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Freedom of Access, Public Agency in Private Role
1 M.R.S.A. 402-3
20 M.R.S.A. 1801

Don

June 3, 1977

Honorable Charles P. Pray
State Senator
State House
Augusta, Maine 04333

Re: Freedom of Access Law

Dear Senator Pray:

This letter is in further clarification of the March 2, 1977, letter to you on this subject.

The "Freedom of Access Law," 1 M.R.S.A. §§ 401-410, requires that all public records be available for public inspections. You have inquired as to whether teacher placement records are public records and, therefore, open for public inspection. Title 1 M.R.S.A. § 402, sub§-3 defines the term "public record" to include any record which "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."

Title 20 M.R.S.A. § 1801 authorizes the Commissioner of the Department of Educational and Cultural Services to operate a teacher placement service. Certified teachers may, upon payment of \$5, file an application with the Commissioner ". . . as a candidate for employment as a teacher in the public schools of Maine." As a result of such an application the Commissioner, pursuant to 20 M.R.S.A. § 1802, has had reference forms, which are marked "confidential," sent to persons named by the applicant as references. These forms have been returned and placed in the applicant's file. The application and reference forms are kept by the Department until such time as a school administrative unit may request information pertaining to applicants. In other words, in performing this function the Department is acting solely as an intermediary between teacher applicants who are seeking positions in Maine

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school systems and the systems which are requesting information upon which to base their hiring decisions. The Department does not provide its own recommendations, rate or rank the applicants, or in any other way participate in the actual decision-making process. The actual transaction of public or governmental business, in the sense of the hiring decision, is made by the individual school administrative units.

The principle purpose of the teacher placement records is for the benefit of the teacher applicants and the school administrative units in the State; they are not intended for use by the general public. In this regard, the Legislature has identified the proper parties to receive information from the Commissioner relative to the teacher applicants as being, "... school committees, school directors or superintendents of schools." 20 M.R.S.A. § 1801. Therefore, the proper recipients of this information as designated by statute are those individuals who would use such information for the purpose of making employment determinations.

Applicability of the Freedom of Access Law to these specific hiring materials while they are in the possession of the Department, depends upon the scope of the definition of "public record" as set forth above. The legislative declaration of public policy with regard to the Freedom of Access Law states, in part, "It is the intent of the Legislature that their actions [public proceedings] be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly." 1 M.R.S.A. § 401. It is clear from this statement that the Legislature's primary concern was that decisions which will affect the public should be arrived at openly and with full disclosure of the materials being considered and the decisions which are made. (For similar interpretation of the Federal Freedom of Information Act, see SDC Development Corp. v. Mathews, 542 F.2d 1116, at 1119 (9th Cir., 1976)). Since the records in question are not used by the Department in making any decision, nor do they relate to any decision which the Department may make, public access to these records while they are in the possession of the Department would not advance the stated intent of the Legislature. On the other hand, public access to these materials might endanger the utilization and efficiency of the information service established by statute, and thereby frustrate the Legislature's intent in establishing such system. For the reasons stated above, we concur with the opinion expressed by Assistant Attorney General Waldemar G. Buschmann in his letter to you dated March 2, 1977.

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The foregoing opinion is limited to the specific circumstances of this case, which appear to be relatively unique in State government. The opinion is not intended to be a statement with regard to the applicability of the Freedom of Access Law to any other records in the custody of any State or local agency. We also note parenthetically that our opinion would not limit access to these materials at the time they are received by the local school administrative unit for actual use in its governmental decision-making process. A much stronger argument for applicability of the Freedom of Access Law can be made when the records are being so used by the local officials.

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

HEB:jg

cc: W. G. Buschmann