

JAMES E. TERPIL
ATTORNEY GENERAL



① Conflict of
Interest
② Freedom of Access Law

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

September 6, 1984

The Honorable John L. Martin
Speaker of the House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin:

In your capacity as presiding officer of the House of Representatives, you have requested an opinion from this Office as to whether a letter dated August 29, 1984 from the Chairman of the Commission on Governmental Ethics and Election Practices constituted a valid advisory opinion. For the reasons discussed below, it is the opinion of this Office that because the Commission violated the Freedom of Access Law, the Commission has not yet issued a valid advisory opinion.

Also in your capacity as presiding officer of the House of Representatives, you have requested an opinion of this Office as to whether legislators who are full-time teachers or spouses of full-time teachers have a conflict of interest within the meaning of the Maine Governmental Ethics Act, 1 M.R.S.A. §§ 1001-1021 (1979 & Supp. 1983), if they vote on Legislative Document 2482, "AN ACT to Implement the Recommendations of the Commission on the Status of Education in Maine," in that each full-time Maine teacher in the public school system under the bill would receive a \$2,000 "teacher recognition grant." For the reasons set out below, it is the opinion of this Office that full-time teachers or spouses of full-time teachers in the public school system would not have a conflict of interest if they vote on this bill.

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Prior to addressing your specific inquiries, it is important to emphasize that the opinions of both the Commission and this Office are advisory only, and that ultimately, it is for the particular member of the Legislature in question to determine whether to be bound by any such opinion. Additionally, each legislator will have to determine for himself or herself whether the conduct is permitted by the "Legislative Code of Ethics" adopted by the Legislature.

I

On August 15, 1984, Representative Norman E. Weymouth sent a letter to the Commission on Governmental Ethics and Election Practices (the "Commission") as to whether "legislators who are full-time teachers have a 'conflict of interest' if they vote on the Governor's salary increase for teachers." On August 17, 1984, copies of Representative Weymouth's letter were forwarded to members of the Commission. On August 24, 1984, a draft of a letter from the Chairman of the Commission to the Speaker of the House of Representatives was mailed to members of the Commission. On August 28, 1984, another draft of the letter was mailed to the members. Between August 29 and September 5, 1984, the Executive Director of the Commission polled the members of the Commission by telephone as to whether they concurred with the letter sent by the Chairman of the Commission. At no time was a meeting held by the Commission to act upon Representative Weymouth's request.

The letter from the Chairman of the Commission to the Speaker of the House dated August 29, 1984, concluded that "it is the opinion of this Commission that if the Governor's proposal includes payment of state stipend or bonus directly to full-time teachers,^{1/} Legislators who are full-time teachers or whose spouses are full-time teachers in the public school system should refrain from voting on the proposed legislation." The threshold question presented is whether, in the absence of a public meeting, the Commission has issued a valid advisory opinion.

The Law Court previously has made clear "that to a maximum extent the public business must be done in public." Moffett v. City of Portland, 400 A.2d 340, 347-48 (Me. 1979). The Freedom of Access Law codifies this intent.

^{1/} At the time the letter was sent from the Chairman, neither the Commission nor Representative Weymouth had a copy of the actual legislation that the Governor proposed.

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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.

1 M.R.S.A. § 401 (1979). In furtherance of this declared purpose, the Legislature statutorily has mandated that, unless it is otherwise specifically provided, "all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection." 1 M.R.S.A. § 403 (1979).

There can be little doubt that the proceedings of the Commission are "public proceedings" within the meaning of the Freedom of Access Law. Public proceedings include the transaction of business by legislative committees, pursuant to 1 M.R.S.A. § 402(2)(A) (1979),² and by commissions of any "political or administrative subdivision," pursuant to 1 M.R.S.A. § 402(2)(C) (1979). In addition the statute creating the Commission mandates that "[n]otwithstanding any other provision of law, all meetings, hearings or sessions of the Commission shall be open to the general public unless, by an affirmative vote of at least six members, the Commission requires the exclusion of the public." 1 M.R.S.A. § 1005 (1979).³ The remaining issue, therefore, is whether the telephone poll of the Commission members satisfied the provisions of the Freedom of Access Law.

² Commission members are appointed by the legislative leadership. See 1 M.R.S.A. § 1002(1) (1979).

³ Even if the Commission had excluded the public from their meeting, the Freedom of Access Law would prohibit them from taking any final action on Representative Weymouth's request for an advisory opinion, pursuant to 1 M.R.S.A. § 409(2) (1979).

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This Office has had several occasions to address the question of whether meetings conducted by telephone satisfy the requirements of the Freedom of Access Law. The conclusion reached by this Office in 1979 applies with equal force to the instant situation.

The practice of conducting "public proceedings" over the telephone is inimical to the fundamental purpose embodied in the Freedom of Access Law that, except in those instances where executive sessions are authorized, all "public proceedings" are to be conducted openly and subject to the public's eye. See 1 M.R.S.A. § 403 (1979). See also Op. Atty. Gen., May 17, 1977; Op. Atty. Gen., April 6, 1977; Op. Atty. Gen., March 25, 1977.

* * *

In [emergency] situations the Freedom of Access Law permits a relaxation of the notice requirements which must precede all public proceedings. However, the requirement that the meeting be public is not eliminated by its emergency nature. Thus, the practice of conducting a "public proceeding" by telephone cannot be justified, under the Freedom of Access Law, on the ground that an emergency exist. Cf. Op. Atty. Gen., July 3, 1974 (telephone poll of Commission members held to violate statute governing the Lottery Commission).

Op. Me. Att'y Gen. 79-126 (June 15, 1979) (footnote omitted). Indeed, in emergency situations concerning possible conflicts of interest, the presiding officer of the Senate or the House (not the Chairman of the Commission):

may, at his discretion, issue an advisory opinion, which shall be in accordance with the principles of this subchapter, which shall be in writing, and which shall be reported to the commission. The commission may then issue a further opinion on the matter. The presiding officer may refer

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such question or problem directly to the commission, which shall meet as soon as possible to consider the question or problem.

1 M.R.S.A. § 1013(2)(K) (1979), (emphasis added). The statute, therefore, contemplates that the Commission will meet to render advisory opinions, and, if that is not possible, the presiding officer of the appropriate legislative body will issue such opinions.

Applying that analysis to the instant situation, it must be concluded that the Commission's practice in this case of simply polling the Commission members by telephone did not comply with the Freedom of Access Law. Accordingly, pursuant to 1 M.R.S.A. § 409(2) (1979), it should be concluded that the Commission's action was invalid, and therefore, the Commission has not yet issued a valid advisory opinion.

II

In responding to your second inquiry as to whether full-time teachers or spouses of full-time teachers in the public school system have a conflict of interest if they vote on Legislative Document 2482 (AN ACT to Implement the Recommendations of the Commission of the Status of Education in Maine) (the "bill"), it is important to recognize that the Commission is specifically authorized to issue advisory opinions to legislators "on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature." 1 M.R.S.A. § 1013(1)(A) (1979). Although this Office is authorized to issue written opinions upon questions of law to legislators, 5 M.R.S.A. § 195 (1979), questions concerning possible conflicts of interest should be addressed, if possible, by the Commission. It is our understanding, however, that the Commission will be unable to meet prior to the time that a vote will be taken on the bill, and therefore, with some reluctance, this Office answers your inquiry.

In addressing questions concerning legislative ethics, this Office is mindful of the stated legislative purpose of such statutes. In particular, the Legislature recognized that being a legislator in Maine "is not a full-time occupation" and that "[m]ost legislators must look to income from private sources, not their public salaries, for their sustenance and support for

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their families." 1 M.R.S.A. § 1011 (1979). The Legislature recognized further that "[t]he public interest will suffer if unduly stringent requirements, deprive government of the services of all but princes and paupers." Id. Finally, the Legislature recognized that it "cannot legislate morals and the resolutions of ethical problems must indeed rest largely in the individual conscience." Id. In light of these considerations, your specific inquiry can now be addressed.

In determining whether or not it would be a conflict of interest for a full-time teacher or a spouse of a full-time teacher in the public school system to vote on the bill, it is necessary to consider the relevant features of the bill. Although the 92 page bill addresses many educational issues, as relevant to your inquiry, the bill provides twice yearly \$1,000 "teacher recognition grants" to all full-time teachers in the public school system. Specifically, "qualifying schools" are defined as the following:

- A. Public schools that are governed by a school board of a school administrative unit.
- B. Private secondary schools whose school enrollments are at least two-thirds publicly funded pupils as determined by the previous school years' October to April average enrollment; and
- C. Schools operated by an agency of the state government, including the following:
 - (1) Baxter School for the Deaf;
 - (2) Arthur R. Gould School;
 - (3) Pineland State (Berman School); and
 - (4) Education of children in unorganized territories.

H.P. 1879, L.D. 2482, Part J, § 3, enacting 20-A M.R.S.A. § 13502(1). A "teacher" is defined as "a person certified by the Department of Educational and Cultural Services who is an employee of a public school, an eligible private school, or a state operated school including elementary and secondary teacher, specialized subject teacher, vocational-industrial teacher as defined in the Certification Rules of the State Board of Education." Id. § 13502(2). Finally, the bill provides that:

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Teacher recognition grants of \$1,000 shall be awarded twice during the school year to only those teachers who have been employed full-time in qualifying schools since the first day of each corresponding semester. Teachers employed less than full-time or less than a full semester, as determined by the qualifying school, shall not receive a prorated grant amount.

Id. § 13503. The issue presented is whether a teacher or a spouse of a teacher eligible for a "teacher recognition grant" has a conflict of interest in voting on the bill.

A conflict of interest exists:

Where a legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the legislator or a member of his immediate family is engaged, where the benefit derived by the legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

1 M.R.S.A. § 1014(1)(F) (1979).^{4/} Although teachers eligible for "teacher recognition grants" would derive a benefit from the proposed legislation, a conflict of interest does not exist because the benefit derived is not "unique and distinct from that of . . . persons engaged in similar professions."
Id.^{5/} If enacted, the bill will apply equally to all

^{4/} This is the provision relied upon in the letter from the Chairman of the Commission and the other provisions do not appear to be relevant to the instant situation. See generally 1 M.R.S.A. § 1014 (1979).

^{5/} It is irrelevant that the statute refers to "professions" instead of "profession" because it is a common rule of statutory construction that references to the plural may include the singular, which has been codified by Maine law. See 1 M.R.S.A. § 71(9) (1979) ("Words of the singular number may include the plural; and words of the plural number may include the singular.").

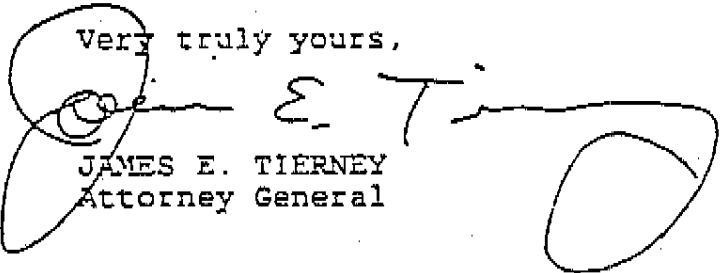
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teachers, and not just those located in a particular area or with particular characteristics. This bill, therefore, is like any other state statute which comprehensively regulates education, including statutes which establish minimum teacher salaries, see 20-A M.R.S.A. § 13402 (1983 & Supp. 1983), and statutes which establish the state contributions to local school districts which, in turn, are used to pay teachers' salaries, see 20-A M.R.S.A. ch. 605 (1983 & Supp. 1983) and the collective bargaining statutes. See 26 M.R.S.A. ch. 9-A (1974 & Supp. 1983). Because the bill applies equally to all members of the teaching profession, the benefit derived by those teachers who are members of the Legislature is not "unique and distinct," and therefore, it may be concluded that it is not a conflict of interest for a full-time teacher or a spouse of a full-time teacher in the public school system to vote on Legislative Document 2482, "AN ACT to Implement the Recommendations of the Commission of the Status of Education in Maine." As emphasized at the outset, however, this is a determination ultimately that must be made by each legislator.

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I hope that you find this information helpful to you. Please feel free to call upon this office if we can be of any further assistance.

Very truly yours,



JAMES E. TIERNEY
Attorney General

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This conclusion is in accordance with two prior decisions of the Committee on Legislative Ethics. See Op. Comm. Leg. Ethics (Feb. 13, 1972); Op. Comm. Leg. Ethics (Jan. 16, 1973).