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By Email  
September 2, 2015

Thomas G. Leahy, Esq.  
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**RE: *Cape Elizabeth Freedom of Access Act***

Dear Attorney Leahy:

I reviewed all the materials that have been forwarded to me concerning the Freedom of Access Act (FOAA) controversy in Cape Elizabeth. There are competing allegations about exactly what has happened and opposing positions on the proper application of the open meeting requirements of FOAA. Without engaging in a time consuming fact-finding regarding the issues specific to Fort Williams Advisory Commission (FWAC) member Terry Ann Scriven, there are several observations I can offer.

It is certainly true that any public decision-making body must take care to conduct both deliberations and voting in a public proceeding. However, one of the rules of construction established by FOAA is that communications outside of public proceedings between members of a public body are not prohibited unless those communications are used to defeat the purposes of the law. Informal communications between board members need not be subject to a hard and fast prohibition to comply with this principal; on the other hand, such communications are not protected simply because there is no quorum present.

Similarly, I am aware of no authority supporting the notion that a member of a body such as the FWAC cannot contact knowledgeable members of town government to gather information relevant to a pending non-adjudicatory matter without violating FOAA. Asking members to make a statement on the record of any information obtained in such a fashion should be sufficient to apprise the other members and the public and to satisfy FOAA.

The FOAA issues that are the subject of the back and forth correspondence in this matter have clearly become tangled with the parties' polarized positions on the resolution of the problem of the deteriorating bleachers. Whatever the advice that is provided to board and commission members, it should apply regardless of the topic or the identity of the speaker. A well intentioned board member should be able to ask herself if a communication she has had with another

member informs the decision before the board and should therefore be disclosed at a board meeting so that all members and the public can benefit.

Sincerely,

A handwritten signature in black ink, reading "Brenda L. Kielty". The signature is written in a cursive style with a large, stylized "B" and "K".

Brenda L. Kielty  
Assistant Attorney General  
Public Access Ombudsman

cc: James N. Katsiaficas, Esq.