M E M O R A N D U M

TO: **New Members of Cape Elizabeth Boards and Commissions**

FROM: **Thomas G. Leahy, Town Attorney**

RE: **Right To Know Law/Conflicts of Interest/Bias**

DATE: **February 1, 2010**

RIGHT TO KNOW LAW

Maine's "Right to Know" or "Freedom of Access" Act is set forth in 1 M.R.S.A. §401 *et seq*. The 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 and 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 a recent case, *Citizens Communications Co. v. Attorney General, et al.*, our highest court relied upon this legislative statement that the Act was to be construed liberally in denying the claim that attorney-client privilege prevented disclosure of certain settlement negotiation documents. So, we should assume a broad, liberal construction and correspondingly narrow interpretation of exceptions.

This law applies to transactions of any functions by enumerated groups, including "*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)(c))

- Public Records: Public records are *"…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,…"* with limited exceptions. The exceptions in this statute do not include legal opinions from the Town's Attorney. Therefore, you must assume they are generally available. Our highest court has 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 (1998) Me., 715 A.2d 148*)

- Notice: Public notice must be provided if the public proceeding is a meeting 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. In *Crispin v. Town of Scarborough*, (1999) Me., 736 A.2d 241, 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. If any record or minutes of a public proceeding are required by law, they 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 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 the *Freedom of Access Act*, 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)

- E-Mail: Communications by electronic mail among board members raises two issues. First, are such communications covered by the *Freedom of Access Act*? Second, 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. Presumably, there is no notice to the public and no opportunity 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 a pending matter would. If there is no dialogue, but simply sending a report, such report must be introduced at the next meeting or immediately placed in the file. As to inspection and copying your e-mail communications, the public would have the right to do so unless such communications were otherwise confidential.

- Making Public Records Available: The *Freedom of Access Act* 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.

- Training: Beginning July 1, 2008, elected officials with executive or legislative powers have been required to complete a training course covering the *Freedom of Access Act* (1 M.R.S.A.

§412). The applicable elected officials are defined to include, at the municipal level, *"F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments; G. Officials of school units and school boards; and H. Officials of a regional or other political subdivision who, as part of their offices, exercise executive or legislative powers…."* Newly elected executive or legislative officials must take the course within 120 days of taking office. The course should take no longer than two hours to complete. Those required to take the training course must make a record of completing the training, then keep it or file it with the public entity to which the official was elected.

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 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, such as when a board member's participation is challenged by another board member or a member of the public, 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 standards 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 the Maine Superior 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 involving a police chief resulted in his bias or predisposition to prematurely accept the truth of the pending charge against the police chief. *Planche v. The Inhabitants of Cumberland and Robert Benson* (Cumb. Sup. Ct., K. Lipez, Justice, Docket No. CV-93-252)