

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

*Audits: Maine Guarantee Authority
Maine Guarantee Authority: Audits
10 M.R.S.A. § 852*

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 10, 1978

To: Philip Clifford, Manager, Maine Guarantee Authority
Richard Dieffenbach, State Controller, Bureau of
Accounts and Control

From: Sarah Redfield, Assistant Attorney General

Re: State Audit of Maine Guarantee Authority

This is in response to Mr. Dieffenbach's request for an opinion as to the propriety of the Maine Guarantee Authority's (MGA) providing its files and records to the auditors hired by the State of Maine, where such records are covered by the confidentiality provisions of Title 10 M.R.S.A. § 852. Providing such access would be proper.

Title 5 M.R.S.A. § 243.1 provides that:

"The Department of Audit shall have authority:

"1. Post audit. To perform a post audit of all accounts and other financial records of the state government or any department or agency thereof, including the judiciary and the executive department of the Governor except the Governor's Expense Accounts and to report annually on this audit, and at such other times as the Legislature may require;" (emphasis supplied)

It is my understanding from Mr. Dieffenbach that pursuant to this authority, the State has contracted with the accounting firm of Coopers and Lybrand to audit and review State financial records.

A question has apparently arisen as to the authority of such auditors to review the data and files of the Maine Guarantee Authority regarding loans guaranteed by MGA.

Title 10 M.R.S.A. § 852 provides as follows:

"Records confidential.

"No member of the Authority, agent or employee thereof, shall divulge or disclose any information obtained from the records and files or by virtue of such person's office concerning the name of any lessee or tenant or information supplied by any lessee, tenant, mortgagee or local development corporation in support of an application for mortgage insurance. Annual returns filed with the Authority by a mortgagee, lessee, tenant or local development corporation shall be privileged and confidential.

"Nothing in this section shall be construed to prohibit the disclosure of information from records or files of the Authority or the production of records or files of the Authority to a special interim legislative investigating committee, or its agent, upon written demand from the chairman of the committee or any member of the committee designated by him. Such information, records or files may be used only for the lawful purposes of the committee and in any action arising out of the investigation conducted by it."
(emphasis supplied)

The Attorney General's Office has on previous occasions reviewed the authority of the State Auditor in regard to confidentiality provisions of certain other State statutes. In an opinion of September 2, 1976, the Attorney General found that the State Auditor was not prohibited from examining those records of the State Development Office that were necessary to the performance of the auditor's statutory duties. (A copy of this opinion is attached for your information.) Similarly, in an opinion dated August 3, 1976, the Attorney General found that the confidentiality provisions concerning tax records did not bar inspection of otherwise confidential records by auditors performing the duties required by them by Title 5 M.R.S.A. §§ 243, 244 and 1621. (A copy of this opinion and those prior opinions of the Attorney General upon which this opinion is based are also attached.)

These prior opinions of the Attorney General emphasize the fundamental importance of the role of the State Auditor in the financial integrity of the State. These opinions support the authority of the State Auditor to investigate all matters properly subject to a customary audit, even if such records may otherwise be found to be confidential. The opinions, at the same time, support the various statutory confidentiality provisions in other aspects and conclude that documents or information which the auditor obtains in the course of his inspection may nevertheless be withheld from public disclosure by him. That is, the fact that the auditor obtains such documents in the course of performing his official duties, does not alter the character of these documents, as exceptions to the definition of public records in Title 1 M.R.S.A. § 402.

These previous opinions of the Attorney General demonstrate the importance of allowing access to State records by the State Auditor. The questions remain, however, whether the language of 10 M.R.S.A. § 852 is more restrictive than those statutory provisions previously construed, and, if so, whether this section must be read to prohibit the inspection of MGA records by auditors of the State absent an explicit legislative mandate therefor. The issue in terms of statutory construction is whether the explicit naming of a legislative committee in this section precludes the authority of any other State agency not so named. In view of the historical background of the enactment of § 852, and the general principles of statutory construction, this does not appear to be the case.

The second paragraph of Title 10 M.R.S.A. § 852, quoted above, was enacted in 1970. The enactment of this section was related to the adoption on January 22 and 23, 1970, of a Joint Resolution of the Maine Legislature providing for an investigation into the activities of Maine Sugar Industries. That Resolution established a special legislative research committee to proceed with such an investigation and to report to the next regular session of the Maine Legislature. As a result of the establishment of such a legislative committee and the proposed effectiveness of Title 10 M.R.S.A. § 852.2, declaratory judgment was sought in the case of Maine Sugar Industries, Inc. v. Maine Industrial Building Authority, 264 A.2d 1 (Me., 1970).

In determining the power of the Legislature to investigate the records of the Maine Guarantee Authority (then the Maine Industrial Building Authority), despite the confidentiality provision of the statute, the Court said that provisions such as § 852 should be "strictly construed as prohibiting only voluntary disclosures," 264 A.2d 1, 5. The Court reviewed the situation and found that the appropriate method of analysis was the balancing of the injuries that would inure to the relation in question by the disclosure of the confidential communications with the benefit to be gained from disclosure. The Court stated:

"We recognize that there is some risk of injury to plaintiffs from disclosure but we are satisfied that that risk is outweighed by the public interest in having the Legislature fully informed as to matters which involve the use of public funds and the credit of the State, and which may suggest the need for further legislation. We conclude that sec. 852 must be construed as prohibiting voluntary disclosure by the Authority but not in prohibiting mandatory disclosure either when required by a court of competent jurisdiction or required by the intervenors Special Interim Legislative Committee. As to the amendment to become effective May 9, 1970, it suffices to say that it is so worded as to be interpreted and is entirely consistent with the construction we have given to sec. 852 in its present form," 264 A.2d 1, 6.

Although the Court speaks directly only to disclosure to the courts or to a legislative committee, the analysis is equally applicable to the functions of the State Auditor. The prior opinions of this office analyzing the unique importance of the State Auditor's access to financial records of all departments of the State amply indicate the public interest in the availability of all State records for audit. The power to audit all State agencies is specifically conferred by statute, and any power necessary to carry out these functions effectively will be implied. See State v. Fin and Feather Club, 316 A.2d 351 (Me., 1974).

When the statutory mandate of the State Auditor is read in conjunction with that of the Maine Guarantee Authority, it appears that the legislative intent for both agencies may be adequately accomplished without severe detriment to persons holding loans guaranteed by the MGA.* (See generally, Finks v. State Highway

* It should be noted that in its opinion in Maine Sugar Industries, the Court considered whether the disclosure of records should be prohibited by statements in various forms of the Maine Industrial Building Authority, which indicated to the applicant or tenant that it was to be understood that the Authority would not disclose the information obtained to any person, firm, association, corporation or other governmental agency without express written permission of the applicant or tenant.

The Court, in reviewing such provisions, indicated that it would be beyond the power of the Maine Industrial Building Authority to foreclose a "proper legislative action by any agreement it might seek to make." 264 A.2d 1, 8. It appears that the Courts' analysis of this problem would be applicable to any similar contractual provisions existing in the present circumstances. See generally, 264 A.2d 1, at 7-8.

Commission, 328 A.2d 791 (Me., 1974) as to construing statutes as part of the entire legislative system; and Clark v. Maine State Employees Appeals Board, 363 A.2d 735 (Me., 1976), as to the appropriateness of consideration of the practical operation and consequences in construing statutes.) The statutory objective of both departments may be satisfied by the MGA's making its records available for State audit, and the auditor maintaining the records as confidential as appropriate.*



SARAH REDFIELD
Assistant Attorney General

SR/ec

* Without a more specific request as to a given fact situation, we are unable to address at this time the limits of such confidentiality.