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Right-to-Know: Common Myths

(from *Maine Townsman*, May 2007)

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EDITOR'S NOTE: The following article was originally prepared for a Maine State Bar Association program in September 2006. It is reprinted here with the MSBA's permission.

There are a lot of myths or at least misconceptions out there among municipal officials, the public and the press about what, exactly, Maine's Freedom of Access Act (FOAA) or "Right to Know" law requires. Here's a baker's dozen of them, in no particular order:

1. A meeting is not a "public proceeding" unless decisions are going to be made.

Wrong. Section 402(2) defines "public proceedings" as "the transactions of any functions affecting any or all citizens of the State" by any of the bodies enumerated therein, including "[a] ny board, commission, agency or authority of any… municipality." Section 401 states that the FOAA is to be "liberally construed and applied to promote its underlying purposes and policies." One of those policies is that "deliberations [of public bodies] be conducted openly." It is thus clear that the phrase "transactions of any functions" contemplates more than just voting or decision-making; it also includes discussions and deliberations, so meetings (commonly called "workshops") where only informal discussion is planned or anticipated are nonetheless public proceedings.

2. Any meeting of 3 of more public officials is a "public proceeding."

Wrong again. The FOAA's definition of "public proceedings" applies only to meetings of public *bodies*, such as boards or committees. While this includes special and advisory panels as well as standing committees (e.g., *Lewiston Daily Sun v. City of Auburn*, 544 A.2d 335 (Me. 1988)), a meeting of officials who are not members of the same board or body is not a public proceeding.

3. Notice of "public proceedings" must be published and include an agenda.

Not true. Section 406 requires that public notice be given "in a manner reasonably calculated to notify the general public in the jurisdiction." What is "reasonable" will of course depend on the circumstances, including the size and character of the jurisdiction and, especially, what the public there has become accustomed to. For example, it is customary (and probably sufficient) in most of Maine's small towns simply to post notice at the town office or at the post office or general store. Some other method or methods, possible including publication, may be the only reasonable way of giving notice in larger communities, however. It all depends on whether it's

Portland or Portage, Bangor or Bancroft, Caribou or Caratunk. In any case, the FOAA does not require notice to include an agenda (although it's not a bad idea). Op. Me. Att'y. Gen. (Oct. 6, 1981).

4. No notice is required in order to hold an executive session.

False. Section 405(3) states that "executive session may be called only be a public, recorded vote of 3/5 of the [board's] members, present and voting." Thus, an executive session may be held only after a board has convened in public in a publicly noticed meeting and voted publicly to close the doors. In addition, the motion to go into executive session must "indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business."

5. A "public proceeding" means everybody can participate.

No it doesn't. According to §§ 403 and 404, it means that the meeting is open to the public and that any person may attend and record or broadcast the proceedings (provided this does not interfere with the orderly conduct of proceedings), but in no way does this mandate a public *hearing* or that the public be allowed to speak.

6. Minutes or a record must be made of all "public proceedings."

Nope, sorry. Although minutes or some sort of record probably *should* be made of all board meetings, the FOAA doesn't require it. Section 403 does require, however, that where minutes or a record is required by law, "[it] shall be made promptly and shall be open to public inspection." Also, according to § 407 there must be a written record, with findings and reasons, of every decision involving the conditional approval or denial of any license or permit or the dismissal or refusal to renew the contract of any official, employee or appointee.

7. Records are not "public records" until they have been approved or finalized.

Understandable perhaps, but wrong. Section 402(3) defines "public records" as "any written, printed or graphic matter or mechanical or electronic data… 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 [thereto]." Nothing in this definition supports any distinction between "official" and "unofficial" records or between preliminary and final records. If a record would qualify as a public record in its final form, the draft version is also a public record.

8. Requests for "public records" have to be in writing.

No they don't. Section 409(1) states that *denials* of requests for public records "shall be… in writing, stating the reason for the denial," but § 408, which entitles the public to inspect and copy public records, imposes no such requirement on *requests* for public records.

9. "Public records" must be made available within 5 working days.

Not so fast. This is a misreading of § 409(1), which applies to *denials* of requests for public records and which states that a written denial must be made "within 5 working days of the request." The applicable law is § 408(1), which states that "every person has the right to inspect and copy any public record… within a reasonable period of time after making a request." Again, what is "reasonable" will depend on the circumstances, including the scope and volume of the request and the other responsibilities of the record's custodian. Section 408(2) expressly acknowledges that inspection and copying "may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought."

10. "Public records" must be made available in the form or format requested.

Only if the record already exists in that form or format. Otherwise, nothing in the FOAA obligates officials to compile or supply information in the form requested or to reformat data for the convenience of the requester. If mechanical or electronic data is incomprehensible without translation, however, it must, by implication, be translated into a comprehensible form (see § 402(3), the definition of "public records"). Also, if the information requested is public, its availability must be disclosed even if it is not in the form requested. *Bangor Publishing Co. v. City of Bangor*, 544 A.2d 733, 736 (Me. 1988).

11. "Public records" must be copied and mailed upon request.

A common assumption, but wrong. Section 408(1) states that "every person has the right to inspect and copy any public record *during the regular business hours of the agency or official having custody of the public record* (emphasis added)." And as noted above, § 408(2) states that inspection and copying "may be scheduled to occur *at such time as will not inconvenience the regular activities of the agency or official having custody of the public record sought* (emphasis added)." The clear implication here is that the only obligation of the agency or official having custody of public records is to make them available for inspection and copying *at the location where they are regularly kept*. Copying and mailing a public record is a courtesy, for the convenience of the requester, the custodian or both, but it is not required.

12. If there is no record, officials must tell what they know.

Nonsense. This is why calling it the "Right to Know" law is somewhat misleading. Nothing in the FOAA requires officials to disclose what they *know* about public or governmental business. "Public proceedings" and "public records," as defined in § 402(2) and (3), respectively, are what the law provides public access to, nothing more, nothing less (which is why "Open Meeting and Open Records" law would be more accurate). The FOAA does not force officials to answer questions or provide information other than what may already exist in record form.

13. Email is not subject to the Freedom of Access Act.

In fact, the FOAA may be applicable to email in several ways. First, email that qualifies as a "public record" within the meaning of § 402(3) is of course subject to public inspection and copying. Second, depending on its contents email may also be subject to the records retention

requirements of the State's Rules for Disposition of local Government Records. Third, email *dialogue* between or among board members, at least about substantive board business, may well constitute discussions or deliberations that may only be conducted in a publicly noticed board meeting that is open to the public (see § 402(2), the definition of "public proceedings"). Using email for procedural notices or one-way transmission of materials seems both appropriate and innocuous, but email *conversations* between board members about board business may run afoul of the obligation to conduct such business openly and in public.