

City Council Workshop

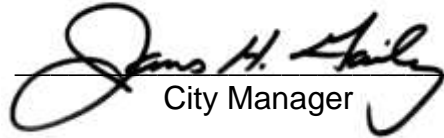
Agenda Item #4

June 23, 2014

Council Voting After Executive Session

Mayor Jalbert has asked for this item to be brought forward to further the discussion on the rules and regulations pertaining to executive sessions.

Attached are a memorandum from Corporation Counsel Sally Daggett and an email from Michael Stultz from the MMA Legal Services Department regarding executive sessions. They describe the instances where the City Council may enter into executive sessions, the need for a motion to enter into one, as well as voting after executive sessions.


City Manager



MEMORANDUM

TO: James H. Gailey, City Manager

FROM: Sally J. Daggett, Esq.

RE: Post-Executive Session City Council Action

DATE: May 8, 2014

The Maine Right-to-Know law recognizes that there are certain instances where the City Council may enter into executive session. Certain information obtained in executive session is required to be kept confidential by federal and/or State law, such as medical information, personnel matter information, poverty abatement application materials and appeal hearings, and general assistance application materials and fair hearing appeals. However, other information discussed in executive session is subject to an executive session privilege, such as real estate negotiations, union contract negotiations and litigation matters, but such information is not mandated to be discussed in executive session.

You have inquired whether it is possible for the City Council to enter into executive session to discuss a matter authorized to be discussed in executive session, return to public session and then to vote publicly to take certain action on the basis of Council discussions in executive session. The short answer is that it depends on the nature of the executive session topic. For some matters that are discussed in executive session, the law requires a vote in public session following the executive session discussion, such as poverty abatement appeals and fair hearing appeals. In other situations, it is up to the City Council to decide if it wants either to provide some short summary of what transpired in the executive session or to formally vote in public session to direct staff to take certain action on the basis of Council discussions in executive session. In situations where the City Council is not legally required to vote in public session following the executive session discussion, the appropriateness of doing so is going to depend on the facts and circumstances of each situation. It may not disadvantage the City to have the City Council vote to direct the City Manager to negotiate with other area municipalities about the possible sharing of an E-911 addressing officer or to authorize the City Manager to prepare bid documents for the sale of a parcel

of City-owned property. On the other hand, it will disadvantage the City to have the City Council vote to direct the Human Resources Director to negotiate up to a 3% cost-of-living adjustment with the firefighters union. Sometimes a brief update of the executive session that does not reveal confidential or executive session privileged information can be effectively used to balance the City's right to keep certain matters privileged or confidential with the public's right to have the people's business conducted in public.

Again, Maine law recognizes that there are certain instances where the City should act like a private business and not reveal all of its cards on a particular subject matter publicly so as not to prejudice the City's interests or disadvantage the City in its official business dealings. It is up to the City Council to decide if it wants to vote on matters in public session following an executive session discussion even when the law does not require such a vote in public session, and if so, under what circumstances. In this regard, I could prepare a short "fill-in-the-blank" form for the City Council Chair to read each time the City Council votes to enter into executive session to let the public know if there might be anything further said on the matter after the City Council comes out of executive session.

email from the MMA legal services

VI. Executive Sessions

Another category of legally non-public municipal activity involves matters of discussion during a public proceeding, which by its nature could cause any party (other than the members of the municipal board holding the proceeding) injury if publicly disclosed. In order to avoid such an injury, board members are allowed to go into an executive session to deliberate on those matters and no others (see 1 MRSA § 405). Strict rules apply to the calling and conduct of executive sessions by municipal boards (see 1 M.R.S.A. § 405(1)-(5)). Board members should especially note the following:

- Executive sessions may be held only for the limited purpose of the permitted deliberation, and no final action may be taken in executive session.
- The law requires that a board must first be conducting a properly noticed public meeting before it goes into executive session.
- In addition, before a board enters executive session, there must be a public motion to enter executive session and the motion must be approved by a public recorded vote of at least 3/5ths of the board members present and voting.
- The motion to enter executive session must state "the precise nature of the executive session" and must also "include a citation of one or more sources of statutory or other authority that permits an executive session for that business." (Note that the parties must be named before going into executive session to discuss labor contracts or proposals.) See "Executive Session Motions – A Quick Guide" above for sample motions.
- If the board members wish to approve an action after they have discussed a matter in executive session, the board must exit the executive session, return to the public meeting, and take any vote or other formal action in the public portion of its meeting.
- Finally, the purpose of the Right to Know law cannot be defeated through the misuse of executive session. Action taken or resulting from an executive session in violation of the Right to Know law is illegal, and upon complaint would be found by a court to be void and unenforceable.

The "Right to Know" Law itself only permits closed-door deliberation on specific subjects listed in the statute (see 1 M.R.S.A. § 405(6)). (Additionally 36 M.R.S.A. § 841(2) requires that hearings and proceedings related to poverty abatements be held in executive session.) Moreover, the board that meets in executive session bears the burden of establishing the legitimacy of the executive

session if its legality is challenged in court (see *Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148). Executive sessions are permitted for the following topics:

1. Personnel matters concerning an individual employee or group of employees, or public officials and appointees -- but only when public discussion could damage a person's reputation or, when a person's right to privacy would be violated.

NOTE: The individual who is the subject of the executive session may request an open meeting, in which case the meeting must be open.

2. Real estate and economic development negotiations, but only when premature disclosure would hurt the town's competitive or bargaining position.

3. Discussion of labor contracts and proposals between the town and the labor negotiators, but negotiations may be held openly provided both parties agree.

4. Meetings between the town and its attorney, but only when premature disclosure of the topic would place the town at a substantial disadvantage. Similarly, the municipal officers (selectmen or councilors) may consult with the code enforcement officer representing that municipality in a Rule 80 K land use enforcement matter in executive session where the consultation related to that enforcement matter.

NOTE: In order to enter into an executive session for this purpose, the municipal attorney must be present - at least to the degree of a telephone hook-up or conference call.

5. Discussion of information contained in records made confidential by statute.

6. Discussion or consideration by the school board of the suspension or expulsion of a public school student, or a private school student whose costs of education are paid from public funds.

NOTE: The student, and parents/guardians if a minor, and legal counsel are permitted to be present at the executive session.

7. Discussion, consultation, review or approval of the content of examinations that were administered by a body or agency for licensing, permitting or employment purposes.

As will be described below in the section on Public Records, minutes taken or any form of written or electronically recorded record or note is generally not confidential by law and would be subject to public inspection. It is therefore recommended that no physical record of executive sessions be taken.

From the MMA Municipal Officers Manual, Chapter 6:

The FOAA has some important procedural rules to follow before going into executive session:

First, executive session can only be entered after a motion has been made in public session to go into executive session. The nature of the business to be discussed must be a part of that

motion, although the wording of the motion should not reveal the sensitive information that the law intends to protect by the executive session process. The motion must “include a citation of one or more sources of statutory or other authority” to justify the executive session (1 M.R.S.A § 405(4)). See “Executive Session Motions Now Required to Cite Law,” “Legal Notes.” *Maine Townsman*, December 2004; “Executive Sessions (Again),” “Legal Notes.” *Maine Townsman*, January 2005; and “Executive Session Motion Citations—A Quick Guide.” The motion must carry by at least 3/5 of the members present. A written record must be made of the motion and vote, even if the board does not usually keep minutes.

Second, no other matters except the specific subject cited in the motion to enter executive session may be discussed.

Third, an executive session is for the purpose of discussion only. No decision can be reached by the board, no motion can be made, and no final action can be decided or taken in executive session. See “Board Vote by Secret Ballot Violates FOAA,” “Legal Notes.” *Maine Townsman*, February 2007.

Finally, the purpose of the FOAA cannot be defeated through the misuse of executive session. Action taken or resulting from an executive session in violation of the FOAA is illegal, and upon complaint would be found by a court to be void and unenforceable. For an FOAA claim filed on or after January 1, 2010 alleging that action was taken in executive session, the court may award reasonable attorney’s fees and costs to a “substantially prevailing plaintiff” where the court determines that the illegal action was committed in bad faith (1 M.R.S.A. § 409(2)). Willful violations of the FOAA may result in a fine of \$500 (1 M.R.S.A. § 410).

I trust these materials are helpful. Please contact me if you have additional questions.

Kind regards,

MLS

Michael L. Stultz

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