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)

This document is from the files of the Office of the Maine Attorney General as transferred to the Maine State Law and Legislative Reference Library on January 19, 2022

82-42

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

August 18, 1982

Harold R. Raynolds, Jr.
Commissioner
Department of Educational &
Cultural Services
State House Station #23
Augusta, Maine 04333

Dear Commissioner Raynolds:

This responds to your inquiry regarding the applicability of the confidentiality provisions of Section 554(2)(E) of the Maine Personnel Law, 5 M.R.S.A. § 551, et seq., to the public release, pursuant to Maine's Freedom of Access Law, 1 M.R.S.A. § 401, et seq., of Section XII(B) of the report of the Department of Eductional and Cultural Services ("Department") released on July 14, 1982,1/ dealing with the role of Department personnel in responding to allegations of physical and sexual abuse of children at the Baxter School for the Deaf. For the sake of clarity and convenience, we have rephrased your questions as follows:

> 1. Does Section 554(2)(E) create an exception to Maine's Freedom of Access Law which prohibits the public release of Section XII(B) of the Department's report?

1/ At 3:00 P.M. on August 18, 1982, the date of the issuance of this Opinion, our office was presented with a document purporting to be different version of Section XII(B) of the Department of Educational & Cultural Services' report of July 14, 1982. This Opinion expresses no view as to whether the document presented to this office today may be publicly released. Each time this report refers to "Section XII(B)" or its accompanying documents, it refers only to the materials made available to this office in connection with the Department's July 14, 1982 report.

2. Does Section 554(2)(E) create an exception to the Freedom of Access Law which prohibits public access to the internal agency memoranda and other documents in the Department's possession which were quoted in Section XII(B) of the Department's report?

3. Does the confidentiality of any portion of Section XII(B) of the report or the documents quoted in Section XII(B) of the report depend upon whether a state employee who is mentioned in either Section XII(B) or its accompanying documents is employed currently by the State, and, if not, upon the method of his termination?

We have reviewed Section XII(B) of the Department's report and its accompanying documents, and the relevant statutes, their legislative history, and case law bearing on these questions. For the reasons set out below, it is our opinion that all three questions listed above must be answered in the negative. Specifically, although we find that Section XII(B) of the Department's report and its accompanying documents fall within the purview of Section 554(2)(E), we conclude, on the facts of this case, that the Department may publicly release Section XII(B) and its accompanying documents since we cannot see how any of the legislative purposes behind the statute would be injured by such disclosure.

I

We begin with a brief review of the circumstances leading to your inquiry. On July 14, 1982, the Department publicly released a report concerning the Baxter School for the Deaf. The report contained the findings and recommendations of the Department's Special Review Team which had been created by Commissioner Raynolds, and, at his request, had investigated the Baxter School. Section XII(B) of the Department's report, however, was not publicly released.

Section XII(B) of the report evaluates the role of the Department in responding to charges of physical and sexual abuse at the Baxter School during the 1975-1981 period. Relying upon internal agency memoranda, resignation letters, and interview notes, the report concludes that the Department failed to investigate adequately repeated allegations of mismanagement and child abuse at the Baxter School during the 1975-1981 period. Section XII(B) quotes or relies upon the following to reach its conclusions:

1. Summaries of and quotations from the following documents:

(a) Resignation form of Susan Nordmann dated June 13, 1975;

(b) Letter from Joseph Youngs to Beverly Trenholm dated July 17, 1975;

(c) Written statement by Susan Nordmann dated September 25, 1975;

(d) Memorandum from Joseph Youngs to Beverly Trenholm dated October 27, 1975;

(e) Resignation form of Gerald Amelotte dated April 16, 1976;

(f) Letter from Congressman David H. Emery's Office to H. Sawin Millett dated October 1, 1976;

(g) Notes prepared by Larry Pineo during an October 14, 1976 meeting with Susan Nordmann;

(h) Memorandum from Joseph Youngs to Larry Pineo dated January 7, 1977;

(i) Memorandum from Larry Pineo to H. Sawin Millett dated August 17, 1978;

(j) Notes prepared by Beverly Trenholm during a November 28, 1978 telephone conversation with Susan Nordmann;

(k) Resignation form of Sarah Treat dated November 11, 1980;

(l) Resignation form of Donna Allen dated November 11, 1980;

(m) Memorandum from Harold Raynolds, Jr. to Larry Pineo dated November 2, 1981; and

(n) Resignation forms of other former Baxter School staff and other minor miscellaneous documents.

2. Summaries of portions of interviews conducted by the Department's Special Review Team with current and former Department personnel and current and former staff members at the Baxter School.

II

In determining whether Maine's Freedom of Access Law requires the release of Section XII(B) of the report,[2] we begin with the language of the statute itself. Cummings v. Town of Oakland, Me., 430 A.2d 825, 829 (1981); Mundy v. Simmons, Me., 424 A.2d 135, 137 (1980). The statute provides, in pertinent part, that "[e]xcept as otherwise provided by statute, 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. . . ." 1 M.R.S.A. § 408. The first question, then, is whether Section XII(B) of the Department's report is a "public record" within the meaning of Maine's Freedom of Access Law.

The statute defines a "public record" as:

> . . .any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions 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, except:

---

[2] We have reviewed the original documents submitted to us in support of Section XII(B) as well as the text of Section XII(B) of the Department's report, and we can perceive no substantial difference between the contents of the documents quoted in the report and the report itself. Our opinion, therefore, applies with equal force to the release of the documents submitted to us in support of Section XII(B) as well as to the release of Section XII(B). For the sake of convenience, this opinion will refer only to the release of Section XII(B) of the Department's report, although we likewise conclude that the documents accompanying Section XII(B) may also be released at the Department's discretion for the same reasons.

> A. Records that have been designated confidential by statute;. . .[3]

1 M.R.S.A. § 402(3).

In applying this statutory language to the records at issue in this case, we are mindful of "the fundamental rule of statutory construction [that we must] ascertain the real purpose and intent of the legislature which when discovered, must be made to prevail." Franklin Property Trust v. Foreside, Inc., Me., 438 A.2d 218, 222 (1981) (citations omitted). In this case, the Legislature clearly has expressed its intent to create an "open" government which is subject to public scrutiny. Specifically, the declaration of public policy and rules of construction contained in Section 401 of the Freedom of Access Law state that the statute "shall be liberally construed and applied to promote its underlying purposes as contained in the declaration of legislative intent." 1 M.R.S.A. § 401 (1979). Thus, Maine courts have construed the terms of Maine's Freedom of Access Law to mean that "to a maximum extent the public's business must be done in public." Moffett v. City of Portland, Me., 400 A.2d 340, 347-48 (1979).[4] The Maine courts also have said that, in light of the express statutory direction by the Legislature in the Freedom of Access Law to construe its terms broadly to promote public access, "a corollary to such liberal construction of the Act is necessarily a strict construction of any exceptions to the required public disclosure."[5] Id. at 348. In light of these specific instructions, both by the clear terms of the statute and by the courts, to protect the public's right to access to the workings of its government, close questions must be resolved, wherever possible, in favor of public disclosure. See Op.Me.Atty.Gen. 80-95 at 5 (June 5, 1980); Op.Me.Atty.Gen. at 2 (November 23, 1976).

3/ The statute sets forth four other categories of exempted records, none of which are relevant here.

4/ The remainder of the Moffett opinion deals with the construction of one of the other four exemptions from the Freedom of Access Law, see note 3 supra, and is therefore not relevant to our discussion here.

5/ This approach of broadly construing the terms of a Freedom of Access statute and narrowly construing any exemptions to such a statute is also reflected in the Freedom of Information Act ("FOIA") of the federal government and the Freedom of Access statutes of other states. See Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (federal law); Braverman and Heppler, A Practical Review of State Open Records Laws, 49 Geo.Wash.L.Rev. 720, 722, 734 (1981) (state laws).

The documents in question here are plainly "written. . .matter. . .that is the possession. . .of an agency [and relates to] the transaction of. . .governmental business." Therefore, applying the plain and ordinary meaning of the statutory langauge, see Lee v. Massie, No. Law-81-163, Slip Op. at 4-5 (Me., July 2, 1982), and consistent with the legislative purposes of the Freedom of Access Law, we conclude that Section XII(B), is a "public record." The only question, then, is whether it is a record that is exempted from disclosure because it has been made "confidential by statute."

III

In determining whether Section XII(B) has been made "confidential by statute," there appears only one statute which might be applicable. Section 554 of the Maine Personnel Law provides, in pertinent part:

> The following records shall be confidential and not open to public inspection, and shall not be "public records" as defined in Title 1, section 402, subsection 3:
>
> * * *
>
> 2. Personal information. Records containing the following:. . .
>
> * * *
>
> E. Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action shall no longer be confidential after it is completed.

In applying this statute to the case at hand, we again first examine its plain language. The plain language of

5 M.R.S.A. § 554(2)(E)[6] states that complaints, charges and accusations of misconduct by public employees which could lead to disciplinary action are exempt from disclosure under Maine's Freedom of Access Law until disciplinary action against employees is final. Even then only the final written decision of the disciplinary action taken is not exempt from public disclosure. The statute thus is not ambiguous on its face.

Nor is the legislative history of Section 554(2)(E) of any assistance.[7] The original version of the current Section 554 was enacted in 1977 as part of an Errors and Inconsistencies bill. P.L. 1977, c. 564, § 14. Debate on this bill did not include any comments on § 14, which contained the following language:

> The term "public records," as defined in Title 1, section 402, subsection 3, shall not apply to: Working papers, research material, records and the examinations prepared for and used specifically in the examination or evaluation of applicants for positions wihin the classified service of State Government; applicatons, resumes, ratings or performance evaluation sheets, records of disciplinary actions, interoffice or intraoffice memoranda or other correspondence deemed to be related to the personal history of state employees or applicants for classified state positions.

---

[6] It is worth noting that the third paragraph of Section 554 reaffirms the general policy of the Freedom of Access Law that: "[r]ecords of the Department of Personnel shall be public records and open to inspection of the public during regular office hours at reasonable times and in accordance with such procedure as the commissioner may provide." 5 M.R.S.A. § 554. Thus, for the reasons similar to those set forth in Part II of this Opinion regarding the interpretation of exemptions under the Freedom of Access Law, the exemptions in Section 554 should be strictly construed.

[7] Although, in situations where the plain language of a statute is clear, we are not required to examine extrinsic evidence of legislative intent, we have examined such evidence in this instance to determine that such evidence does not contravene the plain language of the statute.

In 1979, this statute was replaced by the current statute. P.L. 1979, c. 403, § 1. The Statement of Fact on the legislation eventually enacted stated only that the bill was intended to establish "a uniform provision for state, county, and municipal personnel records." 109th Maine Legislature, Legislative Document No. 826 (1979).[8/] Again, however, there was no recorded debate on this amendment prior to its enactment, and no other dispositive legislative history exists. Thus, the legislative history of Section 554 is silent, and the plain language of the Section must control.

Consequently, if Section XII(B) of the Department's report can be found to contain "complaints, charges or accusations of misconduct" against State employees "which may result in disciplinary action," it is exempt from the mandatory disclosure provisons of the Freedom of Access Law.

Having examined the documents contained in the list set forth in Part I of this Opinion, it is clear that many of these documents contain complaints, charges, and accusations which could be used in disciplinary proceedings. For example, the September 25, 1975 written statement by Susan Nordmann contains a number of complaints and accusations against Robert Kelly, Director of Academic Affairs at the Baxter School, and names a male student to whom it is alleged that Mr. Kelly showed unusual favoritism. The July 17, 1975 letter from Joseph Youngs, Superintendent of the Baxter School, to Beverly Trenholm, Director of the Division of School Operations for the Department, raises several concerns regarding Mr. Kelly's conduct with teachers and students at Baxter School. The resignation forms of Baxter School staff members, while they are generally unspecific in identifying persons at the School who allegedly had engaged in misconduct, as a whole demonstrate significant dissatisfaction by staff members with the administration of the School, and are corroborative of other more specific allegations of misconduct known to Departmental administrators at the time. All of these items, along with the textual discussions of interviews with Department and Baxter School officials contained in Section XII(B) of the Department's report, indicate a pattern of repeated allegations of physical and sexual abuse of Baxter School students, and repeated allegatons of general mismanagement at the School. Such evidence could have been used as part of disciplinary actions against then current Baxter School and Departmental officials. It could also be used now in disciplinary actions against officials remaining within the Department at this time.

8/ This amendment provided an exemption identical to § 554(2)(E) for county and muhicipal employees. See P.L. 1979, c. 403, §§ 2, 3, amending 30 M.R.S.A. §§ 64, 2257.

Accordingly, in light of the clear language of the statute, and the absence of any legislative history or dispositive case law[9/] running contrary to the plain meaning of the statute, we must conclude that 5 M.R.S.A. § 554(2)(E) exempts Section XII(B) of the report of the Department of Educational and Cultural Services from the mandatory disclosure requirements of the Freedom of Access Law and thus authorizes the Department to withhold the report and its accompanying documents from public scrutiny. Whether it must withhold such documents from public scrutiny, however, is a different matter.

IV

As a general proposition, the Freedom of Access Law does not prohibit the disclosure of documents which are exempt from inclusion within the term of "public records." The law merely authorizes state agencies to withhold such material from public scrutiny. Thus, were the documents in question here merely exempt from disclosure under the Freedom of Access Law, we would have no difficulty in concluding that the Department, while not being required to do so, could release them to the public if it so wished.[10/]

9/ There is no case law interpreting Section 554.

10/ Although federal law is different from Maine law, compare 5 U.S.C. § 552(b)(1976) with 1 M.R.S.A. § 402(3)(1979), the U. S. Supreme Court similarly has interpreted the exemptions to FOIA to be permissive instead of mandatory. See Chrysler Corp. v. Brown, 411 U.S. 281, 290-94 (1979). Because, like Maine, Congress intended that the basic objective of FOIA to be disclosure, not secrecy, Department of Air Force v. Rose, 425 U.S. at 361, government agencies may release information otherwise exempt from disclosure. The language of the federal FOIA contemplates a balancing test between the public interest in disclosure and the individual's interest in personal privacy. See 5 U.S.C. § 552(b)(6)(1976). Accordingly, federal courts examine four factors in determining whether exempted material nonetheless may be released: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any alternative means of obtaining the requested information. Church of Scientology v. U. S. Department of Army, 611 F.2d 738, 746 (D.C.Cir. 1979). Because Maine's statute is different from the federal FOIA, we do not employ a balancing test, although we conclude that the Legislature intended to make the exemptions to the Freedom of Access Law permissive instead of mandatory.

The problem here, however, is presented by the fact that the Legislature, through 5 M.R.S.A. § 554(2)(E), chose to make the documents in this case "confidential," a denomination which might be interpreted as prohibiting their disclosure. See Dunn & Theobald, Inc. v. Cohen, Me., 402 A.2d 603 (1979), in which the Supreme Judical Court of Maine implied that the legislative denomination of investigatory records in the hands of the Attorney General as "confidential" might prohibit their disclosure outright. Id. at 605-06. As indicated above, the legislative history of Section 554 is silent as to what the Legislature intended to accomplish with this provision. Thus, it is impossible to determine whether the Legislature intended that a Department in the possession of "confidential" material be prohibited from releasing such information to the public, or whether it intended that the agency might have the discretion to make such a release, notwithstanding the information's "confidential" status.

For the reasons which follow, we are disinclined to impute the former intention to the Legislature. To require public agencies to deny public access to governmental records wherever possible under 5 M.R.S.A. § 554(2)(E) conceivably could require the exemption from public disclosure of virtually all governmental documents or files which describe the official actions of a state employee simply because such records arguably could become the subject at some future time of some form of disciplinary action. Such a mandatory interpretation of the exemptions provided in 5 M.R.S.A. § 554(2)(E) would be so broad that it would directly contradict the fundamental public purposes of Maine's Freedom of Access Law, and it would essentially repeal the operation of that statute with regard to large numbers of documents created by government agencies in the normal course of business.

The preferable course is to attempt to analyze the legislative purpose behind Section 554(2)(E). It would appear that, in enacting Section 554(2)(E), the Legislature was attempting to protect three classes of persons: those who are the subject of the "complaints, charges or accusations of misconduct," those who make such charges, and those who might be the victims of the alleged misconduct. On the other hand, it would also appear that the Legislature, in enacting this provison, was not attempting to shield public officials from public scrutiny of the consequences of their policy decisions. To find otherwise would be to read so much into the word "misconduct" as to seriously negate the overall purpose of the Freedom of Access Law, which is to insure that such scrutiny is

possible. Accordingly, we would think that the proper course of inquiry, when determining whether "confidential" documents may be disclosed, is to ascertain whether such disclosure would be incompatible with one of the evident purposes of Section 554(2)(E). If so, its disclosure would be prohibited; if not, the agency would have the discretion to release the information.

Applying these principles to the case at hand, we find that none of the three purposes of Section 554(2)(E) set forth above would be compromised by public disclosure of Section XII(B) of the Department's report and its supporting documents.

First, as to the subjects of the allegations of misconduct, we have examined the documents in question and find that most of the information which is contained in Section XII(B) of the Department's report has already been released publicly, either in the July 12, 1982, report of the Attorney General relative to Baxter School, or in the press. Current and former State employees already have been publicly singled out by name, and their actions have been described in great detail. All that Section XII(B) of the Department's report does is to chronicle a pattern of agency action over a period of several years in dealing with repeated allegations of physical and sexual abuse of Baxter School students. No compelling personal privacy interests of State employees remain to be protected by the withholding of this information.

Second, the release of Section XII(B) of the Department's report would not compromise the identity of any of the persons who made specific charges of misconduct. Their names also have already been released publicly and they therefore no longer have any interest in further public disclosure of their respective involvement in the investigation.

Finally, the identities of the victims of the alleged misconduct could easily be protected by deleting the names of any students at the Baxter School, much in the manner employed by our office in its recent report on the subject.

Accordingly, while it is possible for the Department to decide to withhold this information from public disclosure pursuant to the language of 5 M.R.S.A. § 554(2)(E), we believe that the Legislature's intent to create an open government would permit the Department to release the information after making suitable provision for the protection of the identities of the victims. Further, any refusal to disclose, if motivated solely by the purpose of protecting the Department from public scrutiny, would be contrary to the intent of the Legislature as evidenced in the original enactment of the Freedom of Access Law.

V

Your final question is whether the confidentiality provisions of 5 M.R.S.A. § 554(2)(E) apply depending upon whether a person involved is currently employed by the State, and, if the person involved is no longer employed by the State, whether the provisions of the statute apply depending upon whether the former employee resigned, retired, or was dismissed as a result of disciplinary action. Because the plain terms of the statute refer to the treatment of records and not to the status of employees when those records were created, we conclude that the confidentiality provisions of State law which exempt information about State employees from public disclosure apply whether or not the individual is currently employed by the State, and regardless of his method of separation, if any, from State service. In short, the confidentiality provisions of the State Personnel Law apply to records compiled and maintained by the State with regard to public employment and that is not conditioned on the current or former employment status of the employees themselves. Indeed, it is not necessary for a person ever to become employed by the State in order to receive the extent of the confidentiality protections for personal employment information which exists under the Personnel Law, and the records of unsuccessful applicants for State employment are already given the same confidentiality protections as those of successful applicants. In addition, we believe it is clear that an employee's method of separation from State service does not affect the extent of the confidentiality provisions which apply to the personnel records which were compiled with regard to the employee while as a State employee. The personnel records of the employee survive the employee, and so do the confidentiality provisions which apply to such records.11/

11/ The only caveat to this is that personnel information, whether of a personal nature or otherwise, which is included as findings in a final written decision of disciplinary action against a State employee, is always exempted from the confidentiality provisions of the Personnel Law, pursuant to 5 M.R.S.A. § 554(2)(E).

VI

In conclusion, although we find that 5 M.R.S.A. § 554(2)(E) allows the Department of Educational and Cultural Services to withhold from public disclosure Section XII(B) of its report relating to the Baxter School for the Deaf, we conclude that the Department may permit public disclosure of Section XII(B) of its report, since such disclosure in this case poses no threat to any significant personal privacy interests which the statute seeks to protect. Moreover, we are also of the view that non-disclosure, if sought to protect the Department itself from public scrutiny, would be contrary to the intent of the Legislature.

I hope that you find this information helpful. I would suggest that if you should decide to release any of the documents mentioned in this opinion, and if you believe that there are any persons whose privacy interests may be affected by the release of this information, you may wish to contact them prior to the release of the information.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/dab