

## **Maine Supreme Court Decision a Sea Change in Laws Governing Executive Sessions**

Amanda A. Meader | May 1, 2008

The Maine Supreme Court has just issued a decision that transforms the relationship between public documents and executive sessions. In *Blethen Maine Newspapers, Inc. v. Portland School Committee*, 2008 ME 69, the Court decided that documents prepared exclusively for use during an executive session, as well as notes written during the session, are not public records.

Prior to *Blethen*, such documents were widely considered to be public documents, because there is no exception in the statutory definition of “public records” for documents prepared for or created during an executive session. We had always advised our clients that there was no clear statutory protection for executive session documents, and so the prudent thing to do was to assume that they would be treated as public records—especially in light of prior court decisions interpreting the Freedom of Access Act in favor of disclosure. Now the Court has on its own created a new exception to the definition of public records.

This case arose from a request by the *Portland Press Herald* to the Portland School Committee. The newspaper asked for copies of “all notes, transcripts, recordings, minutes or other documents reflecting the discussion during the meeting [about a \$2.5 million budget shortfall] as well as any documents distributed to or by Committee members of Department staff during the meeting.” The School Committee refused to provide the documents.

The newspaper prevailed in the Superior Court, but the Maine Supreme Court reversed on appeal. The Court ruled that when an executive session is lawfully held, the public has no right to see any documents that were used or notes that were taken during the meeting. So the law now is this: when the public is legitimately excluded from an executive session, any documents prepared exclusively for and notes taken during such session are not public records and not open to public review.

Be careful, however, because any documents brought in to the executive session must have been prepared exclusively for that session and no other purpose; otherwise, the public has the right to review the documents. Also be aware that such documents may be available to adverse parties during the “discovery” phase of a lawsuit. And keep in mind that the documents are protected only if the executive session was lawful to begin with. For those reasons, we will continue to advise clients to be extremely careful about creating documents for or during executive sessions. There is still the risk that, if it’s in writing, someone may eventually get to see it.

We encourage you to speak with Amanda Meader (207 623-1596 or [ameader@bernsteinshur.com](mailto:ameader@bernsteinshur.com)) of Bernstein Shur's Municipal and Regulatory Practice Group for more information and assistance.