

MAINE STATE LEGISLATURE

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Inter-Departmental Memorandum Date September 29, 1975

To All State Departments Dept. _____
From Joseph E. Brennan, Attorney General Dept. Attorney General
Subject Disclosure of names of persons making complaints

Our office has received several inquiries posing the question: when and under what circumstances, if any, may written records of complaints from citizens alleging violations of law be kept confidential? The questions are in reference to 1 M.R.S.A. § 405 requiring disclosure of public records and the new definition of public records, 1 M.R.S.A. § 402-A adopted by P.L. 1975 chap. 623.

The answer is that generally the written records of such complaints should be made available, however, they may be made available in a way which does not disclose the source of the complaint.

Discussion

The revised definition of public records expresses a clear legislative intent that all records maintained by State Departments except those specified in the three exceptions should be made public. In the spirit of this provision, all reports relating to alleged violations should be public.

This general interpretation favoring disclosure, should, however, be read in light of Rule 509 of the Maine Rules of Evidence published in June of 1975 and to be effective February 2, 1976. This rule provides:

"The United States, a state or subdivision thereof, or any foreign country has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation."

Rule 509 also provides: The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished." The privilege extends to staff members of the various State Departments who are, pursuant to this rule, law enforcement officers for the purpose of enforcing the laws under the responsibility of their Department.

Rule 509 has two exceptions:

1. Once the name of an informer has been disclosed to a person who would be adversely affected by the informers communication, it is no longer privileged.

2. If the informer may be used as a witness, the informer's name may be disclosed. However, this determination may be made at a later date and need not be made at the first point when a person requests disclosure of the name of an informant.

This rule recognizes the law in Maine as it presently exists. The advisory committee notes to the rules on evidence provide:


"The privilege of the state to refuse to disclose the identity of an informer is well established in Maine as elsewhere. State v. Fortin, 106 Me. 382, 76 A. 896 (1910). It reflects a recognition that effective use of informers in law enforcement compels protection of their anonymity."

The advisory committee notes on the rules of evidence also provide:

"It is only the identity of the informer that need not be revealed. The content of what he says is not privileged except to the extent necessary to conceal his identity." Thus documents which have been prepared by the Department subsequent to a complaint from an individual or documents received from that individual should be considered public records but those documents, or copies of the documents which are made public, may be altered in such a manner that they give no indication of the identity of the informant.

Pursuant to the provisions of 4 M.R.S.A. § 9-A the Rules of Evidence have the full force and effect of law and preempt laws with which they conflict. No conflict, however, is suggested in this case between the rules of evidence and the revised definition of public records.

The second exception to the public documents definition, & 402-A exempts: "Records that would be within the scope of a privilege against discovery or use as evidence as recognized by the courts of this State in civil or criminal trials, if the records or inspection thereof were sought in the course of a court proceeding." This exception protects all materials which, if they were involved in a court proceeding, would be privileged against discovery. It protects these materials now under existing court decisions. It protects them in the future under Rule 509. Thus, it is the view of this office that State Departments may, pursuant to section 402-A, decline to disclose the names of persons who have presented complaints of violations of law.


Joseph E. Brennan
Attorney General

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