Freedom of Access Law
1 MRSA § 402
5 MRSA § 243, 244, 1621

STATE OF MAINE

Inter-Departmental Memorandum Date September 2, 1976

To Hadley P. Atlass, Director Dept. State Development Office

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Confidentiality of Files and Meetings

SYLLABUS:

1. The definition of public documents in the Freedom of Access Law, 1 M.R.S.A. § 401, et seq., does not include documents which disclose trade secrets or confidential commercial information.

2. Correspondence or documents to a company communicating information of general knowledge, such information to be used in the formation of confidential business plans, are public documents.

3. The fact that documents may be privileged under the Freedom of Access Law does not prevent other state agencies from viewing such documents under appropriate statutory authority.

4. Meetings between state employees or officials and other persons are not public proceedings and need not be open to the general public, unless the state official is a member of and acting in his capacity as a member of a multiple member board or commission of the State.

FACTS:

The State Development Office was created by 5 M.R.S.A. § 7001. The duties and powers of the Director of the Office include the rendering of assistance to industry and businesses relative to new and expanded economic activities in the State. In carrying out that task the office routinely corresponds and confers with individuals and corporations regarding industrial and business sites and other factors relevant to the process of locating new or expanded facilities.

QUESTION AND ANSWER:

1. Are the correspondence and other materials in the files of the Development Office and relating generally to the above-described functions "public records" and therefore subject to inspection by any person? The answer depends upon the type of information in the document or documents.

2. Are meetings held between representatives of the Development Office and prospective firms "public proceedings" and therefore meetings at which anyone is entitled to attend? No.

REASONING:

1. Records. In 1976 the Legislature revised the statute dealing with public records and proceedings. P.L. 1975, c. 758 repealing and replacing 1 M.R.S.A. § 401, et seq. The current Freedom of Access Law is a revision of several earlier versions which have existed for some time in Maine statutes. The definition of "public records" in § 402(3) provides that any written matter or other information regardless of form in the possession of the agency is a public record. The Act requires, among other things, full disclosure of "public records." Failure to disclose such records is subject to judicial review (§ 409) or penalties (§ 410).

The definition of "public records" in § 402(3) contains several express exceptions, only one of which is applicable to the type of documents in issue here. Paragraph 402(3)(B) provides that public records do not include:

> "records that would be within the scope of a privilege against discovery or use as evidence 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."

The Maine Rules of Civil Procedure and the Maine Rules of Evidence both contain provisions that apply to the type of information here in issue. Rule 26(c)(7) of the Rules of Civil Procedure provides that a court may prohibit or limit discovery into "a trade secret or other confidential research, development or commercial information." Rule 507 of the Maine Rules of Evidence provides a privilege for disclosure of trade secrets. Like Rule 26, this rule is not absolute but is applicable so long as protection of the trade secret will not conceal a fraud or promote injustice.

Both the above rules are discretionary to be applied by the Court when it finds that circumstances warrant application. Rule 26 is not absolute in ordinary civil litigation. Moore's Federal Practice, § 26.60(4) (1976). Discovery may be had on confidential business matters if necessary to resolution of the litigation. Discovery may also be had with stringent limitations on its use and disclosure by the party receiving it. Under Rule 26 trade secrets are to be disclosed or withheld at the direction of the Court based on such considerations as (1) the need of the parties for the information, or (2) the harm likely to occur from its disclosure, or (3) the availability of remedies to prevent dissemination. Similarly, Evidence Rule 507 is not absolute. It cannot be invoked to conceal fraud or promote injustice.

The problem created by the qualified nature of these rules is that the Freedom of Access Law does not seem to contemplate circumstances under which a document might be disclosed to one person but not another. But that is precisely the result if the rules of procedure and evidence are grafted in toto onto the act. To apply the above rules and their exceptions to the act would require in each case the following analysis: (1) a determination of whether the document was a trade secret or confidential commercial document, (2) an evaluation of the need for the information by the requesting party, (3) consideration of the harm likely to result from disclosure, (4) determination of whether a fraud was being concealed or injustice promoted by nondisclosure, and (5) disclosure on certain terms and conditions including limitations on distribution or publication. Plainly this analytical procedure, common to civil ligitation, does not transfer easily to the Freedom of Access Law. These tests and limits were designed for different application.* At the very least it is clear that no agency has the statutory authority to release information placing limits on its use or dissemination. Nor does the

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* It must be noted that there is some case law to the contrary on this question. In Uribe v. Howie, 96 Cal. Rptr. 493, 19 C.A.2d 194 (1975), an intermediate appellate court in California considered the question of whether the California statute requiring public disclosure of "public records" included documents alleged to be trade secrets. In that case the California Code of Evidence provided that public records did not include records the disclosure of which were exempted under the California Code of Evidence. The California Code of Evidence, like the Maine Rules of Procedure and Rules of Evidence, provided that trade secrets were not discoverable or admissible except at the discretion of the court. The court in Uribe concluded that because under the Code of Evidence the trade secret protection was discretionary, the question of whether a public agency must disclose a trade secret was a matter to be resolved by weighing the interests in each case. Interestingly, however, the court reached this conclusion despite other clear language in the California Freedom of Information Act that expressly and unconditionally exempted trade secrets. In part, however, the court may have used the weighing of interests test because of other language in the California Act placing on the agency the burden in each case of showing that public interest in nondisclosure outweigh the public interest of disclosure. In view of the fact that the issue has not been addressed by any other court or the California Supreme Court, and the fact that the Uribe decision is in part distinguishable and that its analysis was not complete, we do not believe it should control here.

agency have the power to pick and choose who should receive "public records." The declaration of public policy in § 401 of the Act forecloses such an approach to the disclosure of public records. Records are available not to those who need to know, but to the "public." Similarly § 408 affords the right of inspection to "every person." Therefore,we conclude that the limiting considerations ordinarily applied to Civil Rule 26 and Rule 507 of the Rules of Evidence in the context of litigation are inapplicable to the Act and that the discretionary protection provided to such materials in litigation is absolute for materials in the possession of state agencies.*

Having thus concluded that the exclusionary language in the Rules of Procedure and Evidence are absolute when applied to the Freedom of Access Law, the question then becomes, what is the scope of protection afforded by these rules? Both Rule 26 and Rule 507 provide protection for "trade secrets." A trade secret has been generally construed to mean a formula, device, machine, pattern or manufacturing technique. Some recent cases have held that the term includes other kinds of business information that give the business a competitive advantage over another. See, e.g., Central Plastics Co. v. Goodson, 537 P.2d 330 (Okla., 1975); Telex Corp. v. I.B.M. Corp., 510 F.2d 894 (10th Cir.1975). In a few cases "trade secret" has been held to include customer lists and data on insurance policies. See generally 42 Words and Phrases, "Trade Secrets" and exhaustive annotations therein. Regardless of the scope of the subject matter, it is clear that the information must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated as trade secrets. See American Law Institute, Restatement of Torts, § 757.

In addition to the protection provided for trade secrets, M.R.Civ.P., Rule 26(c)(7) provides such protection to "confidential research, development or commercial information." Such language is broad enough to encompass such subjects as the state of one's accounts, customer lists, contract bids, sources of supply, plan for expansion or retrenchment or future marketing plans. Restatement of Torts, § 759 and 8A Words and Phrases "Confidential Information." In Sears Roebuck & Co. v. General Services Administration, 384 F.Supp. 996 (D.C.D.C., 1974) affirmed 509 F.2d 527 (D.C.Cir., 1974), the United States District Court interpreted a provision in the Federal Freedom of Information Act, 5 U.S.C. § 552(b)(4) as encompassing plans for "expansions, reductions, mergers and other major shifts in [a company's] personnel requirements." Similarly in National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C.Cir. 1974), the Court said that confidential commercial information

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* This opinion does not mean that such records are automatically protected in the event the agency is a party to litigation. See, however, Verrazano Trading Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972). Analysis of that question ought to await an appropriate case.

included information the disclosure of which would be likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." In Fisher v. Renegotiation Board, 355 F. Supp. 1171 (D.C.D.C., 1973), the Court construed confidential commercial information as including sales, statistics, total net sales, total costs and expenses and operating profits.

Applying the foregoing general analysis to this case, and in the absence of particular documents to examine, we can establish certain broad parameters for application of the Freedom of Access Law to the Development Office. In general, we believe that confidential business information supplied by a firm to the state constitutes an exception to the "public records" disclosure requirements. Such information includes development or expansion plans or other business information in the sole possession of the company and not known or available to the public or competitors. The mere providing of commercial or development information is not protected, however, unless it can be demonstrated that such information is also confidential; that is, that it has been carefully guarded by the company as a part of its business operations. However, information supplied to a firm by the Development Office is a public record where the information itself is in the public domain (e.g., available sites, markets, labor force, natural resources) unless the communication to the firm itself discloses or can be used to reconstruct confidential business information. Fisher v. Renegotiation Board, 473 F.2d 109 (D.C.Cir., 1972) on remand, 355 F. Supp. 1171 (D.C.D.C., 1973). While a company's confidential commercial plans and goals may be withheld, information of a public nature provided to it to be used by it in the formulation of those plans may not be withheld. Nor may the communication of such information to a company be withheld as confidential on the grounds that it may reveal a company's plans, since it is the use of that information which is protected and not the information itself. In addition, inclusion of some protected information in a document is not in itself grounds for withholding the entire document or even the identity of the parties involved if the confidential information can be protected by means of appropriate deletions from the document. Fisher, supra, at 1174, and Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C.Cir., 1970).

To recap, we believe that correspondence and records to or from a company discussing or referring to the company's confidential commercial plans are not public records. Such documents may be withheld from public disclosure at the discretion of the agency. Such documents may not be withheld if through the use of appropriate deletions the confidential information can be protected. However, since the Act is not a bar to disclosure, the agency may elect to disclose the documents even though not compelled to do so. Correspondence or records of a more general nature requesting or providing facts or information without reference to its intended use is a public record.

This opinion is not inconsistent with our opinion to the State Auditor of August 3, 1976. In that opinion, we concluded that the State Auditor had a statutory right of access to tax records to perform his official duties under 5 M.R.S.A.§§ 243, 244 and 1621 despite other statutory provisions regarding the confidentiality of tax returns. We find the same to be true here. In this case, we do not believe that the provisions of the Freedom of Access Law prohibit inspection by the State Auditor of records of any state agency, including the Development Office.

The Freedom of Access Law, unlike the statute providing for confidentiality of tax returns, is not a bar to public disclosure of documents. Rather, it is a grant of authority to withhold documents at the option of the state official charged with their custody. That authority, however, relates to general public disclosure and not to inspection of documents authorized by other provisions of law. The Act does not pre-empt the statutory powers of the State Auditor. Even if the Freedom of Access Law were a bar to disclosure, we have already ruled in a nearly identical situation that a statute requiring the confidentiality of certain records cannot be used to prevent the State Auditor from examining those documents if necessary to perform his duty. In this case, it is even clearer that the Freedom of Access Law does not prohibit the Auditor from examining those records of the Development Office that are necessary to the performance of his statutory duties.

Any documents or information which the Auditor obtains in the course of his inspection may be withheld from public disclosure by him. Simply because the Auditor obtains those documents in the course of performing his official duties, they do not lose their character as exceptions to the definition of "public records."

2. Meetings. Section 402(2) includes within the definition of a public proceeding "the transaction of any functions affecting any or all citizens of the State" conducted by any "board or commission of any state agency." The qualifying provision in paragraph B of section 402(2) makes it clear that the public proceeding requirement applies not to the actions of individual state officials and employees but only to multiple member bodies engaged in the conduct of public business (e.g., the Public Utilities Commission, Board of Environmental Protection, Employment Security Commission, etc.).

This limitation on the application of the Act is confirmed by other sections of the Act which authorize executive sessions on the vote of 3/5 of the membership of the body (§ 405), the requirement for disclosure of minutes or other records of meetings (§ 402), and the requirement of public notice for meetings of boards comprised of 3 or more members (§ 406). Since the Development Office does not include within its organizational structure any board or commission, the public proceedings provision is inapplicable to it. Thus, the meetings and discussions of the Director or other employees of the Office with third parties are not required to be held in public.

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