

Freedom of Access Law: It's Not Easy Keeping Secrets

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The generation that made the nation thought secrecy in government one of the instruments of old world tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.

—Henry Steele Commager¹

INTRODUCTION

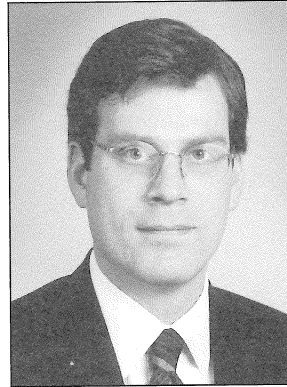
Maine's Freedom of Access Act ("FAA" or "Act")² is the wellspring of a broad public right to open government meetings. Over time this right has become subject to many exemptions, over 80 by the author's count. Each exemption permits government discussion and deliberation of a category of subjects in secret. Concern over inappropriately broad interpretation of these exemptions by public bodies has triggered legislative proposals in the current session aimed at mitigating abuses.³ It is against this backdrop that the Law Court held last summer in *Underwood v. City of Presque Isle* that public bodies have the burden of proving that an executive session was lawful.⁴ The decision in *Underwood* has already been applied to hold that a Town failed to prove that its actions during executive session were within the FAA.⁵ Although *Underwood* did not overrule prior precedent, the Law Court recognized that it was contrary to what "prior opinions may have suggested."⁶

This article will consider the practical effects of *Underwood* on

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governmental bodies subject to the FAA. *Underwood* guides the two basic tasks confronting a public body wishing to hold a closed meeting. The first task is to make an accurate and conservative determination of the scope of the subjects that may be discussed in executive session. This determination should be made from a post-*Underwood* mind-set. Every

subject presumptively cannot be discussed in executive session unless proven otherwise. The second task is procedural, to carefully adhere to the procedures for convening an executive session and to create a supporting record. A review of these two essential tasks in the wake of *Underwood* sheds light on the burden facing public bodies considering whether to enter executive session.

I. FIRST TASK: ERR ON THE SIDE OF PUBLIC ACCESS.

The public has a right to notice⁷ and to broad access to public proceedings. Public proceedings are expansively defined to include "transactions of any functions affecting any or all citizens of the State" by nearly all state, county, or local boards, commissions or committees, including those of the University of Maine, entities controlled by the state, and political and administrative subdivisions.⁸ The most notable set of proceedings excluded from the definition of public proceedings are those of the judiciary, which are governed by specific court rules.⁹ The argument that a fact gathering meeting was not a "public proceeding" was rejected by Justice Lipiez while he was on the Law Court in a well reasoned decision giving the term "transactions" its broad, plain meaning.¹⁰ Overall, the definition of "public proceedings" is very broad, including virtually all meetings of individuals and entities affiliated with the government.

The otherwise broad ambit of "public proceedings" that cannot be closed to the public is undermined by the multitude of exceptions.¹¹ The FAA itself sets forth five protected subjects that may lawfully be discussed in executive session; summarized as follows:

1. Discussion of employment issues only if public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be affected;¹²
2. A school board's discussion of the suspension or expulsion of a student;¹³
3. Discussion of property issues that would prejudice the competitive or bargaining position of the governmental body;¹⁴

4. Negotiations between a public employer and public employees;¹⁵ and

5. Consultations between a public body and its Attorney concerning pending or contemplated litigation, matters that are confidential under the Maine Code of Professional Responsibility, or matters that would clearly place the public body at substantial disadvantage.¹⁶

A practical difficulty is that the Act does not cite or cross-reference the many additional exceptions throughout other areas of Maine law. There are at least seven specific exemptions applicable to public proceedings outside the FAA that can be invoked by a governmental body.¹⁷ In addi-

tion, discussions of information contained in records designated confidential are also closed.¹⁸ By the author's count, there are about seventy statutory exceptions rendering a category of records confidential.¹⁹ Clearly, many special interest groups and programs with confidentiality needs have won the legislature's approval of special protection. Most recently, effective July, 1998 the laws providing confidentiality to municipal and county employee information were broadened in response to a decision granting public access in *Doe v. Dept. of Mental Health*.²⁰ Although an executive session may be held to discuss only specifically enumerated matters and "no others,"²¹ there are many such matters. Thus, the initial task is to determine whether there is any law pertaining to the subject

¹ *Environmental Protection Agency v. Minsk*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, *The New York Review of Books*, Oct. 5, 1972 at 7).

² 1 M.R.S.A. §§ 401-410.

³ Rep. Kevin Glynn (R-South Portland) is sponsoring in the current 119th Session L.D. 205, "An Act to Require Electronic Recording of Closed Sessions of Public Bodies"; and L.D. 437, "An Act to Clarify the Law Regarding Executive Sessions of Public Bodies". The former Bill, L.D. 205, as originally drafted would require public bodies to record executive sessions electronically or by videotape and to make those records public under certain circumstances. The latter Bill, L.D. 437, would require that the parties to a labor negotiation be noted on the record and that a public body must state the case name of pending litigation on the record prior to entering executive session for this purpose. Neither Bill has survived the Judiciary Committee as drafted. For updates on the status of this legislation, please see Rep. Glynn's website, www.glynn.org.

⁴ *Id.*, 1998 ME 166, ¶ 23, 715 A.2d 148. Representative Chick of Lebanon has presented L.D. No. 1857, "An Act To Amend The Freedom of Access Laws," which would clarify that 72-hour notice prior to the public meeting be required. The Act would also require the creation of an agenda listing the items to be discussed at the public meeting and much needed tougher penalties for violations. For the first time, a private party would be able to recover a monetary penalty for a violation of the law.

⁵ *Id.*, AP-98-25, slip op. at 7 (Cumberland Cty. Sup.Ct., August 20, 1998) (Justice Susan Calkins).

⁶ *Underwood*, 1998 ME 166, ¶ 23.

⁷ 1 M.R.S.A. § 406.

⁸ 1 M.R.S.A. § 402(2).

⁹ The Law Court refused to enforce a statute regulating proceedings in Maine trial courts by opening them to the media, finding such regulation to be an unconstitutional violation of the separation of powers. *See* Direct Letter of Address to Joseph E. Brennan, Charles P. Pray and John L. Martin dated April 25, 1986 (signed by every Justice of the Law Court), citing Me. Const. Art. VI, § 1. The court cited its "power to preserve the ability of the judiciary to function in the manner determined to be most conducive to the performance of its assigned task." *Id.* at 6.

¹⁰ *Guy Gannett Publishing Co. v. City of Portland*, CV-92-858, *supra*, at 7.

¹¹ 1 M.R.S.A. § 403. "Except as otherwise provided by statute or by section 405, all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection." *Id.* (emphasis added).

¹² 1 M.R.S.A. § 405(6)(A). Notwithstanding that a closed meeting could otherwise be held on an employment-related issue, the legislature directed that all "budget" and "budget proposal" issues be discussed in public. *Id.* The legislative history of the provision indicates that the terms "budget" and "budget proposal" are meant to be interpreted broadly, specifically including discussions of the salary for a job or set of jobs, and even whether a particular job should continue to exist. House Legis. Record, 113th Legislature (April 9, 1987) (L.D. 1161). Despite what this legislative history indicates about the intent of the budget provision, the legislature failed to amend a provision permitting discussion or consideration of the "compensation" of an individual or group of public officials when that discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated. This may have been an oversight. In sum, the term budget in this context generally will have wide applicability when a public body is considering the expenditure of public funds.

¹³ 1 M.R.S.A. § 405(6)(B).

¹⁴ 1 M.R.S.A. § 405(6)(C).

¹⁵ 1 M.R.S.A. § 405(6)(D).

¹⁶ 1 M.R.S.A. § 405(6)(E).

¹⁷ *See* 3 M.R.S.A. § 427 (legislative investigating committees); 1 M.R.S.A. § 1005 (Commission of Governmental Ethics and Election Practices); 3 M.R.S.A. § 154 (confirmation hearings and pre-hearings); 25 M.R.S.A. § 2006 (concealed firearm permits); 24-B M.R.S.A. § 7014 (sterilization proceedings); 22 M.R.S.A. § 811 (communicable diseases); and 25 M.R.S.A. § 2957 (meetings of the Maine Drug Enforcement Advisory Board).

¹⁸ 1 M.R.S.A. § 405(6)(F).

¹⁹ *See* "Guide to Maine Freedom of Access Law," published by Preti, Flaherty, Beliveau, Pachios & Haley, LLC (1996).

²⁰ *Id.*, 699 A.2d 422 (Me.1997). The language of 30-A M.R.S.A. § 2702 was amended, effective July 9, 1998. Me.Legis.Serv. Ch.769 at 702 (West) to require disclosure only of decisions imposing or upholding discipline against municipal or county employees.

²¹ 1 M.R.S.A. § 405(6).

under consideration for discussion in executive session.

No matter whether a Court or the public body itself is determining the scope of an exemption, a decision is often hampered by the lack of reported authority and the vagueness of many of the exemptions. In making tough interpretive decisions, the public body and the court must keep the policy and purpose of the FAA in mind.²² The Legislature has flatly instructed that the Act be interpreted to promote free and unrestricted access to government decision-making:

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. . . . This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.²³

The Law Court has followed the Legislature's instruction, declaring "to a maximum extent the people's business must be done in public."²⁴ The Courts uniformly reject arguments that an executive session was permissible because it would be impractical, inconvenient, or inefficient to hold a public discussion on a subject.²⁵

Just as the Act itself should be interpreted to promote public access, exceptions to the Act, whether found within the Act itself or in other provisions strewn through Maine law, should be interpreted narrowly. In *Underwood* the Court advised, "any statutory exceptions to the requirement of public deliberations must be narrowly construed."²⁶ The Act and exceptions to it, wherever found in Maine law, are interpreted to promote public access.

The *Underwood* decision confirms how the policy behind the FAA

guides every aspect of cases arising under it, including the procedural issue of burdens of proof. A *ratio decidendi* of *Underwood* was that the "underlying purposes and policies" require a public body prove that its executive session is lawful. The goal of promoting free access has now been applied not only to the substantive provisions regulating access to meetings, but also to a key procedural issue in FAA cases.

By allocating the burden of proof *Underwood* also teaches a mind-set. Public bodies should presume that a subject must be discussed openly and that a closed meeting is presumptively illegal. A decision to hold an open meeting is the best way to avoid a successful challenge. To the extent a public body can deliberate openly it should seek ways to do so, particularly as some of the exceptions to the Act permit a public body the option of going into executive session, rather than requiring it. In addition, courts will carefully police decisions to go into executive session. If there is an argument that an exception does not apply, public policy will frequently dictate that the exception will be found inapplicable. A public body's

decision to go into executive session should be made conservatively, firmly erring on the side of openness.

II. SECOND TASK: ADHERE TO THE PROCEDURE FOR ENTERING EXECUTIVE SESSION AND GENERATE AN ADEQUATE RECORD.

Public bodies should have known all along of the necessity to strictly follow the procedure for convening an executive session, but the consequences are now more clear than ever before: the Town that does not follow the appropriate procedures will find it difficult or impossible to meet its burden of proof. In *Underwood*, the Law Court held:

If the FAA is to be liberally construed and applied to promote its underlying purposes and policies..., the burden should not be on the party asserting a violation to establish what the public body did and said at a meeting from which the party was excluded. Rather, a public body charged with violating terms of the FAA during an executive session has the burden of proving that its actions during the executive session complied with an exception to the FAA's open meeting requirement.²⁷

²² The legislature instructed that executive sessions "shall not be used to defeat the purposes" of the FAA. 1 M.R.S.A. § 405(1).

²³ 1 M.R.S.A. § 401.

²⁴ *Moffett v. City of Portland*, 400 A.2d 340, 347-348 (Me.1979).

²⁵ The argument that government efficiency warrants an executive session is clearly attractive to towns, and was most recently raised by the Town of Scarborough in its brief to Justice Calkins in *Guy Gannett Communications v. Town of Scarborough*, who rejected the argument. The limited legislative history to the Freedom of Access Act does contain a brief but notable discussion by Rep. Henderson of a Bangor ordinance similar to a proposed bill, ultimately passed, that shapes Maine's executive session law. Rep. Henderson noted the opposition of the City Manager and other "small groups" to a Bangor ordinance similar to the proposed state legislation restricting the availability of executive sessions:

[During discussion of a Bangor ordinance similar to the proposed executive session amendments, there] were the traditional. . . reactions from the small groups of people who make decisions on the feeling that they have greater wisdom than the rest, by raising questions about interference, and that people would be listening in too much and might be disrupting the meetings. . . and the City Manager was generally of the same persuasion that [the ordinance] interfered with the smooth functioning and administration of things that maybe people ought not to get involved with.

....
I think [Bangor ordinance restricting the availability of executive sessions] should be extended to all of the citizens in the state and I don't think it would do any harm.

House Legis. Record, 107th Legislature (May 19, 1975) at B1122. The legislature was clearly aware that some objected to public access as an "interference" in the activities of government, but expressly rejected such considerations and passed the law. See also *Ohio ex rel Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St.3d 165, 15 Med.L.Rptr. 2083, 2086 (1988) ("The ends sought by secret discussion of the public's business, no matter

For the first time, the Law Court explicitly dispelled any doubt whether public bodies bear the burden of proving compliance with exceptions to the FAA. The burden of proof has a number of practical implications for proper procedures.

A. Before Executive Session

After making a well considered decision that a subject may permissibly be discussed in executive session, the public body must then properly go into executive session. In light of *Underwood*, sound practice dictates that a public body should create a detailed record supporting its decision. The first step in carrying its burden of proof is to state, on the record, the factual predicate leading the public body to believe an exception applies. For example, if the public body wishes to receive from its attorney updates on the status of pending litigation, the name of the case, its status as pending, and that the town attorney is present and wishes to give an update should be made on the record.²⁸ The public body should deliberate on the record whether the predicate facts warrant an executive session. A statement on the record of the factual predicate will

help to ensure an adequate basis for a decision to go into executive session.

After a factual predicate is on the record, the body must then pass a motion stating the "precise nature of the business of the executive session."²⁹ This motion should set forth on the record the precise subjects for discussion and purpose of the executive session.³⁰ The motion should be akin to a specific agenda for discussion in executive session. The public body should be self-consciously creating a record clearly establishing a reasoned basis to close a public proceeding, and limiting the subjects to be discussed.³¹ A failure to create an adequate record should itself be a basis for finding an executive session illegal, given that the policy behind the Act applies to procedures for invoking executive sessions as much as it does to the substance of the topics discussed. An adequate record is also the only means by which a public body could hope to avoid a time-consuming trial of the facts of the executive session.³² Moreover, a citizen questioning a closed session could be convinced, based on the carefully wrought public record, that the public body complied with the law. The public body itself can also

rely on the record as evidence that it did not discuss impermissible subjects in executive session.

After a satisfactory record is created, the present and voting members of the body must then approve the motion by a public recorded vote of 3/5 of the members.³³

B. During Executive Session

A motion to deliberate on specific subjects permitted by law to be discussed in a closed session does not ensure that those subjects, and only those subjects, will actually be brought up in executive session. Discipline is required. Discussion cannot extend beyond the scope of the motion to go into executive session,³⁴ or beyond the scope of the particular exemption justifying an executive session. For example, no response may be made to a question by a member of a public body that calls for an answer beyond the scope of the executive session.³⁵ While there is not necessarily a bright line between permissible and unlawful deliberation,³⁶ the public body must keep in mind that a court may be asked to make an after-the-fact review of deliberations held in executive session to determine if in fact only matters that could legally be discussed were discussed.³⁷ If discussion strays, a challenge should succeed.

Because the public body carries the burden of proving that discussion was limited only to those permitted subjects of deliberation in executive session, it should consider keeping contemporaneous notes or minutes of the subjects discussed in executive session. Rep. Kevin Glynn (R-South Portland) introduced legislation this session that would have required electronic or video tape recording of executive sessions.³⁸ The proposal has not survived the Judiciary Committee. For a public body considering a highly contentious issue, this may make sound voluntary practice. These descriptions or recordings may have

how admirable or altruistic, never justify the means.").

²⁶ *Underwood*, *supra*, at ¶ 16. See also *Moffett v. City of Portland*, 400 A.2d 340, 348 (Me.1979) ("[A] corollary to such liberal construction of the Act is necessarily a strict construction of any exceptions to the required public disclosure."); *Bangor Pub. Co. v. City of Bangor*, 544 A.2d 733, 736 (Me.1988) ("Because the Freedom of Access Act mandates liberal construction of its terms . . . , we must interpret strictly any statutory exceptions to its requirements.").

²⁷ *Underwood v. City of Presque Isle*, 1988 Me. 166 ¶ 19.

²⁸ See *Vella v. Town of Camden*, 677 A.2d 1051, 1055 (citations omitted) (Me.1996).

²⁹ 1 M.R.S.A. § 405(4).

³⁰ In *Vella v. Town of Camden*, the Law Court upheld an executive session in which the town attorney updated the town council on the status of litigation where the record "clearly established" that the "stated . . . purpose" of the session was a permitted subject of closed deliberation. *Id.*, 677 A.2d at 1055.

³¹ See *Vella*, 677 A.2d at 1055 (upholding executive session where the record "clearly established" a stated purpose to confine discussion to permitted subjects of deliberation) and *Wisconsin ex re. Journal/Sentinel, Inc. v. Pleva*, 16 Med.L.Rptr. 2262, 2265 (Wisc.Ct.App.1989) (a "reasoned basis to close" a public proceeding must be placed on the record).

³² *Underwood*, *supra* at ¶ 22.

³³ 1 M.R.S.A. § 405(3).

³⁴ 1 M.R.S.A. § 405(5).

³⁵ *Guy Gannett Publishing Co. v. City of Portland*, CV-92-858, slip op. at 12 (Cumberland Ct. Sup. Ct., Sept. 24, 1992) (Lipez, J.) at 10 n.9.

³⁶ *Underwood*, *supra*, at ¶ 16.

³⁷ *Guy Gannett Publishing Co. v. City of Portland*, CV-92-858, slip op. at 12 (Cumberland Ct. Sup. Ct., Sept. 24, 1992) (Lipez, J.) at 10.

³⁸ See, *supra*, note 4.

to be disclosed to the Court *in camera* to show compliance with the law or to the public in entirety or as redacted if there were a violation. Notes or minutes may also be the basis for sworn statements that may be submitted to the judge *in camera*.³⁹ To the extent the public body fails to keep contemporaneous records of the subjects discussed in executive session, it opens itself to successful challenges. Minutes or notes from a meeting could be given greater probative weight than vague affidavits proffered after a meeting, particularly when the public body did not make a unanimous decision to go into executive session. It would be unfortunate if different members of the same public body have differing recollections of subjects discussed in executive session and offer conflicting affidavits. The public body must be ready to meet its burden of proof if challenged.

C. After Executive Session

The ultimate decision or "official action" on any subjects discussed in a closed session must be made publicly after the executive session is over.⁴⁰ For example the decision to narrow the number of candidates for a position is an "official action" that cannot be made in executive session.⁴¹ The final vote, or action, even if no final vote is required, must be public. Thus, even when a public body may deliberate in a closed session, it may never keep its final decision from the public.

A public body which recognizes that, for one reason or another, an executive session should not have been held, or that subjects were improperly discussed in executive session, ought to immediately come clean. The public body should admit its error and voluntarily describe what happened in executive session, answer questions about the contents of the executive session, and, if appropriate, hold a new session open to the public.

Of course, any action taken in executive session must be nullified.⁴² As former Law Court Justice Lipez recognized, there is no way to recreate secret deliberations,⁴³ so efforts should be made throughout executive session to avoid any improper subjects.

CONCLUSION

The line of cases leading to *Underwood* has practical implications for public bodies. The burden of proving compliance with the FAA requires public bodies to set forth a reasoned basis for going into executive session on the record. Insufficient care in creating a record invites a successful challenge, and likely will require a costly fact-finding trial in the Superior Court if the public body is to have any hope of success. Public bodies must recognize that their responsibility is to err on the side of openness. Courts will enforce this

duty. Open government deliberation is not only a rule of law, but a matter of public responsibility. According to Madison, "[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy..."⁴⁴ To the extent the public can have access to governmental decision-making, it should. Although a burden of proof is a procedural tool to decide disputes, it should have a considerable effect on the number of executive sessions held and the care with which public bodies choose to go into executive session.

³⁹ *Id.* at 11.

⁴⁰ 1 M.R.S.A. § 405(2).

⁴¹ *Guy Gannet Communications v. Town of Scarborough*, AP-98-25, slip op. at 7 (Cumberland Cty. Sup.Ct., August 20, 1998) (citing *Booth Newspapers v. University of Michigan Board of Regents*, 507 N.W.2d 422, 430-431 (Mich.1993)).

⁴² *Id.*

⁴³ *City of Portland*, *supra* at 7-9.

⁴⁴ 9 Writings of James Madison (Hunt Ed. 1910) 103.

