

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date November 17, 1976

To Markham L. Gartley, Secretary of State Dept. Secretary of State

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

Subject Confidentiality of Investigators' Reports

## FACTS:

The Motor Vehicle Division of the Secretary of State's Office employs several investigators whose duties include the enforcement of the laws relating to the operation of motor vehicles and the licensing of motor vehicle dealers. The investigative reports submitted by the investigators are used by the Secretary of State's Office for: (1) restoration of motor vehicle operators' licenses, and (2) hearings on both applications for and the suspension or revocation of motor vehicle dealer licenses.

## QUESTIONS:

1. Are the investigative reports submitted by Motor Vehicle Division investigators to the Secretary of State in conjunction with hearings to suspend or restore an operator's license or to deny, suspend or revoke a motor vehicle dealer's license discoverable by the licensee or prospective licensee?
2. Is the information contained in these reports public record with no restrictions on accessibility?

## ANSWERS:

1. Because investigative reports submitted by Motor Vehicle Division Investigators to the Secretary of State are public records, there is no reason to answer question #1. Requests for these reports should be treated as demands for inspection under 1 M.R.S.A. §408.
2. Investigative reports submitted by Motor Vehicle Division Investigators to the Secretary of State are public records. The only restrictions which the Secretary of State may impose upon their accessibility are those authorized by 1 M.R.S.A. §408.

## REASONING:

Section 402(3) of the Maine Freedom of Access Law, 1 M.R.S.A. §§401 et seq., defines a "public record" as:

"any written, printed or graphic matter. . . that is in the possession or custody of an agency or public official of this State . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business. . . ."

Paragraphs A-E of §402(3) then enumerate five exceptions to this definition, which are, generally, (A) records designated confidential by statute, (B) records which would be within the scope of a privilege against discovery or use as evidence in civil or criminal proceedings, (C) legislative memoranda, (D) collective bargaining materials, and (E) memoranda of the boards of trustees or the faculty and administrative committees of the University of Maine and the Maine Maritime Academy.

The reports of Motor Vehicle Division investigators clearly fall within the definition of "public records." They are written or printed matter, are in the possession of a State agency or official and have been prepared for use in connection with the transaction of public business. The only question to be answered, then, is whether the investigative reports fall within one of the five exceptions.

The only exceptions within which the subject investigative reports might fall are those contained in §402(3)(A) and (B). However, the exception for confidential records is inapplicable since there is no statute designating the reports confidential. Moreover, because the reports of the Motor Vehicle Division investigators are not privileged they do not fall within the exception carved out by §402(3)(B).

It might be argued that pursuant to Rule 502(d)(6), M.R. Evid., the reports are subject to the attorney-client privilege. However, even if the reports might be construed as communications, they are not subject to the attorney-client privilege because they are not made to a lawyer. The fact that the reports may fall into the hands of a lawyer at a subsequent stage of the proceeding does not alter this result.

It might also be argued that the reports are privileged because they constitute work product and are subject therefore to the protections of Rule 26 (b)(3), M.R.C.P. However, information is not privileged simply because it is work product. The work product rule provides a qualified protection for unprivileged information.

It is the opinion of this office, therefore, that the investigative reports prepared by the investigators of the Motor Vehicle Division are public records and, pursuant to §408 of the Freedom of Access Law, must be made available for inspection by any member of the public. Likewise pursuant to §408, the only restrictions which the Secretary of State may impose upon access to the investigative reports are: (1) inspection and copying of the reports may be limited to the regular business hours of their custodian or the office where they are located; and (2) a person requesting a copy of a report may be required to pay the cost of copying.

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Attorney General

JEB/rh