

STATE OF MAINE

Inter-Departmental Memorandum Date August 31, 1979

To Patricia Ryan

Dept. \_\_\_\_\_

From John Carnes

Dept. \_\_\_\_\_

Subject \_\_\_\_\_

QUESTION

Is "Executive Session" an appropriate forum for Commission deliberation concerning possible future Commission action or policy related to circumstances surrounding cases which have come before the Commission?

DISCUSSION

Maine's Freedom of Access statute, 1 M.R.S.A. §401, states:

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. It is further the intent of the Legislature that clandestine meetings, [or] conferences...not be used to defeat the purposes of this subchapter.

Section 402 defines "public proceeding" as:

...the transactions of any functions affecting any or all citizens of the State by any of the following: B. Any... Commission of any state agency or authority...

Section 403 states:

Except as otherwise provided by statute or by section 405 [Executive Sessions] all public proceedings shall be open to the public...

Section 405, entitled Executive Sessions, states that agencies may hold executive sessions subject to certain specified conditions. The possibly relevant conditions include the following:

§405(1) These sessions shall not be used to defeat the purposes of this subchapter as stated in section 401.

§405(6) Deliberations may be conducted in executive sessions on the following matters and no others:

(A) 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 the following conditions...

I interpret the word "persons" to refer to the "public officials, appointees or employees of the body or agency" mentioned earlier in the sentence. If the Commission would interpret the word to mean people generally, then it

would have to apply the conditions listed in §405(6)A (1-4), which are:

- (1) An executive session may be held only if public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated;
- (2) Any person charged or investigated shall be permitted to be present at an executive session if he so desires;
- (3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against him be conducted in open session. A request, if made to the agency, must be honored; and
- (4) Any person bringing charges, complaints or allegations of misconduct against the individual under discussion shall be permitted to be present.

It is my opinion that Section 405(6) A, would allow executive sessions for deliberations concerning the employment, evaluation or termination, etc., of a Commission employee, but does not allow for executive session for deliberations concerning future Commission action or policy related to circumstances surrounding discrimination cases which have been before the Commission.

Section 405(6) E, allows executive sessions for:

Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's counsel to his client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State...agency or person at a substantial disadvantage.

If the Commission intends to have its attorney present during its deliberations and if the deliberations will concern the relationship between the Commission's legal rights and duties and the establishment of future courses of action or policy, §405(6) E, would arguably allow for executive session. The same would be true if the Commission felt that discussions with its attorney concerning certain matters would place the Commission at a substantial disadvantage legally, if the public gained premature knowledge of the consultations.

Section 405(6) F, allows executive sessions for:

Discussion of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute.

Section 2.08(D) of the Commissions Procedural Rules states that conciliation efforts will be held confidential. Presumably predetermination settlement efforts are also to be held confidential pursuant to this rule. Therefore, if the Commissions deliberations concerning future action and policy will involve the discussion of settlement efforts made during the processing of a case which has been before the Commission, such portion of the deliberations would be held in executive session.

Section 410 states that a willful violation of the requirements of this subchapter is a class E crime.

CONCLUSION

Deliberations by the Maine Human Rights Commission concerning possible future action and/or policy which relate to the circumstances surrounding cases which have come before the Commission, fall within the definition of "public proceeding."

The Legislature has expressed its intent that, unless specifically excepted by statute, all deliberations of public proceedings be conducted openly.

It is my opinion that, if the individual members of the Commission intend to meet as a body, for the purpose of engaging in the above mentioned deliberations, such deliberations must be conducted in public unless: (1) the discussions will involve consultation with legal counsel regarding the Commission's legal rights and duties, or (2) the deliberations will involve discussion of predetermination settlement and/or conciliation efforts.