

MAINE STATE LEGISLATURE

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 27, 1979

John Joseph, Director
Office of Energy Resources
State House
Augusta, Maine 04333

Dear John:

George Tibbetts of your office has asked for a written response from our office as to whether the Office of Energy Resources is obliged to make available to the public the names of persons receiving fuel from the State under the so-called federal "set-aside" program, as well as the amounts of product received. This is to advise you that in our opinion this information is not exempt from disclosure under the State's Freedom of Access Law, 1 M.R.S.A. § 401 et seq., and thus should be made available to any person requesting it.

As we understand the pertinent facts, each month the Office of Energy Resources receives, pursuant to federal law, the authority to direct the sales of a fixed percentage of petroleum product from each distributor of such product in the State. At the same time, the Office receives applications from retailers of the product requesting that the Office allocate a portion of the amount which has been set aside, on the ground that there is a shortage of product in the retailer's area and the allocation is needed to reduce the hardship. The Office then decides which of the retailers should receive allocations, and in what amounts. It is this information which is the subject of this inquiry.

Section 408 of the Freedom of Access Law provides that "every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record." Section 402 defines "public record" to include "any written, printed or graphic matter...that is in the possession or custody of an agency or public official of this State...." The Office's records on fuel allocation appear clearly to fall within this definition. However, the law establishes certain exemptions,

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of which one has potential applicability here: that which exempts "records which have been designated confidential by statute." Before this year, none of the Office of Energy Resources statutes provided for the confidentiality of any of its records. In 1979, however, the Legislature enacted two provisions rendering certain records of the Office confidential. In the first, effective immediately upon its approval as emergency legislation on June 6, 1979, the Legislature authorized the Office to collect "inventory and product delivery data from the State's primary storage facilities of petroleum products" and provided that that information be held confidential. 5 M.R.S.A. § 5005(1)(O), enacted by Laws of Maine of 1979, ch. 372, § 1 (1979). In the second, effective ninety days after the Legislature adjourned, "data dealing with sales of individual companies which are engaged in the wholesale and retail trade of petroleum products in the State," and which have been accumulated by the Director pursuant to his responsibility to collect and analyze information from available energy sources, were made confidential upon the request of any company involved. 5 M.R.S.A. § 5005(1)(D), enacted by Laws of Maine of 1979, ch. 388, § 2 (1979).

The first statute does not appear to be applicable here, since the information protected relates only to petroleum product storage facilities. The data which are the subject of this inquiry, however, are only the names of retailers and the amounts of their allocations from storage facilities pursuant to an order of the State government. Since such information would not be included in the data obtained from the storage facilities, it would not be protected by the Act mandating such reporting. Thus, there is no State statute which exists at present which protects the information in question.

This leaves only the possibility that the information may become protected upon the entry into force of Chapter 388 on September 14, 1979. Whether this Act applies, however, is a difficult question. The Act exempts, inter alia, sales of wholesalers. In one sense, therefore, it might be thought to apply to the information sought here because the transfer of petroleum products from a wholesaler to a retailer under the set-aside program might be considered a "sale", since it is of course paid for by the retailer. It does not seem, however, that such involuntary transfers were intended by the Legislature to be encompassed by the confidentiality provision of the Act. The purpose of Chapter 388 was clearly to insure that the Director have all the information at his disposal with regard to the distribution of petroleum products (and other

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energy sources) within the State, so that he might be able to plan and act in an emergency in an informed way. The information at issue here is quite different in nature. Rather than information about the way in which commerce in petroleum products is conducted in the open market, it is information about decisions made by the government to redirect that commerce in an emergency. It does not appear, therefore, that the purposes of Chapter 388 would be hindered if this information were released, since it is difficult to see how the names of the recipients and the amounts of the allocation of product distributed by order of the government could be of any potential use to a competitor of the distributor involved. In view of this, and in view of the fact that the Freedom of Access Law is to be liberally construed, 1 M.R.S.A. § 401, Moffett v. City of Portland, 400 A.2d 340 (Me. 1979), it is our opinion that this information is not protected from disclosure.

Since there is no state statute which affords confidentiality to the records in question, it would appear that as a matter of state law the records must be made available to any person requesting them. The only other way in which the records might be protected from disclosure is if they somehow came within the ambit of the Federal Freedom of Information Act, 5 U.S.C. § 552 (1976), and were then exempted from disclosure under one of its significantly more comprehensive exemptions. However, by its terms, the federal act only applies to agencies of the United States government, 5 U.S.C. § 551(1), which would not include the Maine Office of Energy Resources. Thus, the federal Act would appear to be inapplicable. Moreover, even if the Act were applicable, we have inquired with the General Counsel's Office of the Department of Energy and are advised that in their view the information requested would not be protected from disclosure under any of the Act's exemptions.

I hope this answers your question. Please let me know if more clarification is necessary.

Sincerely,


CABANNE HOWARD

Assistant Attorney General

CH/d