

MAINE STATE LEGISLATURE

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RICHARD S. COHEN
ATTORNEY GENERAL



Stone
79-99
STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 17, 1979

Honorable James McBreairty
Senate Chambers
State House
Augusta, Maine 04333

Dear Senator McBreairty:

I am writing in response to your oral request of this date inquiring of us whether or not the Joint Standing Committee on Energy and Natural Resources may conduct an executive session to consider the pending confirmation of Richard Barringer as Commissioner of the Department of Conservation.

The Maine Freedom of Access Law, 1 M.R.S.A. §§ 401-410 provides generally that proceedings of agencies of the State of Maine must be conducted publicly. This requirement applies to the Legislature of the State and its committees and subcommittees. 1 M.R.S.A. § 402(2)(A). The Freedom of Access Law does, however, contain certain exceptions to this general requirement. Subsection 6(A) provides that Executive Sessions may be held regarding:

"Discussion or consideration of the employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of public officials, appointees or employees of the body or agency or the investigation or hearing of charges or complaints against persons subject to [certain enumerated conditions]"

An analysis of the language of the above-quoted exception reveals some ambiguity regarding its application to this situation. On the one hand it can be argued that the exception is only applicable to a discussion of the "appointment" of "public officials, appointees, or employees of the body or agency." Since the Commissioner of the Department of Conservation is not an official, appointee or employee

of the Joint Standing Committee on Energy and Natural Resources, it can be argued that the language of this paragraph is inapplicable to consideration of his confirmation by the Committee. Thus construed, the language of this exception would not encompass situations where the Committee was merely reviewing the appointment of an official to a coordinate branch of government, and therefore the Committee could not conduct an executive session.

An alternative construction of the section would rely more heavily on the apparent intent of the exception. It can be fairly argued that the public policy behind enactment of this exception was to protect the privacy of public officials and employees. In recognition of this privacy interest, the section may be read to cover confirmation hearings of gubernatorial appointees. While clearly the language of the statute on its face encompasses actions of agencies regarding their own employees, it would be logically inconsistent if the exception did not also apply to actions of legislative bodies that were a part of the employment process and which also affected the privacy rights of the individual under discussion. Assuming that the section was intended to protect privacy rights, it seems logical that it should be construed broadly enough to cover deliberation of legislative committees who are involved in the appointment and confirmation process of public officials even though they are not themselves the employing body. Reading the statute with this consideration in mind, one could conclude that an executive session would be permitted in this situation.

In addition to subsection 6(A), it is also necessary to look at subsection 6(F) of § 405. Subsection 6(F) provides in essence that a body or agency may discuss privately those records which are themselves not subject to public disclosure. Section 402(3)(C) provides that working papers used or maintained by legislators to prepare reports for consideration by the Legislature are not public records. In this case it may well be that individual members of the Joint Standing Committee have documents in their possession which are relevant to their consideration of the issue now pending before them. Assuming that such documents have thus far been maintained as non-public records, they would probably be subject to the exemption from disclosure. Therefore, reading 402(3)(C) in conjunction with 405(6)(F), it can be concluded that, at least as to private papers in the possession of legislators, discussion of those documents in regard to the pending appointment may take place in executive session.

In addition to the foregoing, we understand that it has been argued that § 405(6)(A) does not apply at all to the legislative confirmation process, since at the time of its enactment the confirmation process for gubernatorial appointments were accomplished through the Executive Council. However, a review of the legislative history reveals that the Freedom of Access Law in its current form was enacted in the same legislative session that revised the confirmation process. The Freedom of Access Law was repealed and replaced by P.L. 1975, Chapter 758. The statute authorizing the Commissioner of Conservation to be appointed by the Governor subject to confirmation by the Senate was enacted by P.L. 1975, Chapter 771, § 156. Both the enactment of the Freedom of Access Law and the statute requiring legislative confirmation of the Commissioner were enacted in the same Special Legislative Session of 1976. Thus, it cannot be said that the Legislature was not aware of the altered confirmation process when it enacted the Freedom of Access Law. It seems reasonable to conclude that § 405(6)(A) was intended to apply to deliberation on such issues.

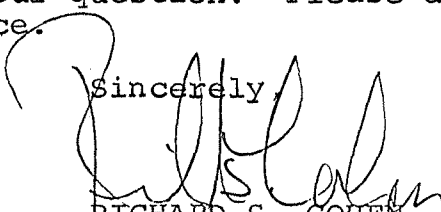
Finally, the general statute dealing with the confirmation procedures are to be found in Title 3 M.R.S.A. § 151. That section sets forth the mechanism for Senatorial confirmation of gubernatorial appointments. Among other things, the section requires a "public hearing on [a] nomination." The section also provides that "at the hearing, the committee shall take oral or written testimony which shall be limited to relevant comments and questions regarding the qualifications of the nominee to carry out the duty of the office." The mandate of this section appears to be that the legislative committee is required to conduct a public session for the purpose of hearing comments on the prospective Commissioner. The section does not, however, address the question of whether the committee may deliberate in executive session.

Having thus reviewed the various considerations and statutory provisions bearing upon the question asked by you, it is my conclusion that, although the question is not entirely free from doubt, the Joint Select Committee on Energy and Natural Resources is entitled to conduct an executive session to consider and discuss the appointment of Richard Barringer as Commissioner of Conservation. On balance, we view § 405(6)(A) as contemplating that the bodies involved in the appointing process may deliberate privately. Having made that general conclusion, however, any executive session is subject to the following limitations:

1. An executive session may be called only by a public recorded vote of 3/5ths of the members present and voting (§ 405(3));
2. The motion to go into executive session must indicate the precise nature of the business of the executive session (§ 405(4));
3. No other matter may be discussed in the executive session other than that covered by the motion (§ 405(5));
4. The executive session may be held only if the committee determines that a public discussion "could be reasonably expected to cause damage to the reputation or the [nominee's] right to privacy" (§ 405(6)(A)(1));
5. The individual under discussion is entitled to be present at the executive session (§ 405(6)(A)(2));
6. The individual under discussion has the right to request, in writing, that the session be opened to the public, which request must be honored by the Committee (§ 405(6)(A)(3));
7. Any persons bringing charges, complaints or allegations regarding the conduct of the nominee are entitled to be present (§405(6)(A)(4); and
8. Any final action on the nominee by the Committee is required to be taken in open session (§ 405(2)).

I hope this answers your question. Please advise me if we can be of further assistance.

Sincerely,


RICHARD S. COHEN
Attorney General

RSC:mfe

cc: Richard Barringer
David Flanagan