

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

# STATE OF MAINE

Inter-Departmental Memorandum Date April 6, 1977

To Maine Milk Commission

Dept. Agriculture

From Donald G. Alexander, Deputy

Dept. Attorney General

Subject Freedom of Access Law: Working Sessions

In reply to your question as to whether a working session meeting of the Maine Milk Commission with its independent milk economics expert is a "public proceeding" under the Freedom of Access law, 1 M.R.S.A. §§ 401 - 410, we answer affirmatively. The described meeting comes within the limits of the Freedom of Access law, does not meet the requirements for an "executive session" and is therefore a public proceeding.

## Opinion

For the purposes of the Freedom of Access law, there are two ways in which bodies or agencies covered by the Act (as the Maine Milk Commission clearly is, see Sec. 402, Sub-§ 2, sub-§ B) may meet to transact business. They may do so in a public proceeding, defined in 1 M.R.S.A. § 402, sub-§ 2 as "the transactions of any functions affecting any or all citizens of the state." To this sweeping definition specific exceptions are made, as discussed below. If the "transaction" of a "function" does not fall within an exception, it is a public proceeding, to which § 403 applies to require that the proceeding and any record thereof be open to the public.

"Executive session", the exception to public proceedings, is the second manner in which public agencies or bodies may meet to transact business. The term "executive session" is not defined in the Act, but implicitly such a session is not a public proceeding and therefore § 403 is not applicable. Section 405 of the Act specifies conditions under which an executive session may be held. Sub-§ 6 of § 405 limits the subjects which may be considered at an executive session to those seven specified therein "and no others." The legislative history of the Act shows that the House debated an amendment deleting from the bill words "and no others." Legislative Record, 1975, Vol. 1; House, May 19, 1975, page B-1122. Proponents of the amendment argued that requirements that a body call for executive session by public, recorded, 3/5 vote (§ 405, sub-§ 3), specify the subject of an executive session (§ 405, sub-§ 4), and limit discussion to the specified subject (§ 405, sub-§ 5) protected the public's right to know while allowing flexibility to public bodies. Opponents of the amendment, arguing for retention of the words "and no others," pointed out that to delete those words would leave virtually unchanged the prior law, which permitted executive session for virtually any purpose (1 M.R.S.A. § 404 (1959)). The amendment failed, 118 to 11 (Legislative Record, supra, page B-1123), a clear indication that the limits of § 405 sub-§ 6 are to be strictly adhered to.

The matters to be discussed by the Commission and its expert do not fall within the scope of deliberations permitted in an executive session. Section 405 sub-sub-§ A of sub-§ 6, the only section even arguably relevant, permits in executive session

". . . discussion or consideration of the employment . . . assignment, duties . . . (or) evaluation . . . of . . . employees of the body or agency . . . ."

Section 405 sub-§ 6, sub-sub-§ A, sub-sub-sub-§ 1, however, limits such discussion to occasions when

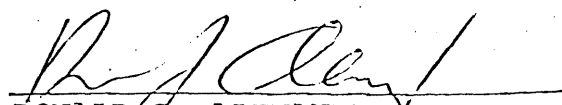
". . . public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated."

It might be argued that potential for damage to reputation or for invasion of privacy exists. For instance, the Commission might find its experts work inadequate and subject him to criticism. Or, his report might be protected by the privacy accorded a "work product" until accepted by the Commission. The arguments are not strong and would be likely to run afoul of a charge that the executive session had been used "to defeat the purposes of this chapter," as forbidden by § 405, sub-§ 1.

There remains the question whether the session you describe might be one which falls outside the Freedom of Access Law altogether. The issue is essentially whether the provisions of 7 M.R.S.A. § 2954 in effect establish another form of agency proceeding not covered by the Freedom of Access law. Section 2954 outlines the Commission's duties and the required procedure in milk pricing hearings. Among the kinds of information on which pricing decisions are to be based is

". . . data received through the implementation of information gathering procedures of its rules and regulations. . . ."

To read the phrase "information gathering procedures of (the Commission's) rules and regulations" to create a procedure by which the Commission can act outside the limits of the Freedom of Access Act would defeat the apparent intent of the Legislature in that Act that "transactions of any functions affecting any or all citizens of the State" by bodies such as the Commission be conducted openly unless specifically excepted by the Act. There may be information gathering procedures which do not fall within the Freedom of Access Act, but the described meeting between the Commission and its expert is not one of them.

  
DONALD G. ALEXANDER  
Deputy Attorney General