

# MAINE STATE LEGISLATURE

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

September 26, 1985

Dr. Lloyd Ohlin, Chairman  
Blue Ribbon Commission on Corrections  
State House  
Augusta, Maine 04333

Dear Chairman Ohlin:

You have requested this Office, in your capacity as Chairman of the Blue Ribbon Commission on Corrections, to provide its Opinion as to whether the meetings and records of that Commission are subject to the Maine Freedom of Access Law, 1 M.R.S.A. § 401 et seq. For the reasons which follow, it is the Opinion of this Department that this Commission is not a "state agency or authority" within the meaning of that Law, and that therefore its meetings and records are not public.

Section 402(2) of the Freedom of Access Law defines the range of entities whose meetings must be held in public:

The term "public proceedings" as used in this chapter shall mean the transactions of any functions affecting any or all citizens of the State by any of the following:

A. The Legislature of Maine and its committees and subcommittees;

B. Any board or commission of any state agency or authority, the Board of Trustees of the University of Maine and any of its committees and subcommittees, the administrative council of the University of Maine, the Board of Trustees of the Maine Maritime Academy and any of its committees and subcommittees; and

C. Any board, commission, agency or authority of any county, municipality, school district or any other political or administrative subdivision.

The issue presented by this inquiry is whether the Blue Ribbon Commission on Corrections is a "state agency or authority" within the meaning of paragraph B of this Section. There is no legislative history relating to this issue, nor has it been the subject of any judicial interpretation. The question of what is a "state agency or authority" has, however, been the subject of several prior Opinions of this Office. The approach taken by these Opinions has been to ask a series of questions regarding the entity in question, and then to balance the responses to determine the status of the entity for purposes of the Freedom of Access Law.

The questions commonly asked have been as follows:

1. Is the entity created by statute, or by some other means such as an Executive Order? If it is not created by statute, it is more likely not to be considered a "state agency or authority."

2. Is the entity's existence limited in time? The more the limitation, that is, the more that the entity is ad hoc in nature, the more that it is likely not to be found a "state agency or authority."

3. What is the method of selection of the entity's members? The more that the members of the entity are chosen by some non-statutory means, the more likely that it will not be found to be a "state agency or authority."

4. Does the agency receive any public funds? The more that the agency is funded from a private source, the more it is likely that it will not be found to be a "state agency or authority."

5. Are the members of the entity compensated? If they are not, it is more likely that the entity will not be found to be a "state agency or authority." It should be noted, incidentally, that none of the past Opinions distinguish between the provision of expenses, as opposed to a per diem over and above expenses, in resolving this question.

6. Does the entity exercise governmental power, or is it only advisory? The more that the entity is advisory in nature, the more it is not likely to be found to be a "state agency or

authority."<sup>1/</sup>

The Opinions from which this list of questions has been distilled, copies of which are attached, are as follows: Op.Me.Att'y Gen. (July 12, 1976) (Governor's Tax Policy Committee is not a state agency); Op.Me.Att'y Gen. (December 15, 1976) (Citizens Dickey-Lincoln Project Impact Review Committee is not a state agency); Op.Me.Att'y Gen. (May 17, 1977) (Joint Select Committee on State Policy for Preservation, Development and Utilization of Historical and Cultural Records is a committee of the Legislature); Op.Me.Att'y Gen. (July 26, 1978) (Maine Potato Council is not a state agency); Op.Me.Att'y Gen. (July 18, 1979) (Budworm Policy Review Committee not a state agency); Op.Me.Att'y Gen. 80-95 (Interrelations Committee of School Administrative District No. 53 and Maine Central Institute is a local agency).

The answers to the foregoing questions as they relate to the Blue Ribbon Commission on Corrections, as this Office understands them, are as follows:

1. The Commission was not created by direct legislative act. The only acknowledgment of its existence by the Legislature appears to have been the appropriation of \$25,000 to the Department of Corrections in a 1984 appropriations act, P.L. 1983, ch. 824, pt. A, the relevant portion of which is attached. This legislative action stands in sharp contrast, for example, to that which created the permanent Maine Correctional Advisory Commission, 34-A M.R.S.A. § 1204, a copy of which is attached.
2. Inasmuch as the Commission has a limitation on its appropriation, it necessarily has a limited life, and therefore is not permanent.
3. The members of the Commission were selected entirely by the Governor, who determined not only their identity, but also their number, since there is no legislation guiding him as to how to constitute the Commission.

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<sup>1/</sup> On this point, it should be noted that one of the Opinions, Op.Me.Att'y Gen. 80-95, states that an advisory committee is not "automatically excluded" from being a "state agency or authority", since the language of Section 402(2) provides that a "public proceeding" shall include the transaction of "any functions" of any of the entities covered by the section, and that the provision of advice could be considered a "function." Id. at 5-6. While this Opinion concerns a local entity, rather than a state entity, its reasoning would appear to apply to the latter since the phrase "any functions" applies to both classes of entities.

4. The Commission is funded entirely from public sources, the \$25,000 appropriation being used for compensation to the members of the Commission for their expenses, as well as for certain administrative expenses, including the salary of a non-permanent "project" employee, Ms. Marguerite Brunette.

5. The members of the Commission receive compensation for their expenses for attending meetings of the Commission, but receive no per diem.

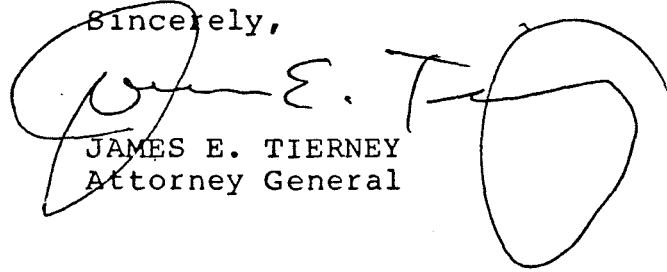
6. The Commission's functions are advisory only.

Weighing these various factors, it would appear that this Commission should not be considered a "state agency or authority" for purposes of the Freedom of Access Law. Although it has been provided a modest amount of public funds, it cannot be said to have been created by statute, in addition to which it is limited in its life, it was created entirely by the Governor without legislative direction, it is advisory in nature, and its members do not receive compensation above their expenses. The only factor suggesting that it might be a "state agency or authority" for purposes of the act would appear to be the provision of \$25,000 by the Legislature for its operating expenses. In the Opinion of this Department, however, this action is not enough to manifest a legislative intention that a "state agency or authority" within the meaning of the Act be created. Rather, this Office is of the view that, like the various committees not found to be state agencies in the prior Opinions of this Office cited above, the Blue Ribbon Commission on Corrections is an ad hoc advisory committee which is free to meet in whatever manner it chooses to provide its advice to the Governor.

It remains only to determine the extent to which documents in the possession of the Commission are "public records" within the meaning of § 402(3). The answer to this would appear to follow directly from the answer to whether the Commission is a "state agency or authority" for purposes of subsection (2). Since it is not a "state agency or authority" for purposes of that paragraph, it would appear clear that it is not covered by subsection (3), which renders public the records of "an agency or public official of this State". Thus, the documents of the Commission are not "public records" within the meaning of the Freedom of Access Law. Needless to say, however, upon the formal transmission of any report of the Commission to the Governor, such a document would lose its character as an internal Commission document; and, because it would then be in the possession of a "public official of this State", it would become public at that time.

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Tierney". The signature is stylized with large, sweeping loops and is positioned above the typed name.

JAMES E. TIERNEY  
Attorney General

JET/ec

	<u>1983-84</u>	<u>1984-85</u>
Division of Probation and Parole as required by the First Regular Session of the 111th Legislature.		
State Prison		
All Other	95,053	75,000
Provides funds for projected workers' compensation expenditures in excess of amounts included in the 1984 fiscal year budget and for anticipated lump sum settlements for fiscal year 1985.		
Unemployment Compensation - Corrections		
Personal Services	10,202	4,896
Provides funds for increased unemployment compensation requirements.		
Capital		
Construction-Repairs-Improvements - Corrections		
Capital Expenditures		75,000
Provides funds for repair to the Bangor Prerelease Center and the State Prison.		
Correctional Services		
All Other		284,255
Provides funds to continue and expand community-based services for adult and juvenile correctional clients.		
Administration - Corrections		
All Other		25,000
Provides funds for Governor's commission established to		

Changes or additions in text are indicated by underline; deletions by ~~strikeouts~~

1983-84

1984-85

examine problems in the criminal justice system and develop a master plan relating to institutional overcrowding, judicial sentencing and community corrections.

Correctional Center - Maine

Positions

Personal Services

Provides funds for a Personnel Officer and a Clerk Typist II position.

(2)  
38,046

Youth Center - Maine

Positions

Personal Services

All Other

Provides funds for a Literacy Volunteer Coordinator position and increased psychiatric services.

(1)  
16,430  
15,168

Administration - Corrections

Capital Expenditures

Provides funds to purchase a computer terminal and printer at each of the 3 institutions and the probation and parole offices.

60,000

Correctional Center - Maine

Positions

Personal Services

Provides funds for a Nurse II and a Medical Secretary position.

(2)  
32,506

State Prison

Positions

Personal Services

(11)  
194,423  
2,670

Changes or additions in text are indicated by underline; deletions by ~~strikeouts~~



A. Any request by a committed offender, informally adjusted juvenile or contract client for action by the office and all written records or accounts related to the request shall be confidential as to the identity of the requesting person.

B. The records and accounts may be released only as provided in section 3003.

1983, c. 459, § 6, eff. Jan. 15, 1984.

**Derivation:**

1975, c. 507.

Former § 1-A of title 34.

**§ 1204. Maine Correctional Advisory Commission**

The Maine Correctional Advisory Commission, as established by Title 5, section 12004, subsection 10, is within the department.

1. **Composition.** The commission shall consist of 12 members to be appointed as follows:

A. One member from the House of Representatives appointed by the Speaker of the House;

B. One member from the Senate appointed by the President of the Senate; and

C. Ten representative citizens appointed by the Governor, including at least one full-time nonadministrative employee from the correctional system and at least one former inmate of the correctional system.

2. **Chairman.** The Governor shall designate the chairman of the commission.

3. **Duration of appointments.** The duration of appointments is determined as follows.

A. Of the first gubernatorial appointments, 4 shall be for terms of 3 years, 3 shall be for terms of 2 years and 3 shall be for terms of one year.

B. Appointments after the first gubernatorial appointments shall be for terms of 3 years, plus the time period until a successor is appointed.

C. Legislative appointments shall be for the legislative term of office of the person appointed.

4. **Expenses.** Commission expenses shall be treated as follows.

A. Each member of the commission shall be compensated according to the provisions of Title 5, chapter 379<sup>1</sup>.

B. The commission may receive public and private grants to aid in defraying the expenses of its operation.

5. **Duties.** The commission shall:

A. Act in an advisory capacity to the commissioner in assessing present programs, in planning future programs and in developing ongoing policies to meet the correctional needs of the State;

B. Regularly advise the executive, legislative and judicial branches of government concerning correctional policy;

C. Issue a report containing the results of its studies to the Legislature, the Governor and the commissioner on December 31st of each year;

D. Meet as often as necessary, at the discretion of its chairman; and

E. Adopt its own rules of procedure necessary to carry out its duties.

1983, c. 459, § 6, eff. Jan. 15, 1984; 1983, c. 581, § 8, eff. Jan. 16, 1984; 1983, c. 812, §§ 256, 257.

<sup>1</sup> Section 12001 et seq. of title 5.

1983 Amendments. Chapter 812, in first paragraph deleted "There is established" at beginning of paragraph; and added ", as established by Title 5, section 12004, subsection 10, is within the department."