceptions include: records that are confidential by statute; social security numbers; and medical records.

Email

Communications by electronic mail among board members raise two issues. First, are such communications covered by FOAA? Second, if so, is such an e-mail a public record under the Law, subject to the right of an interested party or the public to inspect and copy?

The answer to both questions is "yes." Conduct of public business of a board by e-mail is prohibited. There is no notice to the public and no opportunity for the public and the members not in the email chain to observe such business. So, while a simple note confirming a time or place of a meeting, whether by e-mail or phone, would not constitute conducting business, any e-mail dialogue about the substance of a pending matter could amount to the conduct of business of the board or commission as discussed above, in our opinion. If there is no dialogue, but simply the transmission of a report, such report should be introduced at the next meeting or immediately placed in the file. As to inspection and copying e-mail communications that are deemed to constitute "public records," the public would have the right to do so unless such communications were otherwise confidential.

MISCELLANEOUS

- Making Public Records Available: FOAA provides that every person has the right to inspect and copy any public record, during regular business hours, for which the public agency or official can charge a reasonable fee.

- Notice: Public notice must be provided if the public proceeding is a meeting of a board consisting of three or more persons. Notice must give "ample" time to allow public attendance and be disseminated in a manner calculated to notify the general public – although what constitutes ample time is not a hard and fast rule. For example, in *Crispin v. Town of Scarborough*, 736 A.2d 241 (Me. 1999), our highest court held a one-day notice of a town council meeting to approve a contract zoning agreement was sufficient where many interested parties had been involved throughout the process and actually attended the meeting.

- Meetings: All public proceedings shall be open to the public. This does not mean that the public must be allowed to participate. The public is allowed to participate if the public meeting is a public hearing, but not necessarily during other portions of the meeting and not during deliberations. Any member of the public may tape or film a public proceeding, subject to reasonable rules. A record of a public proceeding is required by law, and it shall be made promptly and shall be open to public inspection.

- Executive Sessions: These sessions can be called only after a board has commenced a public meeting; only by a publicly recorded vote of 3/5 of the members present and voting; and only if the motion states the precise nature of the business of the executive session and includes a citation of the statutory authority that permits such executive session. No vote or action can be taken in executive session. No matters other than those made in motion to enter executive session can be considered in such executive session. Deliberations in executive session may only be for the following matters:

    (1) Certain described employment or appointment issues and then subject to specific limitations;

(2) A school board's consideration of suspension or expulsion of a student, subject to rights of the student, student's parents and legal counsel to be present if so desired;

(3) Consideration of the condition, acquisition or use of real property, but only if premature disclosure would prejudice the Town's bargaining position;

(4) Discussion of labor contracts and proposals, and negotiations of labor contracts, unless otherwise agreed to by the parties;

(5) Consultation with the Town Attorney concerning the legal rights and duties of the board, pending or contemplated litigation, settlement offers where such attorney's professional responsibility clearly conflicts with FOAA, or where premature disclosure would place the board at a substantial disadvantage.

(6) Discussion of information in records where access is prohibited by law.

(7) Discussion of approval of the content of examinations by a licensing body.

(8) Consultation between municipal officers and their code enforcement officer relating to a pending enforcement matter.

Our highest court has held that public bodies will have the "burden of proof" that an executive session was lawful. *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me. 1998). Our highest court has also ruled that, while a zoning board can go into executive session with its attorney to discuss the board's legal right or duty to grant a special exception, that board cannot in executive session deliberate on the merits of the application. That deliberation must be in public. *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me. 1998).

CONFLICTS OF INTEREST

By statute, the Maine Legislature has set forth a fairly narrow standard and rules for a financial conflict of interest. (30-A M.R.S.A. §2605). Specifically, this statute provides that if the party has a 10% or greater ownership interest in the economic entity to which the contract or question relates, then such party is deemed to have a financial conflict of interest and the vote on the question and the contract, if approved, is voidable.

A member with a financial conflict should disclose it at the public meeting and then abstain from participation as well as from voting on the issue.

A vote is voidable, even if it would have passed without the tainted member's vote.

The above statute goes on to state, that "*[e]very municipal and county official shall attempt to avoid even the appearance of a conflict of interest by disclosure or by abstention.*…." (emphasis added) (30-A M.R.S.A. §2605(6)). Obviously, this statute casts a broader net.

Finally, the statute states that "*in their discretion, the municipal officers* [i.e., Town Council] *may adopt an ethics policy governing the conduct of elected and appointed municipal officials*…." (30-A M.R.S.A. §2605(7)). [Note: State law establishing Boards of Appeal also provides that issues of conflicts of interest shall be decided by a majority vote, excluding the member who is being challenged. (30-A M.R.S.A. §2691(2)(c))].

This latter provision is used from time to time to provide a procedure for having the board or body vote on a conflicts issue, but if a true conflict exists, then notwithstanding a vote allowing a member to participate, the vote will be voidable.

In addition to the above statutory standard for conflicts of interest, we have case law in Maine which sets forth the standard as follows:

> *Whether the town official by reason of his interest, is placed in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act….* (Lesieur v. Inhabitants of Rumford, 113 Me. 317 (1915)).

BIAS

Where the board or body is performing a quasi-judicial function, such as an evaluation of a land use proposal, against a set of standards set forth in an ordinance or Maine statute, then the issue of bias may arise.

A member related by blood or marriage to the applicant within the 6th degree according to civil law, or within the degree of 2nd cousin inclusive, is disqualified for what may be called a "family bias."

A more difficult bias to define or determine is where an interested party, such as an applicant, will not be given the required due process because a board member participates and votes notwithstanding he or she holds such strong feelings or prejudice for or against the applicant or project that he or she could not render an impartial decision.

The burden to establish the basis for disqualification in these cases is upon the party asserting bias.

If, from statements made or involvement with an applicant or project, it is very probable the member could not review the adjudicative facts objectively, he or she should step aside.

While difficult to define a disqualifying bias as it relates to how a member feels about a person or project, clearly there reaches a point where a constitutionally protected right to a fair hearing would be denied if the member participated.

The 1994 case of Planche v. The Inhabitants of Cumberland and Robert Benson is an example where our Law Court found "*the probability of a more subtle bias too high to be constitutionally tolerable,*" where the town manager's knowledge of, and involvement in, past actions and proceedings affecting a police chief would result in his predisposition to accept the truth of the pending charge. Planche v. The Inhabitants of Cumberland and Robert Benson (Cumb. Sup. Ct., K. Lipez, Justice, Docket No. CV-93-252).