

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No. 1161

S.P. 384

In Senate, April 9, 1987

Reference to the Committee on Judiciary suggested and ordered printed.

JOY J. O'BRIEN, Secretary of the Senate
Presented by Senator GAUVREAU of Androscoggin.
Cosponsored by Representative PARADIS of Augusta,
Representative FOSTER of Ellsworth, Senator BLACK of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SEVEN

AN ACT to Clarify the Freedom of Access Law.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRS A §402, sub-§2, ¶C, as amended by PL 1977, c. 164, §1, is repealed and the following enacted in its place:

C. Any board, commission, agency, authority of any one or more counties, municipalities, school districts or any other political or administrative subdivisions whether or not separately incorporated.

Sec. 2. 1 MRS A §405, sub-§6, ¶A, as enacted by PL 1975, c. 758, is amended to read:

1 A. Discussion or consideration of the employ-
2 ment, appointment, assignment, duties, promotion,
3 demotion, compensation, evaluation, disciplining,
4 resignation or dismissal of an individual public
5 officials, appointees or employees official, ap-
6 pointee or employee of the body or agency or the
7 investigation or hearing of charges or complaints
8 against a person or persons subject to the fol-
9 lowing conditions:

10 (1) An executive session may be held only
11 if public discussion could be reasonably ex-
12 pected to cause damage to the reputation or
13 the individual's right to privacy would be
14 violated;

15 (2) Any person charged or investigated
16 shall be permitted to be present at an exec-
17 utive session if he so desires;

18 (3) Any person charged or investigated may
19 request in writing that the investigation or
20 hearing of charges or complaints against him
21 be conducted in open session. A request, if
22 made to the agency, must be honored; and

23 (4) Any person bringing charges, complaints
24 or allegations of misconduct against the in-
25 dividual under discussion shall be permitted
26 to be present; and

27 (5) This subsection does not apply to dis-
28 ussion of a budget or budget proposal, or
29 of an audit or an agency or department-wide
30 evaluation.

31 **Sec. 3. 1 MRSAs §406, as repealed and replaced by**
32 **PL 1975, c. 758, is amended to read:**

33 **§406. Public notice**

34 Public notice shall be given for all public pro-
35 ceedings as defined in section 402, if these proceed-
36 ings are a meeting of a body or agency consisting of
37 3 or more persons and the body or agency will deal
38 with the expenditure of public funds or taxation, or
39 will adopt policy at the meeting. This notice shall

1. be given in ample time to allow public attendance and
2. shall be disseminated in a manner reasonably calcu-
3. lated to notify the general public in the geographic
4. area served by the body or agency concerned. In the
5. event of an emergency meeting, local representatives
6. of the media shall be notified of the meeting, when-
7. ever practical, the notification to include time and
8. location, by the same or faster means used to notify
9. the members of the agency conducting the public pro-
10. ceeding.

11. Sec. 4. 1 MRSA §409, as enacted by PL 1975, c.
12. 758, is amended to read:

13. §409. Appeals

14. 1. Records. ~~If any body or agency or official,~~
15. ~~who has custody or control of any public record,~~
16. ~~shall refuse permission to so inspect or copy or ab-~~
17. ~~stract a public record, this denial shall be made by~~
18. ~~the body or agency or official in writing, stating~~
19. ~~the reason for the denial, within 10 days of the re-~~
20. ~~quest for inspection by any person.~~ Any person ag-
21. grieved by any denial of permission to inspect, copy
22. or abstract a public record may appeal therefrom,
23. within 10 days of the receipt of the written notice
24. of denial, to any District or Superior Court within
25. the State. If a court, after a trial de novo, deter-
26. mines such denial was not for just and proper cause,
27. it shall enter an order for disclosure. Appeals
28. shall be privileged in respect to their assignment
29. for trial over all other actions except writs of ha-
30. beas corpus and actions brought by the State against
31. individuals.

32. 2. Actions. If any body or agency approves any
33. ordinances, orders, rules, resolutions, regulations,
34. contracts, appointments or other official action in
35. an executive session, this action shall be illegal
36. and the officials responsible shall be subject to the
37. penalties hereinafter provided. Upon learning of any
38. such action, any person may appeal to any Superior
39. Court in the State. If a court, after a trial de no-
40. vo, determines this action was taken illegally in an
41. executive session, it shall enter an order providing
42. for the action to be null and void. Appeals shall be
43. privileged in respect to their assignment for trial

1 over all other actions except writs of habeas corpus
2 or actions brought by the State against individuals.

3 3. Proceedings not exclusive. The proceedings
4 authorized by this section shall not be exclusive of
5 any other civil remedy provided by law.

6 4. Attorneys fees. In all actions under this
7 section the prevailing party may be awarded a reason-
8 able attorneys fee and costs incurred in connection
9 with the action, unless the court finds that the po-
10 sition of the opposing party was substantially justi-
11 fied.

12 Sec. 5. 1 MRSA §410, as enacted by PL 1975, c.
13 758, is repealed and the following enacted in its
14 place:

15 §410. Violations

16 For every willful violation of this subchapter,
17 the state government agency or local government enti-
18 ty whose officer or employee was responsible for the
19 violation shall be liable for a civil penalty of \$200
20 payable to the aggrieved party or parties, which pen-
21 alty may be collected in an action brought in the Su-
22 perior Court or District Court. Any such action may
23 be joined with an action under section 409.

24 STATEMENT OF FACT

25 Section 1 of this bill resolves a latent ambigu-
26 ty over whether such organizations as regional plan-
27 ning organizations and other separately incorporated
28 institutions of local government are subject to the
29 freedom of access law. If the governing institutions
30 of municipalities and counties are subject to the
31 freedom of access law, it is hard to see why an in-
32 stitution performing governmental functions in which
33 there is substantial citizen interest, such as plan-
34 ning, should be exempt simply because it includes
35 more than one local government or is organized as a
36 legal entity separate from the governments it serves.

1 Section 2 of this bill resolves a question over
2 the practice of going into executive session to dis-
3 cuss items such as budget proposals when the line
4 item under discussion may be the salary for a partic-
5 ular job or set of jobs. It seems clear that Maine
6 Revised Statutes, Title 1, section 405, subsection 6,
7 paragraph A, was intended to protect individuals from
8 embarrassment that might result if the quality of
9 their performance or charges of misconduct were dis-
10 cussed in public. Frequently, however, public bodies
11 have used this limited authorization as a reason to
12 go into executive session when the topic for discus-
13 sion is not a particular employee, but whether a par-
14 ticular job should continue to exist. The latter
15 kind of discussion is a budget discussion and should
16 be treated as such and held in public.

17 Section 3 amends the requirement for public no-
18 tice of public proceedings so as to eliminate any
19 need to determine whether a public proceeding deals
20 with the expenditure of public funds or taxation or
21 involves adopting policy. It also specifies a gener-
22 al standard for public notice.

23 Section 4 of this bill eliminates the need to ob-
24 tain a written denial of permission to inspect a
25 record, a process for which 10 days is now allowed,
26 before filing an action to compel inspection. More
27 often than not the formal written denial serves no
28 purpose but to delay access to the record for an ad-
29 ditional 10 days. If the court later finds there was
30 a genuine and reasonable doubt whether the record was
31 public, it can find that denial of the right to in-
32 spect was for "just and proper cause." Finally, this
33 section provides that in actions to compel inspection
34 of a public record or to avoid a vote taken unlawfully
35 in executive session, the prevailing party may be
36 awarded attorneys fees, unless the court finds that
37 the position taken by the opposing party was substan-
38 tially justified. This bill authorizes an award of
39 attorneys fees in cases in which the agency holding
40 the record or the body meeting in executive session
41 or the person bringing the suit was acting unreason-
42 ably, but not otherwise.

43 Section 5 of this bill repeals the criminal pen-
44 alty for willful violations and substitutes for it a

1 civil penalty of \$200 that may be recovered by any
2 aggrieved party. The criminal penalty has been very
3 rarely invoked. Most prosecutors treat arguments
4 over the freedom of access law as essentially civil
5 disputes. Yet the citizen concerned in such cases
6 will often have been put to considerable inconve-
7 nience and expense, securing a right to inspect a
8 public record that should never have been denied in
9 the first place. The penalty could only be recovered
10 if the citizen was able to show a willful violation.

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