

STATE OF MAINE
CUMBERLAND, SS
CLERK'S OFFICE
SUPERIOR COURT

STATE OF MAINE

CUMBERLAND, ss.

SUPERIOR COURT
Civil Action

Docket No. CV-92-858

92 SEP 24 PM 1:49

GUY GANNETT PUBLISHING)
COMPANY,)

Plaintiff)

v.)

THE CITY OF PORTLAND,)
et al.,)

Defendants)

DECISION AND ORDER

The matter before the court is an appeal under Maine's Freedom of Access Law (1 M.R.S.A. § 401 *et seq.*) This appeal was the subject of argument and a limited trial of the facts on September 11, 1992. At the hearing, the court denied defendant's motion to dismiss, which was premised on the alleged failure of plaintiff to comply with the procedural requirements of Rule 80B.¹ The court then proceeded to hear

¹ The court explained at the hearing that the provisions of 1 M.R.S.A. § 409, giving the assignment of appeals under the Freedom of Access Law scheduling priority over other matters before the court, justified a departure from the normal scheduling procedures under Rule 80B. The court further concluded that plaintiff had not violated the requirement of Rule 80B(d) with respect to filing a motion for a trial of the facts, along with a detailed statement of the evidence to be presented, because plaintiff took the position that no evidence had to be presented in support of its arguments. The court did permit defendant to offer limited evidence, though no motion to present such evidence had been presented, because of the court's view that such evidence was essential for a fair evaluation of the legality of the executive session at issue in this case.

evidence from City Manager Robert Ganley on the city's rationale for conducting the meeting at issue in executive session.²

In presenting that evidence, the city preserved its argument that the meeting of June 29, 1992 with Daniel Burke and Charles Eshbach was not a public proceeding subject to the Freedom of Access Law. The city contends that the June 29 meeting was an information-gathering session outside the scope of the Freedom of Access Law. Since the court decides that issue contrary to the city's position, the court must address whether the City Council voted properly to go into executive session. There are also a number of related legal issues that the court must resolve before deciding whether notes taken by some of the city councillors at the meeting with Mr. Burke and Mr. Eshbach are public records which must be made available to the public.³ Lastly, the city's motion for summary judgment is still pending.

² The meeting, or workshop, occurred on Monday, June 29, 1992. Those present were members of the city council, City Manager Robert Ganley, Daniel Burke and his wife, Charles Eshbach and his wife, and Corporation Counsel Gary Wood. Mr. Burke was there to discuss his proposal to purchase a AA baseball franchise and bring it to Portland. Mr. Eshbach, a representative of AA baseball and president of the Eastern League, was also present to discuss that proposal.

³ Although both parties emphasized their desire for guidance from the court on issues in dispute between them, the court could not respond to that request if there were not a live controversy between the parties. Plaintiff does not seek a declaration that any action taken by the city council with respect to the AA baseball proposal is null and void. Plaintiff does not seek any finding pursuant to 1 M.R.S.A. § 410 that there was a willful violation of the Freedom of Access Law. However, plaintiff presses the claim for access to the notes taken by some city councillors at the meeting on June 29. That demand gives this controversy its continuing vitality and requires the court to resolve the legal issues presented to it.

The court will set forth its findings of fact on the testimony presented by City Manager Ganley concerning the decision of the City Council to go into executive session for discussions with Mr. Burke and Mr. Eshbach. The court will then set forth its conclusions of law.

FINDINGS OF FACT

1. Prior to recommending to the City Council that it conduct an executive session with Mr. Burke, the city manager discussed the propriety of such an executive session with corporation counsel. Such consultation is a standard procedure when an executive session is contemplated.⁴

2. Mr. Burke did not request the executive session. The idea came from the city manager. Upon hearing the proposal, Mr. Burke said he thought it was a good idea.

3. The city manager testified that he felt the necessity for an executive session for two reasons:

(a) As a general proposition, he felt city officials should have an opportunity to meet privately with a potential investor in the community to discuss that investor's interest in the city and obtain information about the proposal. He worried that public meetings would not be conducive to useful, preliminary discussions, and that

⁴ The city followed this procedure despite its broad position that the meeting with Mr. Burke was not a public proceeding within the meaning of the Freedom of Access Law. Indeed, the city provided public notice of the meeting as required by the Freedom of Access Law. Corporation counsel acknowledged that these procedures were followed because of the city's uncertainty about the applicability of the Freedom of Access Law.

such meetings expose the potential investor to embarrassment if the council shows no interest in the proposal.

(b) More specifically, the city manager anticipated that the discussions with Mr. Burke would require discussion about the possibility of the city acquiring portions of the Ballpark in Old Orchard Beach to improve Hadlock Field in Portland. The city manager was aware of the fact that the University of Maine had already expressed an interest in portions of the Ballpark. He was concerned that there might be other unknown parties who were interested in such an acquisition, and that premature disclosure of the possible interest of the city in the Ballpark might have adverse consequences for the proposal that the city would be discussing with Mr. Burke. The city manager had already had discussions with the town manager of Old Orchard Beach about the availability of the Ballpark.⁵

4. In an affidavit submitted prior to the evidentiary hearing, the city manager stated that,

at the time the City Council voted to go into Executive Session, the reasons presented were (1) to protect Mr. Burke's privacy under 1 M.R.S.A. § 405(6)(A)(1) to allow discussion of Mr. Burke's private finances and (2) to discuss matters regarding the proposal by Mr. Burke to bring minor league baseball to Portland, that if discussed in open session would prejudice the competitive or bargaining position of the City of Portland (1 M.R.S.A. § 405(6)(C)).

⁵ If portions of the Ballpark were purchased, they would be reassembled at Hadlock Field.

5. The minutes of the City Council Workshop Session of June 29, 1992 indicate that corporation counsel told the city councillors that the privacy concern stated in the city manager's affidavit related to "income information presented during the Executive Session relating to income tax records."⁶ The minutes further indicate that corporation counsel "explained that we are one of many communities competing and we could jeopardize our position if this matter were held outside of Executive Session."

6. The executive session consisted primarily of Mr. Burke describing his proposal to bring a AA baseball franchise to Portland and why he wished to do so. There were questions from city councillors about his proposal. In responding to those questions, Mr. Burke disclosed information about the financial structure of the franchise as he envisioned it and his financial capabilities in general terms. Discussions about the quality of the baseball facility that had to be provided by the city did lead to discussions about the possible acquisition of portions of the Ballpark in Old Orchard Beach. Mr. Burke did not submit any financial documents or income tax returns. He did not disclose any tax information. He was never asked to state his net worth.

⁶ Although the city initially linked the disclosure of income tax information to the "right to privacy" language of 1 M.R.S.A. § (6)(A)(1), the city expanded their argument on the income tax information at the time of the evidentiary hearing to include the executive session rationale offered by 1 M.R.S.A. § 405(6)(F): "Discussions 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."

7. There is a disparity between some of the stated reasons for the executive session and the substance of that session. As noted, no income tax records were disclosed by Mr. Burke and no arguably confidential financial information was revealed. At the evidentiary hearing, the city manager testified that he was not concerned that anything discussed at the meeting would affect the city's competitive position in relation to other cities competing for a AA baseball franchise.

8. The discussions at the executive session about the availability of portions of the Ballpark reflect the stated executive session rationale relating to the acquisition of property and the effect that premature disclosure of interest in such property could have on an entity's competitive or bargaining position. The city manager's position that city officials should be able to sit down privately with a potential investor in the city to exchange information reflects the broad rationale for the executive session offered by corporation counsel, as reflected in the minutes of the council workshop: "a session in which the City Council is to receive information is not considered a public meeting."

CONCLUSIONS OF LAW

Applicability of the Freedom of Access Law to the June 29, 1992 Meeting of the Portland City Council

1. The Portland City Council's meeting of June 29, 1992 was a public proceeding within the meaning of the Freedom of Access Law. The court rejects the city's position that a meeting convened solely to gather information is not a "public proceeding".

2. The Freedom of Access Law defines public proceedings as "transactions of any functions affecting any or all citizens of the State." 1 M.R.S.A. § 402(2). The city argues that the use of the word "transactions" indicates that only those meetings at which the public body takes some official action that affects the public are public proceedings. The city misconceives the scope of the public's right because it misunderstands the meaning of the word "transaction", which is subordinate to the concept of functions. "Transact" means "to do, carry out, perform, manage or conduct (business, for example)."⁷ The city councillors carry out an important function of local government when they acquire information about an entrepreneur's intentions and financial proposals as a prelude to city actions in support of that development.

3. Additionally, the city erroneously relies upon 1 M.R.S.A. § 409(2), which refers to appeals from the approval of any "ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action," to buttress its argument that "transactions" do not occur when members of the public body only receive information. Subsection 409(2) authorizes an appeal when the plaintiff seeks to nullify an "official action" taken in an executive session. Such action is voidable because, as subsection 405(2) makes clear, public bodies may not take such actions in executive session. Discussions, deliberations, and considerations carried out in executive session are not mentioned in subsection 409(2) only because talk and thoughts cannot be declared null and void. Moreover, it is well settled that the

⁷ The American Heritage Dictionary (Second College Edition), p. 1286.

Freedom of Access Law provides the basis for attack upon the legality of public proceedings at which no "official action" is taken. See Lewiston Daily Sun v. City of Auburn, 544 A.2d 335, 337-38 (Me. 1988). Accordingly, the language in § 409(2) has no bearing upon the statutory meaning of a public proceeding.

4. In coming to these conclusions, the court relies upon the Legislature's declaration of public policy and the rules of construction applicable to the Act.

Section 401 states:

[P]ublic proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that . . . actions [of public bodies covered by the law] be taken openly [The Freedom of Access Law] shall be liberally construed and applied to promote its underlying purposes and policies as contained [above].

It would be ironic if the word "actions" used in this declaration of public policy justified, as the city urges, a narrow construction of the Freedom of Access Law so at odds with the liberal construction urged upon courts in furtherance of the public policy identified in the law.

5. The city's limited view of the decision-making process is inconsistent with the broad purpose of the Freedom of Access Law to insure that the people's business is conducted in public view. Actions by a public body are the product of discussions and deliberations which sift and evaluate information acquired in many ways, including meetings with people who have information to share. Since those informational meetings are an integral part of the decision-making process, they must be exposed to public view. Without that exposure, there is always the risk that decisions by a public body will be influenced by unknown factors, or that decisions

made publicly will only be the climax of an unseen process.⁸

Legality of the City Council's Deliberations in Executive Session

6. Because the Freedom of Access Law applies to the meeting of June 29, 1992, the content of that meeting will determine whether the provisions of 1 M.R.S.A. § 405 justify the City Council's executive session. The court rejects the city's position that the City Council's expressed intention to discuss matters that would justify an executive session determines the meeting's legality. The city took this position in support of its motion for summary judgment, claiming that a good faith intention and a rational reason to invoke a § 405 justification for going into executive session insulate that session from judicial review. The city also took this position at the evidentiary hearing.

The Freedom of Access Law does not contain any good faith exception. Indeed, the good faith of city officials who vote to go into executive session is relevant only to the extent that it precludes the finding of a willful violation of the Freedom of Access Law under 1 M.R.S.A. § 410, and the forfeiture of \$500.00 by the state agency or local government entity whose officer or employee committed the violation.

⁸ See Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d, 1317, 1323 (Alaska 1985) (private presentation by developer is a "meeting"); see generally Marxsen v. Board of Directors M.S.A.D. #5, 591 A.2d 867, 870-71 (Me. 1991) (risk that, as a practical matter, official action was taken at a closed meeting). These policy considerations that the court concludes are essential to a correct interpretation of the Freedom of Access Law are not intended as a commentary on the specific actions taken by city officials in this case. The information-gathering exception advanced by the city to the Freedom of Access Law poses a question of law only. The concerns expressed by the court are a response to the city's legal position and not to any actions taken by the city after the meeting at issue here.

The facts of this case also demonstrate the weakness of the city's argument. As noted in the Findings of Fact, the city invoked reasons for the executive session which were not borne out by the content of the meeting. The careful delineation of permitted executive session subjects in 1 M.R.S.A. § 405(6) would be meaningless if such departures from the stated reasons for an executive session were immune from judicial review.

Explicit provisions of the Freedom of Access Law further undermine the city's argument for judicial acceptance of the stated reasons for an executive session. Subsections 405(4)-(6) govern the legality of any particular part of an executive session which strays from the discussion of the matters that justify the session. Those subsections state:

4. **Motion contents.** A motion to go into executive session shall indicate the precise nature of the business of the executive session.

5. **Matters not contained in motion prohibited.** No other matters may be considered in that particular executive session.

6. **Permitted deliberation.** Deliberations may be conducted in executive session on the following matters and no others:
[The statute then lists the justifications for executive sessions.]

The statute permits closed deliberations only if, in fact, the deliberations concern matters that can be discussed and deliberated in executive session. The discussions that actually occur in any executive session determine whether those discussions are "permitted"; "no other" discussions are legal.⁹

⁹ The city clearly recognizes this principle. At the evidentiary hearing, the city manager testified that he ended the executive session with Mr. Burke and Mr. Eshbach when a councillor asked a question which he felt was beyond the scope of the executive session.

7. The City Council's executive session was legal during the time that the council received or discussed any information relating to the possible acquisition of portions of the Ballpark in Old Orchard Beach. These executive deliberations were justified by 1 M.R.S.A. § 405(6)(C), which authorizes executive sessions to

[d]iscuss[] or consider[] . . . the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency.

8. There is no evidence in the record to support the legality of any other portion of the executive session with Mr. Burkè and Mr. Eshbach. As noted in the Findings of Fact, the city manager testified that no income tax records were produced and no arguably confidential financial information disclosed. The city manager had no concerns that disclosure of the contents of the meeting would prejudice the competitive or bargaining position of the city for a AA franchise in relation to other cities.¹⁰

9. Although the city foresees great mischief if courts get into the business of reviewing the content of executive session deliberations to determine their legality, the court finds those concerns exaggerated. First, there is language available (general descriptions) and procedures available (*in camera* review of affidavits) to permit the disclosure to a court of enough of the contents of an executive session to determine if the public body carried out the stated purpose of the executive session.

¹⁰ These facts require the court to decline the invitation of the parties to rule on the scope of the "economic development" language in 1 M.R.S.A. § 405(C) or the applicability of 1 M.R.S.A. § 405(F) to income tax records.

Second, the court has not engaged in any second-guessing of the legitimacy of the concerns of the city relating to their possible interests in the Ballpark in Old Orchard Beach. There is substantial evidence on the record to support that position. There is no evidence in the record to support the other reasons invoked by the city for the executive session. Although more troublesome cases that fall somewhere between "no evidence" and "substantial evidence" will surely arise sometime in the future, and perhaps prove vexatious to public officials, that certainty is no reason for the court to abandon its responsibilities under the Freedom of Access Law.¹¹

Other Legal Issues Raised by the Parties

10. The court rejects the city's contention that plaintiff has lost its right to relief on the basis that, having received several days notice of the city's intentions, it failed to seek judicial intervention prior to the meeting itself. The court takes the same position with respect to the city's position that certain statements allegedly made by Mr. Murphy, the reporter who was refused entry into the executive session, waived plaintiff's rights to relief.

¹¹ The court acknowledges that *de novo* hearings that are held to reconstruct the basis for decisions by public bodies pose troublesome issues about the proper allocation of responsibilities between a reviewing court and a public body whose actions are being reviewed by the court. In such situations, the court inescapably has to evaluate the evidence presented at the hearing to determine what happened at the meeting in issue and the basis for the decision being challenged. The court has done that in this case. Once the court completes that fact-finding exercise, it must shift to the appellate mode and determine if the information it has now found was before the public body meets the familiar "substantial evidence on the record" standard of appellate review of decisions by government agencies. The court has also done that in this case. If courts can maintain the distinction between their fact-finding and appellate roles in these cases, the city's concern about second-guessing by courts should be allayed.

Plaintiff complied with the provisions of the Freedom of Access Law authorizing a challenge to an allegedly illegal executive session by a public body. Plaintiff had no obligation to seek injunctive relief, an extraordinary remedy, to prevent the meeting from occurring.

There has been no detrimental reliance by the city on any representations or actions of plaintiff. Absent any detrimental reliance, the city cannot rely on estoppel. See Shackford & Gooch, Inc. v. Town of Kennebunk, 486 A.2d 102, 105-106 (Me. 1984). Nor does the court find that plaintiff's or Mr. Murphy's conduct indicated any intent to relinquish plaintiff's rights under the Freedom of Access Law. See Roberts v. Frank L. McKinney, Inc., 485 A.2d 647, 751 (Me. 1984) (waiver is intentional relinquishment of a known right). Indeed, plaintiff has been unequivocal in asserting its rights.

11. The court rejects the city's argument that the City Council has "cured" any illegality by making itself available to the press and public for thirty minutes after the meeting. This is a harmless error argument which has no place in the application of the Freedom of Access Law. There is an assumption in that argument that what was discussed and revealed publicly after the executive session reflects what was discussed privately at the session. That may be so. But the premise of the Freedom of Access Law is that the public should not be required to accept such representations. To the extent that minutes, notes or records exist which memorialize the content of any illegal portions of the executive session, they are

public records which must be disclosed.¹² The city does not dispute this point. It has taken the responsible course of gathering together all notes taken by any city officials present at the June 29 meeting and is holding them pending the outcome of this proceeding.

Although plaintiff did not include a demand for the records in its complaint, both parties have understood that this suit involves such a demand and have briefed and argued the issue of plaintiff's right to the records. In addition, plaintiff placed both the court and the city on notice of its desire for such records by its allegation within the complaint of the city's refusal to produce them, its attachment to the complaint of the city's refusal letter, and its reference in its demand to 1 M.R.S.A. § 409, part of which authorizes appeals from such refusals.

12. The plaintiff's request for declaratory relief is authorized by 1 M.R.S.A. § 409(3) which authorizes relief for violations of the Freedom of Access Law, other than reversal of government action by appeal, where provided by law. In this case the Declaratory Judgment Act provides for appropriate relief. See also 2 Field, McKusick & Wroth, Maine Civil Practice § 80B.2 at 314 (2d ed. 1970) (declaratory relief available in Rule 80B action).

13. The Freedom of Access Law does not authorize the award of attorney's fees to the prevailing party, and none will be made.

¹² Public records include all "written . . . matter . . . that . . . contains information relating to the transaction of public or governmental business." 1 M.R.S.A. § 402(3).

14. Although the city has now disclosed generally through the city manager's testimony the discussions at the executive session concerning the Ballpark at Old Orchard Beach, there may be information contained in those discussions which, if disclosed, would prejudice the city's bargaining position with respect to that property if the city retains any interest in it. The city has not waived its right to protect any such information from disclosure by the city manager's testimony. The court's order provides a procedure which reflects this conclusion.

ORDER

The June 29, 1992 executive session of the City Council was held illegally except for that part of the meeting during which the council discussed or received information about the possible acquisition by the city of portions of the Ballpark at Old Orchard Beach.

All notes taken by any city officials and any other documents in the possession of the City Council or any city official which contain information about the events at the meeting or which were received or prepared for use in connection with the meeting, except those records referring to the possible purchase of portions of the Old Orchard Beach Ballpark, are public records within the meaning of the Freedom of Access Law.

The city shall deliver to the court within two (2) days of the entry of this order on the docket any and all notes taken by any city officials and any other documents in the possession of the City Council or any city official which contain information about the events at the meeting or which were received or prepared for use in connection with the meeting. The court will review *in camera* these documents, excise any matters relating to the proposed purchase of portions of the Old Orchard Beach Ballpark, and make the documents available to plaintiff.

Alternatively, the city shall deliver the notes and documents covered by this order directly to plaintiff within two (2) days of the entry of this order on the docket if the city concludes that no portions of the notes and documents have to be excised.

The City of Portland's motion for summary judgment is DENIED.

The clerk shall incorporate this order on the docket by reference.

DATED: September 24, 1992

Kermit V. Lipez
Kermit V. Lipez
Justice, Superior Court

TRUE COPY

Guille J. Lepitre

John Puper, Esq.
775 - 5831

Gary Wood, Esq.
874-8480