Links to the following documents are provided as examples for informational purposes only. They have not been reviewed by MMA Legal Services. Do not use any sample unless it has been reviewed by your legal counsel and tailored to meet the needs of your municipality.

Right to Know Law

This packet includes the following attachments:

Title 1 M.R.S.A. §§ 401-412;

"Right to Know," ***Maine Townsman***, November 1990

Executive Session Motion Citations - A Quick Guide

"Executive Session Motions Now Required to Cite Law," ***Maine Townsman***, Legal Notes, December 2004

State of Maine Freedom of Access Act website

Certificate of Completion of Right to Know Training

"Right to Know: Common Myths," ***Maine Townsman***, May 2007

"E-mail and Right to Know," ***Maine Townsman***, Legal Notes, February 2005

Important issues and considerations include:

I. Purpose of the Law

Maine's "Right to Know" Law, officially called the "Freedom of Access Act" (see 1 M.R.S.A. §§ 401-412), was enacted along with similar "sunshine" legislation in other states following the Watergate scandal of the early 1970s. Its purpose is to assure general public access to both the public proceedings and public records of governmental entities, including municipalities and quasi-municipal entities such as school and sanitary districts.

If there is a question as to whether a particular entity is a public "body or agency" subject to the Act, the court will consider and weigh four factors: "(1) whether the entity is performing a governmental function; (2) whether the funding of the entity is governmental; (3) the extent of governmental involvement or control; and (4) whether the entity was created by private or legislative action." *Town of Burlington v. Hospital District No. 1*, 2001 ME 59, 769 A.2d 857, 863.

The term "public proceeding" is broadly defined by the statute and by the courts to mean the transaction of any function affecting any or all citizens of the State. This includes regular and special meetings and workshops of boards of selectmen, town and city councils, planning boards, boards of appeals, boards of assessment review and school boards and committees and sub-committees of these boards and agencies. It also includes site visits conducted by planning and zoning boards and by historic preservation committees.

The term "public record" is defined very broadly by the statute and by the courts to include "any written, printed or graphic matter or any mechanical or electronic

data compilation from which information can be obtained" in the possession or custody of a public official or agency. This definition goes well beyond paper documents, including board and agency minutes, agendas, town reports, personal notes of board members and councilors, and information in electronic records, computer files, and audio and video recordings.

The law specifically directs that it be liberally construed to promote its purposes–a rule often cited by the courts when finding in favor of public access where the statute's applicability is otherwise uncertain.

II. Public Proceedings

This definition of public proceeding (above) is commonly held to include any municipally authorized board or committee. The term includes not only all regularly scheduled meetings of a board, but also work sessions, workshops, strategy meetings and any other informal meeting of a municipal board or committee, *even if no decisions will be made or no formal action will be taken at the meeting*. Since many boards of three need only two members present to constitute a quorum (the minimum number of members required to be present in order to convene a meeting) even telephone calls and e-mail messages between board members would be considered public proceedings under the Right to Know Law if municipal business is discussed. See Legal Note, above.

Except where the Right to Know Law allows an executive session (see below), all public proceedings must be open to the public and any person shall be permitted to attend. Additionally, persons attending a public proceeding may take notes, tape or film the proceedings so long as they do not interfere with the orderly conduct of the proceeding. It is important to note that the law gives the public the right to attend a public proceeding, but does not provide a right to participate in the meeting. Other than public hearings, the body or agency conducting a public proceeding retains the right to control when and how much public participation is allowed, if at all.

III. Notice

The Right to Know Law does not specify the type of notice required for public meetings. The law merely requires that notice “be given in ample time to allow public attendance and…be disseminated in a manner reasonably calculated to notify the general public” in the area served by the body or agency. 1 M.R.S.A. § 406. The body or agency holding the meeting should choose a method of notification that will reasonably communicate to most people in the community the fact that the meeting will be held. Notice should be given far enough in advance for people to reasonably arrange to attend the meeting. If a true emergency arises so that it is impossible to give meaningful notice to the general public, the board must first notify local representatives of the media by the same means that notice of an emergency meeting was communicated to the other members of the board.

IV. Special Notice Requirements

Other statutes impose special notice requirements for certain types of proceedings; these are listed below. This list is not all-inclusive, but does cite some commonly encountered laws. The laws are listed alphabetically by subject matter, with a brief description of the notice requirement. This is not intended to be used as a substitute for reading the full text of the statute. All time periods stated (e.g., "7 days") are minimums and consist of consecutive days, including weekends and holidays.

In addition, municipal charters and ordinances may contain other special notice requirements. The stricter of these requirements generally will apply.

Charter Commission. 30-A M.R.S.A. § 2103(2): 7 days' notice of organizational meeting. 30-A M.R.S.A. § 2103(5): 10 days' notice of public meeting, newspaper publication required. 30-A M.R.S.A. § 2104(5): amendments to charter require 7 days' notice by newspaper publication.

Comprehensive Plan. 30-A M.R.S.A. § 4324(8): public hearing by local planning committee on proposed plan requires posting of notice at least 30 days before public hearing; proposed plan must be available for public inspection at least 30 days before hearing.

Ordinances and Ordinance Amendments. 30-A M.R.S.A. § 3002 requires 7 days' notice by posting for enactment or revision of ordinances by the legislative body of a municipality. 30-A M.R.S.A. § 4352(9) regarding zoning ordinances and zoning maps, requires more notice, and the notice must be published. For ordinances that can be enacted by municipal officers (i.e., selectmen or councilors): 30-A M.R.S.A. § 3008 (cable TV) requires 7 days' posted notice of meeting. 30-A M.R.S.A. § 3009 (traffic regulation) requires 7 days' posted notice of meeting. Although not specifically required by statute, a 7-day notice also should be given before adopting general assistance ordinances.

Referendum Questions. For towns that will consider a secret ballot referendum question, 30-A M.R.S.A. § 2528(5) requires at least 7 days' notice of public hearing on the subject of the referendum. The hearing must be held at least 10 days before the day of the vote.

Subdivision Regulations. Where no local subdivision ordinance has been adopted, 30-A M.R.S.A. § 4403(2) requires 7 days' notice of the municipal reviewing authority's hearing to adopt, amend or repeal regulations. 30-A M.R.S.A. § 4403(4) requires two notices by newspaper publication of any public hearing to approve a subdivision application, with the first notice published at least 7 days before hearing.

Town Meetings. For annual and special town meetings, 30-A M.R.S.A. § 2523 requires at least 7 days' notice by posting a warrant in one or more conspicuous, public places in town.

Zoning.

a. Contract/Conditional Zoning. For conditional or contract zoning, 30-A M.R.S.A. § 4352(8) requires a public hearing, two notices by newspaper publication (the first of which must appear at least 7 days before the hearing), and posting of notice in the municipal office at least 13 days before the hearing. Notice to abutters is also required, as is notice to a public drinking water supplier if the area to be rezoned contains its source water protection area.

b. New or Amended Zoning Ordinance and Maps/Special Requirements. Many municipalities may still be unaware of the

notice requirements found in 30-A M.R.S.A. §4352(9) and (10) relating to the adoption of a new zoning ordinance or the amendment of an existing zoning ordinance.

If your community is going to adopt a new zoning ordinance or map or amend an existing one, the planning board (or municipal officers, if there is none) must conduct a public hearing on the proposal. The hearing must be preceded by public notice which is:

1. posted at the municipal office at least 13 days before the hearing, and

2. published at least 2 times in a newspaper of general circulation in the municipality. The date of the first publication must be at least 12 days before the hearing and the date of the second publication must be at least 7 days before the hearing. The notice "must be written in plain English, understandable by the average citizen." These requirements for notice apply even to ordinances or maps being adopted or amended under the Mandatory Shoreland Zoning Act and the Growth Management Act.

If a municipality is amending an existing zoning ordinance or map which does not involve shoreland zoning or a zoning ordinance adopted under the Growth Management Act, additional notice requirements may come into play. If the proposed amendment affects only certain geographic areas of the municipality and has the effect of either prohibiting all industrial, commercial or retail uses in a geographic area where any of these uses is currently permitted or if it would permit an industrial, commercial, or retail use where such a use is currently prohibited, certain notice to individual landowners is required:

1. The notice must contain a copy of a map indicating the portion of the municipality affected by the proposed amendments, and

2. The notice must be mailed to the owners of each parcel in or abutting the area affected by the proposed amendment by first class mail at least 13 days before the hearing. Notice must be sent by first class mail to the last known address of the person to whom the property was assessed. The municipal officers must prepare and file with the municipal clerk a written certificate indicating the name and address of persons to whom notice was mailed, the date and location of the mailing, and the person who actually mailed it.

In all instances the municipality must send notice of rezoning to a public drinking water supplier if its source water protection area is located within the area to be rezoned (see below).

c. Zoning, Generally. All of the notice requirements required by section 4352 also apply to the adoption or amendment of flood plain development ordinances, since they fit the definition of "zoning" in 30-A M.R.S.A. § 4301.

d. Shoreland Zoning. Title 38 M.R.S.A. § 438-A (1-B) requires that a municipality give landowners written notification (in addition to the notice under § 4352(9)) when their property is being considered for placement in a resource protection district. This notice shall be by first-class mail to the last known address of the person against whom property taxes are being assessed for each parcel included, and must be sent at least 14 days before the planning board hearing.

e. Source Water Protection Area. When a proposed land use project is located within the source water protection area of a public drinking water supplier and that project is reviewed by a planning board through a review process that requires notification to abutters, the municipality must notify the public drinking water supplier (30-A M.R.S.A. §4358-A). This notice requirement specifically applies to contract and conditional zoning (30-A M.R.S.A. § 4352(8)); zoning (30-A M.R.S.A. § 4352(9)(E)); and subdivision (30-A M.R.S.A. § 4403(3)) proceedings.

V. Executive Sessions

Strict rules apply to the calling and conduct of executive sessions by municipal boards (see 1 M.R.S.A. § 405(1)-(5)). Board members should especially note the following: Executive sessions may be held only for the limited purpose of the permitted deliberation, and no final action may be taken in executive session. The law requires that a board must first be conducting a properly noticed public meeting before it goes into executive session. In addition, before a board enters executive session, there must be a public motion to enter executive session and the motion must be approved by a public recorded vote of at least 3/5ths of the board members present and voting. The motion to enter executive session must state "the precise nature of the executive session" and must also "include a citation of one or more sources of statutory or other authority that permits an executive session for that business." (Note that the parties must be named before going into executive session to discuss labor contracts or proposals.) *See* "Executive Session Motions – A Quick Guide" above for sample motions. If the board members wish to approve an action after they have discussed a matter in executive session, the board must exit the executive session, return to the public meeting, and take any vote or other formal action in the public portion of its meeting.

The "Right to Know" Law itself only permits closed-door deliberation on eight specific subjects listed in the statute (see 1 M.R.S.A. § 405(6)). (Additionally 36 M.R.S.A. § 841(2) requires that hearings and proceedings related to poverty abatements be held in executive session.) Moreover, the board that meets in executive session bears the burden of establishing the legitimacy of the executive session if its legality is challenged in court (*see Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148). However, certain types of proceedings, namely, those relating to general assistance and concealed weapons permits, are not public proceedings at all (see 22 M.R.S.A. § 4321 and 25 M.R.S.A. § 2006, respectively); therefore, for these subjects, the rules governing executive sessions do not apply (see Information Packet on "General Assistance Confidentiality and Disclosure of Information" for further information).

VI. Confidential Records

The law's definition of "public records," while broad, excludes records designated confidential by other laws (see 1 M.R.S.A. § 402(3)). Because such designations

are widely scattered throughout both State and federal statutes, some commonly encountered exclusions are listed alphabetically below.

Ambulance and rescue records, including medical records, 1 M.R.S.A. § 402(3)(H).

Concealed weapons applications, 25 M.R.S.A. § 2006.

Criminal history and records information, 16 M.R.S.A. § 611 et seq. This law covers only certain records held by municipal police departments; you must read the definition section carefully to identify what is and is not confidential.

General assistance, 22 M.R.S.A. § 4306.

Homeland Security, 1 M.R.S.A. § 402 (3) (L). Records describing security plans or procedures or risk assessments proposed to prevent or propose for acts of terrorism, to the extent release could reasonably be expected to jeopardize the physical safety of governmental personnel or the public.

Identities of minors participating in municipal recreation programs, 1 M.R.S.A. § 402(3)(K).

Income tax information, 26 U.S.C. §6103 et seq. MMA Legal Services routinely advises that tax-related information is not public under most circumstances. This includes FICA withholding and other deductions or withholdings.

Information technology, 1 M.R.S.A. § 402 (3) (M). Records or information describing information technology infrastructure and systems architecture, design, access authentication, encryption or security.

Juvenile records and reports of municipal fire departments regarding the investigation and family background of a juvenile fire setter, 1 M.R.S.A. § 402 (3)(I).

Minors, 1 M.R.S.A. § 402 (3) (K). Personally identifying information concerning minors that a municipality obtains or maintains in providing recreational or nonmandatory educational programs or services, if the municipality enacts an ordinance specifying when this information will not be disclosed.

Nutrient Management Plan, 7 M.R.S.A. § 4204(10) submitted by a person who owns or operates a farm.

Personnel records, 30-A M.R.S.A. § 2702. This includes records pertaining to an identifiable employee and containing the following: medical information (physical and mental problems); performance evaluations and personal references: credit information, information about the personal history, general conduct or character of members of an employee's immediate family; complaints, charges and accusations of misconduct and replies to same, and other information which may result in disciplinary action.

Resumes, applications, references and other information submitted by a person seeking municipal employment, are confidential, but except for letters and notes of reference expressly submitted in confidence, the application, resume, and letters and notes of reference of a successful applicant become public records after that applicant is hired. (Unlisted telephone numbers remain protected.)

Poverty abatement applications, 36 M.R.S.A. § 841.

Protection from abuse, 19-A M.R.S.A. § 4008. This law authorizes the court to order the omission or deletion from publicly available records of the address of the plaintiff or minor child; when a municipal official receives a copy of such an order, he or she must maintain the confidentiality of that address.

Voter address, 21-A M.R.S.A. § 22(3). Where a voter submits to the registrar a signed statement that the voter has good reason to fear for the safety of the voter or the voter's family if the voter's address were public, the registrar shall treat that voter's address only as confidential, and not as a public record.

Moreover, because new statutes regarding confidentiality are enacted almost annually, a thorough search of Maine statutes should be undertaken before granting a request for records. The State of Maine's Freedom of Access website includes a searchable database of confidentiality exceptions under Maine law. (Note: the database does not include confidentiality exceptions created by federal laws).

VII. Mandatory Records

A 2011 amendment to the law now requires that a record be made of all public proceedings of a public body except where *the body* is a purely advisory one. (P.L.2011, c. 320 (eff. 9/28/11)). The new law requires that a record be made of each public proceeding within a reasonable time after the meeting and that the record be open to public inspection. At a minimum, the record must include: (1) the time, date and place of the meeting, (2) the members of the body recorded as either present or absent, and (3) all motions and votes taken, by individual member if by roll call. There is no requirement for detailed minutes of deliberations, although certain types of proceedings may require a detailed record. An audio, video or other electronic recording of a public proceeding is deemed to satisfy this requirement. As noted, advisory bodies that make recommendations but have no decision-making authority are exempt from the record-keeping requirement. See 1 M.R.S.A. § 403.

In addition, the "Right to Know" Law requires a written record, with findings of fact and reasons, in the following instances: (1) denial or conditional approval of a license, permit or certificate (see 1 M.R.S.A. § 407(1)); (2) dismissal or refusal to renew the contract of a public official, employee or appointee (see 1 M.R.S.A. § 407(2)); and (3) "final" employee disciplinary action (see 30-A M.R.S.A. § 2702(B)(5)).

(However, please note that other statutes may require the issuance of written decisions with findings of fact and conclusions of law in other instances or may impose other requirements; e.g. 30-A M.R.S.A. § 2691(3)(E) requires all decisions of a board of appeals to "include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial of relief," and 30-A M.R.S.A. § 4403(6) requires a planning board to make findings of fact in acting upon an application for subdivision approval. Also, conflict of interest law requires certain disclosures related to a vote (e.g., to award a contract) to be filed with the municipal clerk).

Such records must be kept and made available to the general public. Other than these and the written record of the motion to go into executive session, the law does not generally require that a record be made or that information be compiled in a form that does not otherwise exist. If information does not exist in one form

but is available in another, however, the person requesting it must be so informed and invited to inspect and copy it in the form available (*see Bangor Publishing Co. v. City of Bangor*, 544 A.2d 733 (Me. 1988)).

VIII. Inspection and Copying of Public Records

"Every person" – not just residents or taxpayers of the municipality – "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." 1 M.R.S.A. § 408(1). Requests to inspect or copy public records do not have to be in writing. Persons asking to inspect or copy public records shall be granted access "within a reasonable period of time" after making the request. However, inspection, translation and copying may be scheduled so as not to delay or inconvenience the custodian of the records.

The agency or official with custody of a public record may charge a "reasonable fee" to recover the cost of copying. In addition, the agency or official may recover "the actual cost of searching for, retrieving and compiling the requested public record of not more than $10 per hour after the first hour of staff time per request." The actual cost of translation also is recoverable, but there can be no charge for inspection. 1 M.R.S.A. § 408(3).

The agency or official with custody of a public record will have to provide the requester an estimate of time necessary to complete the request and of total cost. If the total cost exceeds $20, the agency or official must inform the requester before proceeding. If the total cost exceeds $100, or if the requester has previously failed to pay costs in a timely manner, the agency or official may require payment in advance. 1 M.R.S.A. § 408(4). The agency or official may waive part or all of these costs if the requester is indigent or if release of the records is "in the public interest" and "not primarily in the commercial interest of the requester." 1 M.R.S.A. § 408(6)

If the body, agency or official having custody or control of a public record, refuses permission to inspect or copy or abstract a public record, that body, agency or official shall issue a written denial stating the reasons for denial within five working days of receipt of the request for inspection. 1 M.R.S.A. § 409(1).

IX. Training

Certain State, county and municipal officials are required to complete a training course on Maine's "Right to Know" law (*see* 1 M.R.S.A. § 412). On the municipal level, selectmen, councilors, school board members and *elected* clerks, treasurers, assessors and budget committee members must complete the training. Appointed officials are *not* subject to the requirement (although all officials should be familiar with the Right to Know law). Beginning July 1, 2008, officials who are subject to the requirement must complete the training no later than 120 days after they take the oath of office. The training must be completed each time an individual is elected to a new term of office.

The training can be taken online by reviewing all of the information on the State of Maine's Freedom of Access website (**http://maine.gov/foaa/**) under "Frequently Asked Questions" (this is a self-study option and is free of charge). The requirement can also be met by attending any other training that includes all of the information on the State's website. To verify that the training has been completed, officials must make a written or electronic record certifying that they have completed the training, identifying the training completed and the date of completion. This record must be kept by the official or filed with the municipality.

Forms for certifying compliance are available as a link above or the State's website at: **http://www.maine.gov/foaa/Training/CertificationofCompletion.pdf.**

X. Violations

Willful violations of the law are punishable by a civil forfeiture (fine) of up to $500, payable by the governmental entity whose officer or employee committed the violation (see 1 M.R.S.A. § 410). Also, in an expedited appeal, a Superior Court may order the disclosure of wrongfully withheld public records and may invalidate action illegally taken in executive session (see 1 M.R.S.A. § 409).

Date of last revision: 1/12

This packet is designed to provide general information and is not intended as a substitute for legal advice for specific situations. The statutes and other information herein are only current as of the date of publication.