STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. HAN-15-95

TERRENCE E. PINKHAM,

Plaintiff-Appellant,

v.

STATE OF MAINE DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

BRIEF OF AMICUS MAINE FREEDOM OF INFORMATION COALITION, AND NEW ENGLAND FIRST AMENDMENT COALITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

The Court has invited amicus briefs "on whether the language in 23 M.R.S. § 63(1)(A), providing that records in the possession of the [Maine Department of Transportation] relating to appraisals of property are 'confidential and may not be disclosed,' puts the appraisals of other properties outside the scope of discovery as defined in M.R.Civ.P. 26(b) or otherwise prevents the production or disclosure of the information in discovery." (Public Notice, Jan. 17, 2016). The central issue is whether the Court should construe Section 63 to foreclose a litigant from getting from the Department information necessary to enforce legal rights in court.

To answer this question requires consideration of the principle that courts and litigants should have access to all relevant information, and that such access promotes informed decisions by the courts and public confidence in the justice system. Absent a countervailing interest sufficient to eclipse this important principle – and an unmistakable legislative intent to recognize such an interest – exceptions to the Freedom of Access Act, 1 M.R.S. §§ 400-414, should not be construed to create statutory privileges preventing litigants from accessing government records in court proceedings. Because Section 63 does not evince a clear legislative intent to override interests essential to the proper administration of justice, it functions only as an exception to the public's right to know, not as a rule of privilege barring litigants from access to relevant government information in court.

INTEREST OF AMICUS

The Maine Freedom of Information Coalition ("MFOIC"), a tax exempt Maine non-profit corporation, appreciates the Court's invitation to participate as an amicus in this appeal. MFOIC is an organization dedicated to educating Mainers about their rights and responsibilities as citizens in our democracy. The members of MFOIC include the Maine Association of Broadcasters, the ACLU of Maine, the League of Women Voters of Maine, the Maine Library Association, the Maine Press Association, the Society of Professional Journalists, the Maine Real Estate Management Association, and a representative of academic/government interests. Its mission is to broaden knowledge and awareness of the First Amendment and Maine laws aimed at ensuring transparency in government.

The New England First Amendment Coalition, a tax exempt nonprofit organization that defends, promotes, and expands public access to government and the work it does, joins this amicus brief. The Coalition is a broad-based organization of lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment and the principle of the public's right to know in New England. In collaboration with other like-minded organizations, it also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world. It routinely files amicus curiae briefs on freedom of information issues, including in *Commonwealth v. Lucas,* 472 Mass. 387 (2015), *Commonwealth v. George W. Prescott*

Publ'g Co. 463 Mass. 258 (2012); *MaineToday Media, Inc. v. State*, 2013 ME 100, 82 A.3d 104; and *Union Leader Corp. v. N.H. Retirement Sys.*, 34 A.3d 725 (N.H. 2011).[1]

ARGUMENT

I. Maine statutes should be construed to make relevant evidence available to parties and the courts, even if it would be exempt from disclosure under the Freedom of Access Act.

As a general rule, the justice system works best when parties to legal proceedings and the courts have full and fair access to relevant information. This fundamental principle has long been recognized:

> The principle favoring full access by the courts and litigants to relevant information, in the absence of strong competing considerations, is an important foundation for the achievement of justice by the courts in individual lawsuits. This principle is national policy of high rank, wholeheartedly endorsed and furthered by Congress. In the absence of a specific prohibition against disclosure in judicial proceedings, such as Congress has set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice.

Freeman v. Seligson, 405 F.2d 1326, 1349 (D.C. Cir. 1968).

The discovery rules in civil litigation serve this strong public interest by giving litigants access to all relevant information. M.R.Civ.P. 26(b)(1). "Undergirding our discovery rules is the principle that litigants are entitled to every person's evidence. The law favors full access to relevant information." *Agrivest Partnership v. Central Iowa Production Credit Assn.*, 373 N.W.2d 479, 482 (Iowa 1985); *see also Baldridge v. Shapiro*, 455 U.S. 345 (1982) (discovery rules "are designed to encourage open exchange of information by litigants"); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682

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[1] These cases are not included in the table of authorities because they are not cited in support of any argument relevant to the outcome of this appeal.

(1958) (discovery and pretrial procedures "make trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

These principles apply with full force to expert testimony. "Recognizing the importance of expert testimony in modern trial practice, the Civil Rules provide for extensive pretrial disclosure of expert testimony." *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992). As the First Circuit has explained, "In the arena of expert discovery – a setting which often involves complex factual inquiries – Rule 26 increases the quality of trials by better preparing attorneys for cross-examination, minimizing surprise, and supplying a helpful focus for the court's supervision of the judicial process." *Id.* Discovery of expert testimony "promotes fairness both in the discovery process and at trial." *Id.*

The rules of evidence also recognize the strong public interest in giving to the courts and litigants full and fair access to all relevant information. The default rule is that "no person has a privilege . . . from producing an object or writing." M.R.Evid. 501. According to the Adviser's Note, "Most evidentiary rules relate to what happens in the courtroom and are designed to facilitate ascertainment of the truth. Privileges, on the other hand, are designed to shut out the truth so as to protect relationships of sufficient social important to assure their confidentiality." *Id.* (Adviser's Note – Feb. 2, 1976).

By contrast with the important relationships protected by recognized privileges, the standard for creating exceptions to public records laws is generally more favorable to nondisclosure. For example, the criteria used by the Right to Know Advisory Committee to review exceptions to the Freedom of Access Act includes "whether

disclosure puts a business at a competitive disadvantage and, if so, whether the business's interest substantially outweighs the public interest in the disclosure of records" (1 M.R.S. 432(2)(E)), but in judicial proceedings commercial business interests typically only serve as grounds for a protective order in discovery under M.R.Civ.P. 26(c) and are usually not sufficient to keep records secret once they are introduced into evidence at trial. *See Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 843-844 (Me.1994) ("non-disclosure of judicial records could be justified only by the most compelling reasons").

Because statutory privileges make information secret despite its relevance in a judicial proceeding, such privileges are only recognized when created by specific and unmistakable language. *Maine Sugar Indus., Inc. Maine Indus. Bldg. Assn.*, 264 A.2d 1 5 (1970) ("it should plainly appear in the statute itself that the Legislature deemed that the benefits of secrecy in a particular case outweighed the need for correct disposal of litigation"); *see also St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) ("Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result."); *Freeman*, 405 F.2d at 1351 ("The primary principle of according justice to litigants, dependent on ascertainment of underlying facts, is not to be subordinated to some other domestic policy as a matter of inference of Congressional intent from ambiguous or inconclusive references."). According to Field & Murray, MAINE EVIDENCE § 501.4 (6th ed. 2007), "Only if the statutory provision contains a specific ban on evidentiary use of the material should the court treat it as a privilege and exclude the evidence."

This is so because "privileges contravene the fundamental principle that the public has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quotation marks and ellipses omitted). Privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* (quotation marks omitted). There is little downside to this approach because, as the Law Court has recognized, the Legislature knows how to make clear when a privilege is intended. *Health Care Workers' Comp. v. Superintendent*, 2009 ME 5, ¶ 10 n.6, 962 A.2d 968 ("The Legislature has, in other contexts, made a statutory privilege against discovery explicit.").

Government records are not privileged from discovery merely because they are exempt from disclosure under public records laws. *See Health Care,* 2009 ME 5, ¶ 10 (records exempt from Freedom of Access not shielded from "restricted disclosure between private parties in the scope of an adjudicatory proceeding"); *see also Baldridge,* 455 U.S. at 360 n. 15 ("Most courts have concluded that an FOIA exemption does not automatically create a 'privilege' within the meaning of the Federal Rules of Civil Procedure."); *Assn. for Women in Science v. Califano*, 566 F.2d 339, 342 (D.C.Cir. 1977) ("The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges."). Public records laws serve distinct purposes from discovery in litigation. *See Baldridge,* 455 U.S. at 360 n. 14 ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery.").

The Superior Court erred by concluding that an exception to the Freedom of Access Act constitutes a privilege against discovery under M.R.Civ.P. 26. The Court cited *Davric Maine Corp. v. Dept. of Transp.*, 606 A.2d 201 (Me. 1992) [2] for the proposition that the Department's appraisal is confidential. A. 191. But *Davric* dealt solely with a request for records under the Freedom of Access Act. *Davric*, 606 A.2d at 201-202 (framing the issue as whether the "requested documents are public records and subject to disclosure under the Freedom of Access Act"). The opinion does not answer the privilege question posed here. The Superior Court thus relied on inapposite precedent and did not apply the appropriate standard, outlined above, for determining whether 23 M.R.S. § 63 creates a privilege against discovery in litigation.

II. The Department's confidentiality statute neither promotes an interest so compelling as to supersede the interest in the free flow of information to litigants and courts, nor uses language evincing a clear intent to create a statutory privilege.

The government does have an interest in preventing premature access to Department appraisals of real property, to protect "the Department's bargaining position during its negotiations with property owners." *Davric*, 606 A.2d at 203. When the Department is engaged in the acquisition of real property, a measure of confidentiality is reasonable so that parties or potential parties to the transaction do not use access to public records to their advantage (and to the disadvantage of the

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[2] A footnote in *Davric* refers to deference to an administrative agency's construction of statutes it administers, but the Freedom of Access Act provides for *de novo* review by the court. 1 M.R.S. §409(2). It is well established that courts will not defer to state agencies for purposes of deciding whether records are public. *See Underwood v. City of Presque Isle*, 1998 ME 166, ¶ 22, 714 A.2d 148. In *Underwood* the Law Court held, "[I]n its review of the actions of a governmental board or agency pursuant to the F[O]AA, the Superior Court is the forum of origin for a determination of both facts and law with respect to the alleged violation and does not function in an appellate capacity." *Id.*

Department) in negotiations. If private buyers or sellers had access to information on the Department's negotiation strategy or what it would pay to buy or sell real property, those engaged in negotiations with it could unfairly benefit by that transparency. But this interest is limited in time and scope. Once a transaction has closed, disclosure of the information would not prejudice the agency's competitive or bargaining position. Cf. 1 M.R.S. § 405(6)(C) (authorizing executive sessions for "discussion or consideration of the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency").

Likewise, there is no need for confidentiality if negotiations are at an impasse and the Department is subject to a judicial proceeding to decide how much the Department must pay to acquire property by eminent domain. The Department's bargaining position is not relevant to such a proceeding, and is probably not even admissible. *See* M.R.Evid. 408. In court, both sides must provide expert disclosures and testimony supporting (or refuting) their positions with respect to the valuation of property, with the goal of giving the court all information it needs to make an informed judgment. Both sides have a right to cross-examine one another's expert witnesses, and to use relevant records to do so. To the extent that any information relevant to court proceedings might prejudice the Department's bargaining position with respect to other transactions, the Department has tools at its disposal to protect that interest, such as protective orders under M.R.Civ.P. 26(c).

The confidentiality afforded to Department records by 23 M.R.S. § 63 is in line with these interests. The statute does not refer to privilege or create perpetual confidentiality, but rather confidentiality for a limited period of time, after which the Department's records become public. The statute provides, in relevant part, "[r]ecords and correspondence relating to negotiations for and appraisals of property" are "confidential and may not be disclosed[,]" but all such records, correspondence, and appraisals become "public records beginning 9 months after the completion date of the project." *Id.* §63(1), (3). It speaks to when the records become "public records." The creation of a privilege against court use of Department records would be inappropriate where the legislature provided for eventual access to the records by the general public. In general, privileges only exist to protect an interest that is too substantial to have an expiration date. *See, e.g.,* M.R.Evid. 502-509. That is not the case here, where months after a project concludes, appraisal and other records become available to the general public.

For all these reasons, the Superior Court erred by construing 23 M.R.S. § 63 as a privilege barring Pinkham from access to Department records in discovery.

CONCLUSION

No policy objective would be seriously impaired by judicially-supervised disclosure of Department appraisals in litigation, and such disclosure would serve important interests, including fairness to litigants and making available to the court all relevant information. Nor does the plain language of 23 M.R.S. § 63 clearly evince a legislative intent that Department appraisals be kept secret from those with whom the Department is litigating or from courts charged with making decisions in that litigation.

The statute should not be interpreted to handicap a litigant's right to contest the Department's valuation of property in court or, for that matter, to shield from the court information needed to make an informed judgment.

The answer to the question on which the Court invited amicus briefs is that the Department's confidentiality statute does not create a statutory privilege, and therefore the records kept from Pinkham should have been disclosed to him in discovery. The decision below to the contrary should be reversed.

Dated at Portland, Maine, this 12th day of February, 2016.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for Attorney for Amicus Maine Freedom of Information Coalition and New England First Amendment Coalition, certify that I have, this date, mailed two copies of the Brief of Amicus Maine Freedom of Information Coalition and New England First Amendment Coalition to the Attorneys listed below, by United States Mail, first-class, postage prepaid, addressed as follows:

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