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The Maine Freedom of Access Act

Maine law embraces the concept that the actions of public entities should be a matter of public record. With the enactment of Maine's Freedom of Access Act in 1959, the Legislature put into place numerous provisions governing public meetings, executive sessions and access to public records. These provisions apply to school units as well as to any formal authority established by a school unit such as a subcommittee of the school board.[1]

In any situation involving Freedom of Access issues, it is important to keep in mind the statement of public policy adopted by the Legislature in connection with the Act. That statement is as follows:

> 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.
>
> This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.[2]

Maine courts take very seriously the Legislature's direction to construe the Freedom of Access Act liberally.[3]

Public Meetings

Meetings open to the public. Perhaps the most fundamental tenet of the Freedom of Access Act is that "all public proceedings shall be open to the public."[4] Along with this principle goes the requirement that any person must be allowed to attend any public proceeding.[5]

Questions often arise as to whether all meetings of school board members are "public proceedings." Under a decision of the Maine's Supreme Court, informal discussions about school matters among less than a quorum of school board members are not unlawful.[6] Nevertheless, public business may not be

transacted in private or secret meetings. Care also should be taken that e-mail communications not amount to private deliberations of a majority of the board.[7]

Record of meetings. In 2011, the Legislature amended the Freedom of Access Act to require that a record of every proceeding must be made within "a reasonable period of time" after the proceeding, and must be open to public inspection. The record must at a minimum include the date, time and place of the proceeding; the names of the members of the body holding the proceeding recorded as either present or absent; and all motions and votes taken, by individual member, if a roll call vote was taken. Audio or video recordings of proceedings satisfy these requirements, which do not apply to advisory bodies, such as subcommittees, that "make recommendations but have no decision-making authority."[8] Significantly, the statute also provides that the validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required by the statute.[9]

Notice. In order to ensure that people know when public proceedings will be held, the Freedom of Access Act requires that notice be given "in ample time to allow public attendance," and that such notice must be "disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned."[10] In the event of an emergency meeting, local representatives of the media must be notified of the time and place of the meeting "whenever practical," with notification by the same or faster means than is used to notify members of the board or agency that is meeting.[11]

Most school units satisfy the notice requirement by holding regular meetings on a certain day or days of the month and by publicizing those meetings in local newspapers. Sometimes the school board's regular meeting date is published (along with the meeting dates of other local boards) in the annual report of the municipality. Many school units also post an agenda in a prominent location several days in advance of regular school board meetings or on their websites.

Recording and broadcasting of meetings. Some school boards tape record or videotape their public session meetings to provide a permanent record and to facilitate the preparation of meeting minutes. The Freedom of Access Act also specifically allows any member of the public "to make written, taped, or filmed records of the proceedings, or to live broadcast the same, provided the writing, taping, filming or broadcasting does not interfere with the orderly conduct of proceedings."[12] Many school boards also have a policy in place establishing reasonable rules governing recording and broadcasting of meetings in order to treat all members of the public (including the media) in a fair and consistent manner.

Written decisions. The Freedom of Access Act requires that public entities make a written record of certain types of decisions. Of particular relevance to school units, the Act requires that a written record be made "of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee."[13] Except in the case of probationary employees (to whom the requirement does not apply), the Act requires a public entity to

> set forth in the record the reason or reasons for its decision and make findings of fact, in writing, sufficient to appraise [sic] the individual concerned and any interested member

> of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.[14]

This requirement can be troublesome in some of its applications, because the personnel records of any school unit employee, with certain limited exceptions, are confidential pursuant to state law.[15]

Executive Sessions

Despite the fundamental commitment of the Freedom of Access Act to openness of public meetings, the Act recognizes several important subjects that may properly be addressed in "executive" or private session of the public agency.[16] A discussion of those subjects follows and Appendix E contains a chart listing all State statutes authorizing executive sessions for school units.

Employment-related matters.[17] Employment-related matters may be discussed in executive session, but only if public discussion "could be reasonably expected to cause damage to the reputation or the individual's right of privacy would be violated."[18] "Employment" matters include "appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal," or "the investigation or hearing of charges or complaints."[19]

Any person "charged or investigated" has a right to be present during the executive session, as does any person bringing allegations of misconduct. If requested in writing by the person charged or being investigated, the investigation or hearing must be held in open session.[20]

Student suspension or expulsion.[21] Discussion about whether to suspend or expel a student may also be held in executive session. The student, the student's parents (if the student is a minor) and/or legal counsel for the student must be permitted to be present during the executive session if they so desire.

Condition, acquisition or use of property.[22] A school board may go into executive session to discuss or consider certain matters related to property. Specifically, this section applies to real property, personal property permanently attached to real property, disposition of public property or economic development, but only if premature disclosure of the information "would prejudice the competitive or bargaining position" of the public body.

Labor contracts.[23] A school board and its negotiators may discuss labor contracts and proposals in executive session. In such cases, the parties to such contracts must be named before the school board goes into executive session. Negotiations between representatives of a public employer and public employees may be open to the public only if both parties agree to conduct negotiations in open session.

Consultation with legal counsel.[24] A school board may consult with its attorney in executive session regarding the board's legal rights and duties, pending or contemplated litigation, settlement offers, other

matters protected by the attorney/client privilege or where premature public disclosure of the matter being discussed would place the public body at a substantial disadvantage.

Confidential matters.[25] A school board may go into executive session to discuss information restricted by statute from disclosure to the general public. Such information might include, for example, the personnel record of a school unit employee[26] or student records.[27] Appendix F contains a chart listing records considered confidential under State or federal statutes and regulations.

Safeguards. The Freedom of Access Act contains a number of safeguards to ensure that executive sessions are not abused. First, the Act states that executive sessions may not be used to defeat the purposes of the Act.[28] Second, the motion must be approved by three-fifths (3/5) of the members who are present and voting.[29] Third, the Act requires that a motion to go into executive session specify the "precise nature of the business" to be discussed, and include "a citation of one or more sources of statutory or other authority" permitting the executive session.[30] Fourth, the Act makes clear that no final approval for any official action may be taken during executive session.[31]

Finally, as the Maine Supreme Court has held, a public body charged with violating the Freedom of Access Act during an executive session has the burden of proving that its actions during the executive session complied with an exception to the Act's open meeting requirement.[32] Following a clear procedure, such as that employed by the school committee in *Blethen Maine Newspapers v. Portland School Committee,*[33] will help ensure compliance with the statute. In the *Portland School Committee* case, there was a clear agenda for the executive session; the committee's attorney advised committee members of the purposes and limitations of the executive session; and any discussion about issues inconsistent with the stated purpose of the executive session was immediately halted.

Public Records

The Freedom of Access Act defines the term "public records" and the specific procedures allowing public inspection of those records. It is important for school officials to understand both the definition and the relevant procedures.

Definition of "public records." The term "public records" is defined very broadly under the Freedom of Access Act. The term includes information in virtually any form (including written, printed, graphic and electronic data), in the possession or control of an entity subject to the Act, that 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."[34]

As might be expected, certain types of records are specifically excluded from the reach of the Freedom of Access Act. The exceptions applicable to school units include records designated confidential by statute (see also the chart of confidential records in Appendix F);[35] records within the scope of a privilege against discovery as recognized by Maine courts;[36] collective bargaining materials;[37] records related to a juvenile fire setter;[38] security plans aimed at preparing for or preventing acts of terrorism;[39] information describing

technology infrastructure;[40] personal contact information for public employees (but not elected officials);[41] certain information contained in communications between constituents and elected officials;[42] notes prepared during lawful executive sessions;[43] and documents prepared exclusively for lawful executive sessions.[44]

Public inspection of records. The Freedom of Access Act confers on every person the right to inspect and copy any public record during regular business hours of the location of the records. A reasonable fee may be charged for any copies requested, and in addition limited fees for searching for and compiling records may also be charged.[45] In some circumstances, the school unit must provide fee estimates and may require payment of fees in advance.[46]

If a records request is made, the school unit may request clarification concerning which records are being requested,[47] but the receipt of all requests must be acknowledged within a "reasonable period of time."[48] The acknowledgement should be in writing so that the school unit has a record of it. However, a *denial* of a request to inspect public records must be made within five working days after the request is received.[49]

A request may be granted by informing the person seeking access that the records will be available for inspection and copying at a specified date, time and location. Note that the law does *not* require that the records be made available for inspection within five working days. Rather, the law makes it clear that the right to inspect and copy records must be granted within a "reasonable" period of time, and may be scheduled for a time that will not "delay or inconvenience" the regular activities of the school unit.[50]

If a request is to be denied, the school unit (generally the superintendent) must provide a written statement of the reasons for the denial.[51] There is a difference between providing access to records and meetings, which is required, and researching and compiling requested information, which generally is not required (but may, in some cases, be advisable).

If a request to inspect public documents is denied, the person may challenge that decision by filing an appropriate action in superior court. Such an appeal must be filed within five working days of the denial. The court then conducts a trial to determine whether the denial was for just and proper cause. If it was not for good cause, the school unit will be required to disclose the records as requested.[52]

Employee Records

Schools are required to maintain a record of directory information on each employee consisting of: name; dates of employment; regular and extracurricular duties; postsecondary educational institutions attended; major and minor fields of study; and degrees received and dates awarded.[53] The record of directory information must be available for inspection and copying by any person.

Confidentiality requirements for school employee records are very broad. Information "in any form" relating to an employee or applicant for employment, or to the employee's immediate family, must be kept confidential[54] if it relates to:

- Applications for employment;
- Medical information;
- Performance evaluations;[55]
- Credit;
- Personal history, character, or conduct of the employee or any member of the employee's immediate family;
- Complaints, replies and materials relating to disciplinary action;
- Social security number; and
- Teacher action plan and support system documents.

Any written record of a decision by the school board involving disciplinary action of an employee is excepted from the above category of confidential records.

The Freedom of Access Act permits executive session deliberations to consider records made confidential by statute. The employee records statute requires that much information about employees be kept confidential. Disclosure of information required to be kept confidential also may violate an individual's privacy rights. Protection against violating an individual's right to privacy and protecting an employee's reputation is thus a function of executive sessions.

There are employee records that are neither directory information nor confidential. Such records include individual contracts, collective bargaining agreements and salary schedules. These are public records to which access must be provided.

Violations

The Freedom of Access Act imposes a civil penalty of not more than $500.00 for every willful violation of the Act. The penalty is assessed against the governmental entity (i.e., against the school unit) rather than against the individual officer or employee.[56]

In addition, in 2009 the Legislature amended the Freedom of Access Act to allow a court to award reasonable attorneys' fees in successful Freedom of Access appeals.[57] The amended language allows fee awards to a "substantially" prevailing plaintiff who appeals a public records denial or illegal action, but only if the court determines that the refusal or action was committed "in bad faith." While the statute does not define bad faith, the summary of an earlier bill to allow attorneys' fees introduced in the 122nd Legislature in 2006 explained the term "bad faith" as follows: "[b]eing unsure whether a requested record is a public record is not sufficient to rise to the level of bad faith nor would a legitimate, but mistaken, belief that the record requested is confidential."[58]

Training

In 2008, the Freedom of Access Act was amended to require all elected public officials, including school board members, to complete a course of training on the requirements of the statute "relating to public

records and proceedings."[59] The training must be completed not later than the 120th day after the date that an elected school board member takes the oath of office to assume their duties, each time the board member is elected. The statute sets out minimum requirements for the training, which must be designed to be completed in less than two hours, but must include instruction on the following items:

- The general legal requirements of the Freedom of Access statute regarding public records and public proceedings;
- Procedures and requirements regarding compliance with requests for a public record under the Freedom of Access statute; and
- Penalties and other consequences for failure to comply with the Freedom of Access statute.

The statute also provides that these training requirements are met by conducting a thorough review of all of the information made available by the State of Maine on the Frequently Asked Questions portion of the State's Freedom of Access website.[60] Once the training is completed, the statute further requires that an elected official must make a written or electronic record attesting to the fact that the training has been completed and identifying the training and the date of completion. It is strongly recommended that each school board member keep a copy of their completed Certificate of Completion of their training, in addition to filing it with the office of the superintendent in their school unit.

Summary

Although the Freedom of Access Act provides broad protection to the public to be informed about the business of school units, the Act also sets forth numerous exceptions which allow schools units to conduct certain confidential matters in executive session and to withhold certain confidential records. A basic understanding of the statute should allow school units to protect both the public's right of access and its need to maintain the confidentiality of certain matters.

ENDNOTES

[1] *Marxsen v. Board of Directors, M.S.A.D. No. 5,* 591 A.2d 867 (Me. 1991); *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988). *See also* 1 M.R.S.A. § 402(2)(C) (defining "public proceedings" to include transactions of any function taken by a school board which affects any or all citizens of the State).

[2] 1 M.R.S.A. § 401.

[3] *E.g., Guy Gannett Publishing Co. v. University of Maine*, 555 A.2d 470 (Me. 1989).

[4] 1 M.R.S.A. § 403.

[5] 1 M.R.S.A. § 403.

[6] *Marxsen*, 591 A.2d at 870. In 2011, the Legislature recognized this concept in an amendment to 1 M.R.S.A. § 401 which provides that the Freedom of Access Act does not prohibit communications between board members outside of public proceedings "unless those communications are used to defeat the purposes…of the Act."

[7] 1 M.R.S.A. § 403(2).

[8] 1 M.R.S.A. § 403(6).

[9] 1 M.R.S.A. § 403(5).

[10] 1 M.R.S.A. § 406.

[11] 1 M.R.S.A. § 406.
[12] 1 M.R.S.A. § 404.
[13] 1 M.R.S.A. § 407(2). Section 407(1) requires a written record of "every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit." This subsection will not usually be relevant to school units.
[14] 1 M.R.S.A. § 407(2).
[15] 20-A M.R.S.A. § 6101(2). The only exception to this confidentiality requirement is "directory information" which includes an employee's name; dates of employment; regular and extracurricular duties; postsecondary educational institutions attended; major and minor fields of study recognized by any postsecondary institutions attended; and degrees received and dates awarded. 20-A M.R.S.A. § 6101(1).
[16] 1 M.R.S.A. § 405.
[17] 1 M.R.S.A. § 405(6)(A). This section specifically does not apply to discussion of a budget or a budget proposal.
[18] 1 M.R.S.A. § 405(6)(A). *See Blethen Maine Newspapers v. Portland School Committee*, 2008 ME 69 (holding that the time for the reasonable expectation of damage to reputation to be assessed is before the executive session is conducted, not after it is over).
[19] 1 M.R.S.A. § 405(6)(A).
[20] 1 M.R.S.A. § 405(6)(A)(3).
[21] 1 M.R.S.A. § 405(6)(B). This subsection applies both to public school students and to students at a private school if the cost of that education is paid from public funds.
[22] 1 M.R.S.A. § 405(6)(C).
[23] 1 M.R.S.A. § 405(6)(D).
[24] 1 M.R.S.A. § 405(6)(E).
[25] 1 M.R.S.A. § 405(6)(F).
[26] *See* 20-A M.R.S.A. § 6101(2).
[27] *See* 20-A M.R.S.A. § 4008. The protection of confidentiality afforded by this section does not apply to the extent necessary for a person to comply with Department of Health and Human Services reporting requirements or in certain other emergency situations. 20-A M.R.S.A. § 4008(3).
[28] 1 M.R.S.A. § 405(1).
[29] 1 M.R.S.A. §§ 405(3), (4).
[30] 1 M.R.S.A. § 405(4). The statute goes on to provide that neither a failure to cite all possible authorities, if one or more is accurately cited, nor an inadvertent inaccurate citation of applicable authority, violates the Act.
[31] 1 M.R.S.A. § 405(2). Any person who subsequently learns of final action taken during an executive session may challenge that action in superior court. If the court, after a trial, determines that the action was taken illegally during executive session, the action will be declared null and void. 1 M.R.S.A. § 409(2).
[32] *Underwood v. City of Presque Isle,* 1998 ME 166, ¶ 19, 715 A.2d 148, 154.
[33] 2008 ME 69.
[34] 1 M.R.S.A. § 402(3).
[35] 1 M.R.S.A. § 402(3)(A).
[36] *See Springfield Terminal Railway Company v. Department of Transportation*, 2000 ME 126, 754 A.2d 353 (discussing "work product doctrine" privilege under this section of the Freedom of Access Act).
[37] 1 M.R.S.A. § 402(3)(D).
[38] 1 M.R.S.A. § 402(3)(I).
[39] 1 M.R.S.A. § 402(3)(L).
[40] 1 M.R.S.A. § 402(3)(M).
[41] 1 M.R.S.A. § 402(3)(O).
[42] 1 M.R.S.A. § 402(3)(C-1).
[43] *Blethen Maine Newspapers v. Portland School Committee*, 2008 ME 69.
[44] *Blethen Maine Newspapers v. Portland School Committee,* 2008 ME 69.
[45] 1 M.R.S.A. § 408(3).
[46] 1 M.R.S.A. §§ 408(4), (5).
[47] 1 M.R.S.A. § 408(1).
[48] 1 M.R.S.A. § 408(1).
[49] 1 M.R.S.A. § 409(1).

[50] 1 M.R.S.A. §§ 408(1), (2).

[51] 1 M.R.S.A. § 409(1).

[52] *See Cook v. Lisbon School Committee*, 682 A.2d 672 (Me. 1996) (failure to respond to request to inspect public records within five working days deemed denial of request).

[53] 20-A M.R.S.A. § 6101(1).

[54] 20-A M.R.S.A. § 6101(2).

[55] *See Cyr v. Madawaska School Dept*., 2007 ME 28, 916 A.2d 967 (portions of independent report on school controversy confidential under § 6101 and thus must be redacted before any disclosure under Freedom of Access Act).

[56] 1 M.R.S.A. § 410.

[57] 1 M.R.S.A. § 409(4).

[58] LD 466 (122nd Legis. 2006).

[59] 1 M.R.S.A. § 412.

[60] See www.maine.gov/foaa/faq.

