UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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| In the Matter of | ) | |
| | ) | Docket Nos. 50-329A |
| CONSUMERS POWER COMPANY | ) | and 50-330A |
| (Midland Units 1 and 2) | ) | |

Applicant's Answer to Supplemental Motion to Quash Subpoenas on Grounds of Confidentiality

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, and the Board's Third Prehearing Conference Order (p.4-5), Consumers Power Company (hereinafter "Applicant") answers the supplemental motion to quash filed by twenty-one Michigan municipals to February 20, 1973. This Motion objects to Applicant's document requests 4 and 5 and interrogatories 7, 8, 45, 46, 59 and 60, on grounds of relevance, burden and confidentiality.

Applicant's discovery demands were served upon the municipals' counsel on December 18, 1972 and on January 9, 1973, said counsel filed a Motion to Quash. Except for a cryptic parenthetical phrase on page 3 of their 27-page Motion (which made no reference to specific discovery items), the municipals first raised the issue of confidentiality during the course of the Board's rulings as to interrogatories 45 and 46 at the Prehearing Conference of February 12, 1973 (Tr. 289 et seq).

At the Prehearing Conference and in its Prehearing Conference Order, the Board rejected the twenty-one municipals' claims as to burden and relevance with respect

to many items, including interrogatories 45 and 46, and ordered compliance with these items. (See Third Prehearing Conference Order (p.4) and Tr. 288, 299). However, despite the Board's apparent concern about the untimeliness of the municipals' objections on grounds of confidentiality (Tr. 292), the municipals were given leave to file a "brief indicating the bases for their conclusion that a confidential relationship exists which bars the production of the information requested in these three interrogatories" (emphasis supplied). Order, p.4.

Applicant submits that the Supplemental Motion to quash certain items of its discovery demands should be summarily denied for the reasons set forth below.

I. The Supplemental Motion Raises Issues Beyond the Scope Permitted by the Board

The Motion fails to confine itself to the parameters set forth in the above-quoted excerpt of the Board's order. First, the Motion seeks to retry the issues of relevance and burden, even though the municipals' positions in these respects were exhaustively briefed, argued, and rejected by the Board.[1/] Second,

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1/ For example, the Motion complains that the requests are "virtually unlimited" in scope (p.3), that a showing of "relevance" is required (pp. 5, 8 and 9), and that the discovery is not "necessary" to Applicant's case (pp. 5, 7 and 8). These same arguments were presented in the municipals' Motion to Quash (pp. 5-24) and at the Prehearing Conference (Tr. 192-200; 213-216).

in contrast to the three interrogatories which the Board's order granted the municipals leave to challenge, the Supplemental Motion objects to six interrogatories and two document requests.[2/]

Applicant therefore urges the Board to reject the filing of the Supplemental Motion, at least to the extent that the Motion raises objections to other than the three interrogatories specified by the Board and to the extent that the Motion discusses issues of relevance and burden.

II. The Information Which Applicant Seeks is Relevant and Necessary to Applicant's Defense and Compliance is Not Burdensome

Since the Board ordered that supplemental pleadings to the Motion to Quash to be restricted to the question of confidentiality, the municipals' arguments relating to burden and relevance will not be re-litigated here. Rather,

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2/ The interrogatories are 7, 8, 45, 46, 59 and 60; the document requests are items 4 and 5. The Board's order permitted challenges only to "45, 46 and one other" (p.4). Since the discovery demand was served upon the municipals' counsel almost two months prior to the Prehearing Conference, there is no apparent justification why the challenged demands have now been expanded from the three items discussed at the Conference (Tr. 298) to eight. This is particularly so with regard to items 59 and 60, to which no objection was raised (Tr. 303), even though the Board considered these items at the Conference after the issue of confidentiality had been discussed at length (Tr. 290-298).

Applicant incorporates by reference Section B through D of its "Answer to Motion to Quash . . .", filed February 7, 1973, and its oral argument at the Prehearing Conference (Tr. 186-191; 205-212), where issues of relevance and alleged burden were discussed at length.

Subsequent to Applicant's aforementioned pleadings, the statements of Department of Justice at the Prehearing Conference re-enforced Applicant's showing of relevance and need for the requested information. When asked by Board member Clark whether the Department "would be willing to exclude any evidence with regard to any small municipality or small power company who is not an intervenor in this case", the Department's counsel replied, "No, your honor, I would not". (Tr. 217)(emphasis supplied). Thus, since the Department refuses to confine its case to the intervenors, Applicant's defense must include discovery of information about the market structure and competitive environment of these twenty-one municipal non-parties located in the lower peninsula of Michigan.

It should be also noted that the municipals' purported concern about document requests 4 and 5 (See Motion, p.3) is moot in view of Applicant's Application for Issuance of Subpoenas Duces Tecum, filed February 16, 1973. In that filing, document request 4 has been amended

to delete "all document" demands; it now seeks only specific reports, studies, correspondence or simply calls for any documents which show the desired information. Document request 5 was considered at some length by the Board (Tr. 226-228) and, except for subpart 5(d), the Board ordered compliance (Third Prehearing Conference Order, p.3). Request 5(d) is not included in the Applicant's aforementioned filing of February 16, 1973. Thus, the municipals' objection concerning the burden of complying with document requests 4 and 5 has even less merit than it did before the scope of these requests were narrowed.

III. The Municipals Make no Showing That The Identity of Their Customers is Secret or Confidential or That They Will Be Adversely Affected by Disclosure of The Information Applicant Requests

As the municipals concede (Motion, p.4), trade secrets and other confidential information are not privileged. 8 Wright and Miller Federal Practice and Procedure, §2043 (1970 ed.)(stating that lack of privilege is "well-settled"; see cases cited therein at fn.16, p.300). The Rules of this Commission do provide that "for good cause shown", a person may seek a protective order that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way". (Section 2.740(c)(6). This rule, which is identical to Rule 26(c)(7) of the Federal

Rules of Civil Procedure, clearly requires the person resisting discovery to establish that (1) the information sought is, in fact, secret or confidential[3] and (2) that such person will be harmed by the disclosure of such information.[4]

1. Confidentiality: The challenged discovery requests seek to ascertain various relevant characteristics of the municipal systems' largest customers, the efforts utilized to attract and serve such customers, and the reasons why the number of such customers has changed during the past decade. According to the municipals, disclosure of this information may reveal the identity of its retail customers (Tr. 296-297).

However, at the Prehearing Conference Applicant offered to accept responses to the challenged requests in coded form (Tr. 290). Although pressed to do so by the Chairman (Tr. 297), the municipals fail to offer any "specific" reasons why this approach will not adequately protect them. Rather, their Motion simply repeats the unsupported allegation that "in most instances coding

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3/ E.g., Singer Manufacturing Co. v. Brother International Corp., 191 F. Supp. 322 (S.D.N.Y. 1960)(sales and price data or a competitor is not "trade secret".)

4/ E.g., Essex Wire Corp. v. Eastern Electric Sales Corp., 48 F.R.D. 308 (E.D. Pa. 1969)(no showing of competitive disadvantage resulting from disclosure).

of the information would provide minimal protection". (Motion, p.13). Such a statement by counsel clearly does not constitute a sufficient showing of good cause for the relief which the municipals seek. Sacks v. Frank H. Lee Co., 18 F.R.D. 500 (S.D.N.Y. 1955); Essex Wire Corp., supra.

In any event, the identity and characteristics of the municipals' customers do not constitute a trade secret or other confidential information. There is no question that the municipals' large customers use electricity; since the area in which they are located is usually served only by Applicant and one municipal system, the identity of a customer's electric supplier can hardly be considered confidential or secret.

In addition, Michigan law requires that the municipals grant any person (including the Applicant) access to the type of information it seeks here. The Michigan statutes declare that all "books, papers or records created or received in any office or agency" of any political subdivision of the State of Michigan are "public property, belonging to the people of the State of Michigan". Michigan Code of Laws §28.759 (See Attachment A). Moreover, it is a disdemeanor for the official custodian of "any county, city, or township records" to fail to permit examination of the "records and files in

his office" by "any person having . . . any lawful purpose". (Emphasis supplied) Michigan Code of Laws §28.760. See Attachment A.

By this legislation, the State of Michigan "intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require . . ." Burton v. Tuite, 44 N.W. 282, 285 (Mich. Sup. Ct. 1889).[5/] Even as to the records in those subdivisions not specified in the statute,[6/] Michigan common law affords citizens who demonstrate a requisite interest to inspect public records. Nowack v. Fuller, 219 N.W. 749 (Mich. Sup. Ct. 1928)(newspaper editor is interested person in public information)(The Burton and Nowack cases are attached as Attachment B).

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5/ The statute continues to be liberally construed. See Michigan Attorney General's Opinion No. 2786 (Attachment C) which interpreted the statute to require the disclosure of the identity of county employees; see also an unpublished Attorney General's opinion (Att. C).

6/ All but three of the twenty-one municipals herein are cities. Three (Clinton, Paw Paw, and Chelsea) are villages.

Thus, since the information Applicant seeks is, in effect, public knowledge, the municipals have clearly not sustained their burden of demonstration that the information sought in the manner set forth by Applicant constitute trade secrets or other confidential information.

2. Harmful Effect: Even should the information which Applicant seeks be deemed confidential, the municipals have made no showing that they will be competitively affected in any adverse way by its disclosure. As the Department of Justice observed in its advice letter in this proceeding (p.3), "competition in regulated industries is not the hour by hour competition of the marketplace". For example, applicant's rates are regulated and are uniform throughout its service area, so that it cannot reduce its rates to attract a particular customer. Thus, the municipals do not explain, and Applicant cannot fathom, what competitive disadvantage would accrue to the municipals even if the information which Applicant seeks did in fact reveal the identity of their larger customers.

But, assuming arguendo that the municipals might be disadvantaged by disclosure of the requested information, the municipals' Motion must still be denied. Where, as here, the relevance of the information sought has been established,

there is ample case law[7/] supporting the disclosure of customer information -- including such information from non-party competitors in antitrust cases. Particularly in point is Covey Oil Company v. Continental Oil Company, 340 F.2d 993 (10th Cir. 1965), cert. denied 380 U.S. 964 (1965). There, several large, integrated oil companies (including Continental Oil) were charged with violations of Section 1 and 2 of the Sherman Act, inter alia, for "controlling sources of supply, by fixing and maintaining wholesale and retail gasoline prices, and by suppressing competition [by small competitors]". 340 F.2d at 995. The defendant companies caused subpoenas duces tecum to be served on many of their small non-party competitors; these subpoenas required production of information relating to the non-parties' purchase price of gasoline, their sale prices and gallonage of gasoline sold other than at retail, and the number and location of their competitors' retail customers.

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7/ United States v. American Optical Company, 10 F.R. Serv. 2d 26a.32, case 1(N.D. Cal. 1966)(non-party's sales and profit data); United States v. Aluminum Company of America, 193 F. Supp. 251 (N.D.N.Y. 1960)(non-party competitor's production figures); United States v. Lever Bros. Co., 193 F. Supp. 254 (S.D.N.Y. 1961)(sales and production data of non-party competitors); VonWitte v. American Elite, 20 F.R.D. 221 (S.D.N.Y. 1957)(customer list of competitors).

The Tenth Circuit affirmed the district court's refusal to quash these subpoenas on grounds of confidentiality. The holding of the Court is equally applicable to the instant case:

> [W]e believe that the showing [for production] is sufficient under the Sherman Act charges of restraint of trade and monopoly by fixing gasoline prices and suppressing competition of independent jobbers. Exploration into the businesses of admitted rivals may well reveal the validity or invalidity of the charge of competition suppression . . .
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> The cases relied on by appellants are not apposite. In neither Hartley Pen Co. v. United States District Court, 9 Cir., 287 F.2d 324, nor United States v. Serta Associates, Inc., N.D. Ill., 29 F.R.D. 136, was relevancy established.[8/]
>
> Appellants contend that general relevancy is not sufficient to require a non-party witness to divulge trade secrets. The claimed trade secrets do not relate to processes, formulas, or methods but rather to price, cost, and volume of sales of gasoline . . .
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> * * *
>
> The position is based on the fact that Continental and appellants compete in the wholesale market. No absolute privilege protects the information sought here from disclosure in discovery proceedings. The claim of irreparable competitive injury must be balanced against the need for the information in the preparation of the defense. Judicial inquiry should not be unduly hampered. Inconvenience to third parties may be outweighed by the pub-

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[8/ These two cases were also extensively relied upon by the municipals. (Motion, pp. 4, 5, 6, 8 and 9).]

> lic interest in seeking the truth in every litigated case. [Footnotes omitted]. 340 F.2d at 998, 999.

Similarly, as the court held in Service Liquor Distributors v. Calvert Distillers Corporation, 16 F.R.D. 507 (S.D.N.Y. 1954):

> [I]n an action under the antitrust laws, based upon on alleged abuse of competition, competitor's business records, where good cause has been shown, are not only not immune from inquiry, but are precisely the source of the most relevant evidence. 16 F.R.D. at 507, 508. (Emphasis supplied.)

Thus, not only do the municipals ignore the fact that the Board has rejected their claims based upon relevance and has ordered compliance with the challenged demands, they also fail to explain why the information which Applicant seeks is confidential or requires any protection.

WHEREFORE, Applicant submits that the Supplemental Motion of the twenty-one municipals should be denied.

Respectfully submitted,

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Wm. Warfield Ross

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Keith S. Watson

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Toni K. Golden

February 26, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S ANSWER TO SUPPLEMENTAL MOTION TO QUASH SUBPOENAS ON GROUNDS OF CONFIDENTIALITY , dated February 26, 1973, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 26th day of February, 1973:

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ATTACHMENT A

Michigan Code of Laws

Sections 28.759 and 28.760

CHAPTER LXXI

PUBLIC RECORDS

**§ 28.759 Mutilating, removing or detaining public records.]** SEC. 491. All [official] books, papers or records ♦ [created by or received in any office or agency of the state of Michigan or its political subdivisions], are ♦ declared to be public property, belonging to the people of the state of Michigan ♦. [All books, papers or records shall be disposed of only as provided in section 13c of Act No. 51 of the Public Acts of the First Extra Session of 1948, as added, being section 18.13c of the Compiled Laws of 1948, section 5 of Act No. 271 of the Public Acts of 1913, as amended, being section 399.5 of the Compiled Laws of 1948 and sections 2137 and 2138 of Act No. 236 of the Public Acts of 1961, being sections 600.2137 and 600.2138 of the Compiled Laws of 1948.]

Any person who shall wilfully carry away, mutilate or destroy any of such books, papers, records or any part of the same, and any person who shall retain and continue to hold the possession of any books, papers or records, or parts thereof, belonging to the aforesaid offices ♦ and shall refuse to deliver up ♦ [such] books, papers, records, or parts thereof to the proper officer having charge of the office to which ♦ [such] books, papers, or records belong, upon demand being made by such officer [or, in cases of a defunct office, the Michigan historical commission], shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than $1,000.00.

(CL '48, § 750.491.)

**History.**

As amended by Pub Acts 1952, No. 119, eff September 18; 1964, No. 147, eff August 28.

See Pub Acts 1851, No. 6; CL '57, § 5906; CL '71, § 7751; Pub Acts 1875, No. 208, eff August 3; How § 9347; CL '97, § 11361; CL '15 § 15079; CL '29, § 17018.

**Statutory references.**

Section 13c of Act No. 51 of 1948 (1st Ex Sess), above referred to, is §§ 3.516(13c), supra; section 5 of Act No. 271 of 1913 is § 15.1805, supra; sections 2137 and 2138 of Act No. 236 of 1961 are §§ 27A.2137, 27A.2138, supra.

**§ 28.760 Inspection and use of public records; copies; removal orders.]** SEC. 492. Any officer having the custody of any county, city or township records in this state who shall when requested fail or neglect to furnish proper and reasonable facilities for the inspection and examination of the records and files in his office and for making memoranda of transcripts therefrom during the usual business hours, which shall not be less than 4 hours per day, to any person having occasion to make examination of them for any lawful purpose shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by a fine of not more than $500.00. The custodian of said records and files may make such reasonable rules ♦ with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent interference with the regular discharge of the duties of such officer. ♦ [The] officer shall prohibit the use of pen and ink in making copies or notes of records and files in his office. ♦ No books, records and files shall be removed from the office of the custodian thereof ♦, except by the order of the judge of any court of competent jurisdiction, or in response to a subpoena duces tecum issued therefrom[, or for audit purposes conducted pursuant to Act No. 71 of the Public Acts of 1919, as amended, being sections 21.41 to 21.53 of the Compiled Laws of 1948, Act No. 52 of the Public Acts of 1929, being sections 14.141 to 14.145 of the Compiled Laws of 1948 or Act No. 2 of the Public Acts of 1968, being sections 141.421 to 141.433 of the Compiled Laws of 1948 with the permission of the official having custody of the records if the official is given a receipt listing the records being removed].

(CL '48, § 750.492.)

**History.**

As amended by Pub Acts 1970, No. 109, imd eff July 23.

See Pub Acts 1899, No. 133, imd eff June 1; CL '15, § 3449; CL '29, §§ 2713-2715.

**Statutory references.**

Act No. 71 of 1919, above referred to, is §§ 3.591-3.604, supra; Act No. 52 of 1929 is §§ 3.241-3.245, supra; Act No. 2 of 1968 is §§ 5.3228(21)-5.3228(33), supra.

ATTACHMENT B

Burton v. Tuite, 44 N.W. 282

and

Nowack v. Fuller, 219 N.W. 749

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BURTON v. TUITE, City Treasurer of Detroit.

(*Supreme Court of Michigan.* Dec. 28, 1889.)

PUBLIC RECORDS—RIGHT TO EXAMINE.

1. Act Mich. 1889, No. 205, provides that the officers having the custody of any county, city, or town records shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their offices, and for making memoranda or transcripts therefrom, to all persons having occasion to make examination of them for any lawful purpose. *Held*, that the examination of city tax-sales books, made up by the receiver of taxes, and by him handed over to the city treasurer, could not be refused on the ground that they were not public records, although there is no express statutory provision that such books shall be kept.

2. An abstractor cannot be denied access to such books on the ground that he is simply seeking information for private gain.

*Henry A. Chaney*, for relator. *John W. McGrath*, for respondent.

MORSE, J. The relator asks for the writ of *mandamus* to compel the respondent to permit him to inspect and examine the records and files in the city treasurer's office at Detroit, and to furnish proper and reasonable facilities for such inspection and examination, and for making memoranda and transcripts from such files and records, in compliance with Act No. 205, Pub. Acts 1889. The act in question reads as follows: "That the officers having the custody of any county, city, or town records in this state shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose: provided, that the custodian of said records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of such officer: and provided, further, that such officer shall prohibit the use of pen and ink in making copies or notes of records and files. Pub. Acts 1889, p. 286.

Relator shows in his petition that he is engaged in the abstract business in the city of Detroit, and has invested a large sum of money in said business. That his business requires that he should know what taxes, levied by the city of Detroit, are liens upon property of which he is furnishing abstracts, and by whom such liens, if any, are held. That when lands are sold for unpaid taxes the sale is conducted by the receiver of taxes. A statement of such sales in book form is made by the receiver, and turned over to the city treasurer, in whose custody it thereafter remains. When sales are redeemed or city bids sold, such redemption is minuted in this book. That it is necessary in said relator's business to frequently consult this book. If proper facilities were granted him, he would not need to consult the same more than 10 minutes in any one day. That the prevailing rule and custom is, in all the city and county offices, to permit all persons to have free access to the records therein, and he, himself, has ordinarily been allowed this privilege without obstruction or restraint, except in the case of the respondent, who is city treasurer of the city of Detroit. That said respondent has frequently refused to permit your relator to inspect the sales-book above referred to; as have also his subordinates; and, if at times an inspection of such records has been granted, it has always been accompanied with insulting language, implying that relator was taking time which belonged to the public, and that he must hurry, or that the books would be taken from him; and this, too, although no other parties were present to be waited upon or attended to, and though much more time was consumed by said treasurer in making such complaints than would be necessary for relator to inspect and make such memoranda as he needed if he could have access to the records without unreasonable interruption. A clerk would be detailed to see that the relator did not mutilate the records, with instructions not to permit relator to take the books. But more frequently relator has been told by said city treasurer and his subordinates that he could not see the records. Respondent has followed this obstructive course for a long time, to the great annoyance and discomfort of relator, and in face of the fact that there was posted in his office a notice to the effect that all information desired by the public would be promptly and cheerfully furnished. That respondent at one time informed relator that it was a matter of money with him

and that, if relator would pay him $25 per month, relator could have what access he pleased to the records in said treasurer's office. July 2, 1889, relator called at the treasurer's office, at about 11 o'clock A. M., and requested the privilege of inspecting some of the sales-books. Respondent asked if the information wanted was for relator's private business. Relator replied that Richard M. Coon was the owner of lot 24, in Wessons' section of the Thompson farm, in the city of Detroit, and that he had employed relator to see if certain tax-sales which had been previously made were still held by the city or disposed of, and, if disposed of, to whom. Respondent requested relator to write out what he wanted on a piece of paper, which he did. The paper was handed to a clerk, who was called by respondent to wait on relator. The parcel of land had been sold for six successive years, and it became necessary to inspect six different sales-books. That the statement which relator had made for the clerk, a copy of which he retained, informed the clerk the number of the book required, the page of the book, and the line on the page which he desired to inspect. That said clerk produced four of the books required, and they were hastily inspected by relator, but he was not permitted to handle them. During the examination, which could hardly have occupied 10 minutes, respondent himself sat by, discussing the general subject of relator's rights, and apparently in no wise hurried by the pressure of official duties. That, after relator had inspected the fourth volume, said clerk—taking his cue from the language and actions of his employer, said respondent—abruptly, violently, and unreasonably refused to produce the other two books requested, and left the room. That relator then asked the city treasurer himself to produce the two books asked for, but said treasurer refused. Relator then told respondent that he would get the books himself if he (respondent) would permit him (relator) to go into the room where said books were, for that purpose. Respondent told him he could not go into that room, and absolutely refused to permit him to see the books he desired. Relator offered respondent $10 per month to be accorded such treatment as accorded to the public. Respondent refused the offer. Relator then formally demanded the right to inspect the two books he had asked for before, and reminded respondent of the statute. Relator said that if he could not see the books he should ask for a *mandamus*. Respondent told relator to "mandam" if he wanted to; that the books were in the vault, and relator could not see them; and that nothing but an order from the common council would make him remove them. He told relator to leave a written memorandum of what he wanted. This relator refused to do this, as he had already furnished respondent with one statement of what he required. Respondent became vociferous, declared that he had disposed of the subject, refused to hear anything further, and left the room. Relator then, under advice of counsel, made a new memorandum of what he wanted, and offered it to the deputy treasurer, who said he had no time to attend to it. Relator told him he need not attend to it then, as he would send his clerk for it; laid the memorandum on the table, and placed a paper-weight upon it. Respondent came in about then, in a high temper, and with some profanity ordered the relator out of the office, which order relator obeyed. During the whole time of this interview there was no other person in the office on business, unless he was secluded in the private office of respondent.

The respondent in his answer denies that the books referred to by relator are public records, or that they are made so by charter, ordinance, or law, or that they are required by law to be kept, or that relator, or any person except respondent, is entitled to the possession of said books or entitled to take them out of the custody of respondent, or to make extracts from them, except under the immediate supervision of respondent. He denies that it is the universal practice in city offices to permit all persons desiring to inspect the said books to have free access to them, or that such is the usage, or that such usage has become so well established as to have the force of a common-law custom. He denies that relator has been ordinarily allowed to inspect such books without obstruction or restraint, if by obstruction or restraint is meant a denial of the right of access to said books without the supervision of the city treasurer. He denies the right which relator seeks to establish is recognized or confirmed by any act of the legislature. He denies that at any time this respondent, or, by this respondent's direction or authority, any deputy or clerk in respondent's office, has accompanied any inspection of the books which relator has been allowed to make with insulting language. He denies that relator has been told by respondent that he (the relator) could not see the records. He denies that respondent has been guilty of obstructing relator. He denies that respondent derives an income from abstracts amounting to $1,000 per annum, or any such sum. He denies that this respondent has ever said that if relator would pay respondent $25 per month during his term of office the relator could have whatever access he desired to the books in respondent's office. He denies that he made use of the expression found on page 9 of relator's petition, viz., "God damn quick, too." Respondent also sets forth in his answer that relator is seeking the information from the books as a matter of merchandise to sell to others. That up to July 2, 1884, abstracts could only be procured of the city treasurer, and that the treasurer, whose office expired in 1884, realized from $1,500 to $2,000 annually from tax abstracts, and that he is informed relator paid such officer for the privilege of making a copy of the books of said office, and did make and use the same for private gain. That for one year prior to July 1, 1888, relator paid $25 per month for this privilege. That respondent has always been ready and willing to give any lot-owner or citizen desiring it information as to tax charges upon lands, and has always done so free of charge. Insists that he has the legal right to charge a small fee for making out abstracts, as there is no law requiring him to make them otherwise.

That the books in question have been kept for the information and convenience of the city of Detroit, and are not required to be kept by the city charter or any law or ordinance. That each year, after the receiver of taxes makes sale of lands for unpaid taxes, one of said books is made up by such receiver, and entered therein in the name of the owner, if known, a description of such parcel of land, the amount of the city tax, school tax, etc., the total tax, the name of the person to whom sold, which is usually the city of Detroit; and said books also contain blanks for entry of assignment or redemption. There are in all 37 books, containing from 100 to 250 pages each. In addition, there are some sales-books, containing memoranda of sales for unpaid special assessments. There are also 16, one for each ward, indexes to sales-book, each of which contains a description of each parcel of land in that ward, with a column for each year in which to enter, if sold, the number of the page of the sales-book for that year containing the memoranda of the sale. If a sale has been canceled, a red ink line is drawn through the reference figures. That the books so kept are easily subject to alteration or defacement. That the books aforesaid are valuable, and the loss of the same, or any of the same, would be irreparable. That respondent is charged by the city with the care and custody of the same. That a portion of respondent's office is kept for the use of the public, and the public is necessarily, by means of desks, railings, and wire-work partitions, excluded from the private or working department of the office, and from the part containing the moneys, books, and papers in respondent's office. That relator, in order to use the right which he here seeks to establish, must necessarily be admitted to that portion of respondent's office from which the general public is excluded. That the books referred to are kept by respondent in a vault in the city treasurer's office, and in the same vault are other valuable books and papers, together with large sums of the city moneys, varying in amount from $100 to $30,000. That to produce said books, and a number of them, as is often required by relator, requires a large amount of time almost daily, and from 10 to 30 minutes per day have often been consumed in so doing. That respondent insists that it is the duty of respondent, in order to protect himself and his bondsmen, to keep their books under the immediate care, custody, and supervision of himself, or one of his trusted employes. That during the month of July relator's purpose is not so much to look after individual cases of sales, as it is to compare his minutes of sale with the office memoranda of the same. Respondent submits that he is not obliged to produce the books of his office, and supervise the inspection of the same, to one who is collecting information for merchandise, and that, if he does do so, he is entitled to pay for it. He also submits that in other public offices,—in the office of register of deeds, in the probate court, and in the county clerk's office,—when information is furnished which the law does not require to be furnished, charges are made, and legitimately, for such information. He also shows that he has given bond for the safe-keeping of these records. That his total fees for abstracts for 11 months ending December 31, 1888, were but $243. And he finally submits that relator is not entitled to access to the books of respondent's office at his own pleasure, neither is he entitled to frequent or enter into that portion of respondent's office from which the general public is excluded. That respondent is entitled to supervise the examination of the books in his office, and that the relator, as a dealer in information, is not entitled to compel respondent to give his time to relator, at the pleasure of relator, for his gain, and without compensation to respondent.

It is evident, from the petition and answer, that there is more or less of ill feeling between these parties, and it is also clear that the relator has been in fact denied free access to these sales-books, and that the respondent does not propose to permit such access unless he is paid therefor; nor does he propose to furnish any facilities, reasonable or otherwise, to the relator to inspect and examine said books without pay. This right of relator, claimed under the statute, is denied, first, on the ground that these books are not public books, because there is no express statutory provision anywhere that such books shall be kept. These books are made up in the place by the receiver of taxes, and are handed over to the city treasurer. They are therefore books used and kept in one of the public offices in the city of Detroit, and they must be considered public books. The claim that they are private books on account is absurd. They are neither the private books of the receiver of taxes nor the city treasurer, and the city of Detroit, a public municipal corporation, can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records.

But the broad ground is also taken that the relator has no lawful right to have these sales-books without recompense to the respondent, because he is an abstract maker, and his business may be, and in most cases, to sell some person the information gained by such examination; that he does not come under the statute because he does not have "occasion to make examination of them for a lawful purpose," and that this case is covered and governed as to relator by two former decisions of this court: Webber v. Townley, 43 Mich. 534, 5 N. W. Rep. 971; Match Co. v. Powers, 74 Mich. 145, 16 N. W. Rep. 314.

If I understand the latter case, the writ of *mandamus* was denied because the Raymond Match Company was not a citizen nor an inhabitant, nor even a domestic corporation. It did not show its charter, nor give any evidence of its powers or artificial capabilities. This court says: "We have no means of knowing that it has capacity to buy or hold lands or deal in timber anywhere, or to carry on the business in which its petition alleges it to be engaged, or to

apply itself to such an enterprise as making a system of abstracts of all the titles of all the real property in a county. The case is sure of information in regard to the true legal *status* of the relator, and as to whether it is other than a mere intruder in what it now demands." The petition of the relator alleged that it was incorporated under the laws of the state of Delaware; that it had become the purchaser of about 20,000 acres of pine land in the county of Dutton-son, had erected extensive saw-mills, and invested nearly $[illegible], and was cutting large quantities of pine, and constantly purchasing more land; and, to provide against acquiring defective titles, desired to protect its rights and interests by providing for itself an abstract of all the lands in the county. The relator was permitted opportunity to examine and make abstracts, as far as its own ownership or interest was concerned, present or prospective; but the dispute was whether it had the right to go further, and insist on having office accommodations, and the handling of all the records, to make an abstract of title to all the lands in the county. While the writer of the opinion, Chief Justice GRAVES, paused to make some practical suggestions of obstacles in the way of proper relief being afforded by *mandamus*, the ground of the denial of the writ was that the relator had failed to show any title to the right it claimed, because the authority given to it by the state by which it was created was not disclosed, and could not be assumed. See Hatch Co. v. Powers, 51 Mich. 147, 148, 16 N. W. Rep. 314.

In this view of the case above cited, I do not think that it is any authority bearing against the relator's claim in this case. And I cannot agree with the opinion of this court, or the reasons given for it, in Webber v. Townley, supra; nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur, if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and "sufficient unto the day is the evil thereof." I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office, and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstractor—can Mr. Burton—be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation. In such business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys or sells, and buys or sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records, for this reason also shuts out every other person except the buyer, seller, or holder of a particular lot of lands, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the legislature intended that this statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land; and "person" means all persons. I can see no danger of great abuses or inconveniences likely to arise from the right to inspect, examine, or make note of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the statute, which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And when abuses are shown there will no doubt be found by the legislature or the courts a remedy for them. It is plain to me that the legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safe-keeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them. "But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to and examination and inspection thereof at proper seasons." It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen. Lum v. McCarty, 39 N. J. Law, 287; Boylan v. Warren, 39 Kan. 301, 18 Pac. Rep. 174; State v. Rachac, 37 Minn. 372, 35 N. W. Rep. 7; People v. Richards, 99 N. Y. 620, 1 N. E. Rep. 258; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. Rep. 30. It follows, in my opinion, that the prayer of the petitioner must be granted, and the writ issue as prayed, the relator asking in this writ no more than the statute gives him.



CHAMPLIN, J., concurred.

CAMPBELL, J. I think relator has such an interest as entitles him, under the Laws of 1889, to see the book in question, and confine my opinion to that point.

SHERWOOD, C. J., and LONG, J., did not sit.

right, which can be enforced only by mandamus proceedings brought by Attorney General.

3. Records ⇐14—Citizen, to enforce right to inspect public records of state by suit in own name, must show special interest.

Citizen, in order to enforce common-law right to inspect public records in auditor general's office, to determine if public money is being properly expended by suit in his own name, must show he has special interest, not possessed by citizens generally.

4. Records ⇐14—Newspaper editor, desiring material for publication, held to have shown "special interest," entitling him to enforce right to inspect public records in suit in own name (Pub. Acts 1927, No. 84).

Manager and editor of newspaper, wishing to inspect public records in auditor general's office, to determine if public money is being properly expended, under Pub. Acts 1927, No. 84, in order to publish such matters, held to have shown special interest, entitling him to enforce common-law right to inspect such records by suit brought in his own name.

Petition for mandamus by Ed. A. Nowack against Oramel B. Fuller, Auditor General of the State of Michigan. Writ ordered issued, if necessary.

Argued before the entire bench, except POTTER, J.

James A. Greene, of Lansing, for relator.

William W. Potter, Atty. Gen., and M. M. Larmonth, Asst. Atty. Gen., for respondent.

McDONALD, J. The plaintiff seeks a writ of mandamus to compel the defendant to permit him to inspect certain public records in the office of the auditor general pertaining to the expenditure of public money, authorized by Act 84 of the Public Acts of 1927. The act in question empowered the state administrative board to pay out of the general fund a sum of money not to exceed $25,000 to defray the expenses incident to the entertainment of the 1927 annual conference of the Governors of the several states at Mackinac Island, Michigan.

The petition shows that the plaintiff is a citizen of the United States and a resident and taxpayer in the state of Michigan; that he is the editor and publisher of a newspaper known as the Michigan Digest; that in good faith and for a public purpose he desires to inspect the records in question and publish in his paper a true and fair statement of the expenditure of public money by the state administrative board in defraying the expenses of the Governors' Conference; that defendant has denied him access to the records, and that his action in so doing has greatly hampered and injured plaintiff in his business. The defendant excuses his refusal to permit the plaintiff to inspect the records in his office on the ground that there is no public interest in them, and that the plaintiff has no special in-

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## NOWACK v. FULLER, Auditor General.
(No. 79.)

Supreme Court of Michigan. June 6, 1928.

1. Records ⇐14—Citizen has no right under statute to inspect state public records; "other public records" (Comp. Laws 1915, § 3448).

Citizen has no right to inspect state public records, under Comp. Laws 1915, § 3448, relative to "county, city, township, town, village, school district, or other public records," since "other public records" refers only to other records in offices specifically enumerated.

2. Mandamus ⇐82—Records ⇐14—Citizen has common-law right, enforceable by mandamus, to inspect public records in auditor general's office.

Citizen and taxpayer has common-law right to inspect public records in auditor general's office, to determine if public money is being properly expended; but such right is one of public

terest and is not in law entitled to their inspection.

[1] The plaintiff bases his right to inspection on both the common-law rule and statutory grant. In Michigan there is no statute providing for the inspection of state public records. The statute relied on by the plaintiff is section 3448, C. L. 1915, which reads in part as follows:

"The officers having the custody of any county, city, township, town, village, school district or other public records in this state shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices," etc.

It is entitled:

"An act to facilitate the inspection of the records and files in the offices of county, city and township officers in this state."

In specifically enumerating the various official records to which it is to apply, the statute must be construed as excluding from its effect all not expressly mentioned, except those of the same general character. In Brooks v. Cook, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282, it is said:

"But it is a sensible and well-understood rule of construction that when after an enumeration, the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named."

In the title of the act in question the operation of the statute is restricted to the public records of certain specified offices. The body of the act contains the same restriction, but is followed by the words "other public records." Applying the rule of construction announced in Brooks v. Cook, supra, the term "other public records" refers to other public records in the offices specifically enumerated. This rule of construction excludes state public records from the operation of the statute.

[2] In the absence of any statutory grant of inspection, the question in issue must be determined by a consideration of the general common-law principles relative to the right of citizens to inspect public documents and records. If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. In Michigan the people elect by popular vote an auditor general. They prescribe his duties and pay his salary. He is required to keep a true account of the expenditure of all public moneys, and is answerable to the people for the faithful discharge of his duties. He is their servant. His official books and records are theirs. Undoubtedly it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them access to their own books, for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was either in this country or in England. Mr. Justice Morse was right in saying:

"I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records." Burton v. Tuite, 78 Mich. 374, 44 N. W. 285, 7 L. R. A. 73.

There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate.

There remains to be considered the common-law right of the individual citizen to inspect public records, in which he has an interest in addition to his interest as a member of the general public. In the elaborate note to State ex rel. Wellford v. Williams, 64 L. R. A. 419, where the English cases are discussed, it is said:

"In England, by the common law, the right of inspection is very guardedly granted by the courts after a consideration of the purpose for which it is desired. Thus it has been denied when the inspection was desired for private, rather than public, purposes."

It will be noted by reference to the English cases that the courts were seldom called upon to enforce a private individual's right to inspect public documents and records, except where the inspection was desired to secure evidence in a pending or prospective suit. Accordingly there was formulated the following common-law doctrine:

"At common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such that would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. 22 R. C. L. 160; 34 Cyc. 592.

When the procedure which was used for the enforcement of the citizen's right to inspect public records is recalled, it will appear that the doctrine above quoted is not so much a denial of the right to inspect as it is a declaration of the interest which a private individual must have to avail himself of the remedy for the enforcement of his right. At common law, the individual citizen as a member of the public had a right to inspect; but, if inspection was refused, he could only enforce his right by mandamus proceedings instituted in his behalf by the Attorney General. He could not sue out the writ in his own name. Originally the writ of mandamus was a prerogative writ, supposed to proceed from the king himself, who sat in his Court of King's Bench; and it was formerly allowed only in cases "affecting the sovereign, or the interests of the public at large." In

time, the right to the writ was extended to the private individual.

But mandamus is based on interest, and the individual was not allowed to sue out the writ in his own name, unless he could show some special interest to be enforced; that is, some interest different from his interest as a member of the public. The courts held that, to entitle him to the writ, his interest must be direct and tangible, and that the right to inspect public records to secure evidence for a lawsuit was such an interest. By this the courts did not mean that he had no right to inspect the books unless he wanted to use them as evidence, but they meant that they would not issue the extraordinary writ of mandamus to enforce a private right of inspection, unless the purpose was to use it in some pending or prospective suit. The rule adopted amounts to a restriction on the citizen's remedy rather than on his rights. As a citizen and taxpayer, he had the right of inspection; but, when he wanted to use it for private purposes, his right was restricted by the limited remedy which the courts allowed him for its enforcement. He had a naked right, for the enforcement of which the law provided no remedy.

This rule adopted by the English courts has no basis in reason or justice. It is absurd to hold that a man could inspect the public records, providing his purpose was to use the information in some litigation, and to deny him the right to inspect for some other purpose that might be equally beneficial to him. It does not protect all of his substantial rights and has not been received with general favor in this country. In 18 R. C. L. § 160, p. 237, it is said:

"So in this country mandamus will lie to enforce a citizen's right to inspect public records, irrespective of whether it is sought in aid of pending or contemplated litigation with respect to his personal rights." Citing Clement v. Graham, 78 Vt. 290, 63 A. 146, Ann. Cas. 1913E, 1208; State v. Williams, 110 Tenn. 540, 75 S. W. 948, 64 L. R. A. 418; Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219; also see State v. King, Auditor, 154 Ind. 621, 57 N. E. 535.

In American cases, this question has arisen most frequently where there was a controversy over the right of a stockholder to inspect the books and records of his corporation. The records of a corporation are public as to its stockholders. "Inspection of books of public officers is subject to the same restrictions as in the case of corporation books." 1 Greenleaf on Evidence (16th Ed.) § 475. In discussing this question in Foster v. White, 86 Ala. 467, 6 So. 88, the court said:

"We do not assent to the narrow limits to which the jurisdiction is confined in King v. Mer. Tailor's Co., 2 Barn. & Ad. 115; that is, that the inspection must be shown to be necessary in reference to some specific dispute or question depending, in which the parties have an interest. The purpose may be entirely prospective; and an examination would be proper and legitimate, if the object is to obtain information as to the management and condition of the affairs of the corporation, in order to enable the shareholder to determine whether any and what steps are necessary to establish or maintain his rights, or in order to enable him to discharge his corporate duties. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392 [2 A. 274]. Ordinarily a mandamus will be awarded, whenever an inspection and examination are necessary, for any reason, to protect the interests of the stockholders, present or prospective, and is not sought from idle curiosity, or for any improper or unlawful purpose."

See, also, Stone v. Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240, In re Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, People ex rel. Bishop v. Walker, 9 Mich. 328, and Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

In Woodworth v. Old Second Nat. Bank, the court held that, "in the absence of any statutory provision, a stockholder in a corporation has a common-law right, in a proper case and for a proper purpose, to inspect corporate records and documents," and quoted with approval from Huylar v. Cragin Cattle Co., supra, as follows:

"And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers."

So, in the instant case, the plaintiff as a citizen and taxpayer has a common-law right to inspect the public records in the auditor general's office, to determine if the public money is being properly expended. It is a right that belongs to his citizenship. It is a right which he enjoys in common with all other citizens, a public right, which can be enforced only by mandamus proceedings brought by the Attorney General. "It is not, and never has been, the policy of the law to permit private individuals the use of the writ of mandamus against public officers, except in cases where they had some special interest, not possessed by the citizens generally." Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964; Home Telephone Co. v. Railroad Commission, 174 Mich. 218, 140 N. W. 490; Johnson v. Gibson, 240 Mich. 515, 215 N. W. 333.

[3, 4] The plaintiff has not sought to enforce his rights through the office of the Attorney General. He has begun this suit in his own name. In order to maintain it, he must show that he has a special interest, not possessed by the citizens generally. Apart from his public interest, his petition shows that he has been hampered and injured in his business by the refusal of the defendant to allow him to inspect the records in his office. This is a special interest. Is it a sufficient interest to entitle him to the aid of this court by writ of mandamus? We think so. He is the manager and editor of a newspaper. It is published and circulated in Michigan. He sells news to the people through the medium



of his paper. In a proper and lawful manner, he has a right to publish matters of public interest. The citizens and taxpayers of this state are interested in knowing whether the public business is being properly managed. By denying him access to the public records for the purpose of securing such information, he is deprived of legal rights for which he is entitled to redress by the writ of mandamus. It is the plain duty of the auditor general to exhibit his official records to any citizen of Michigan who desires to inspect them for any proper and lawful purpose, in circumstances not detrimental to the public business.

The writ will issue, if necessary.

FEAD, C. J., and NORTH, FELLOWS, WIEST, CLARK, and SHARPE, JJ., concur.

ATTACHMENT C

Report No. 2786 of the
Attorney General of Michigan

and

Unpublished Attorney General's
Opinion dated February 3, 1972

**STATUTORY CONSTRUCTION—DEFINITION OF TERMS—Within the meaning of Section 492, Act 328, Public Acts of 1931, (See. 28.760, M.S.A.), the term "public records" includes lists of county road commission employees; "lawful purpose" means such purpose as subserves any legitimate interest; "any person" means all persons, whether or not citizens or taxpayers of the community.**

No. 2786 November 7, 1956.

MR. W. CHARLES KINGSLEY,
*Prosecuting Attorney,*
*Branch County Building*
*Coldwater, Michigan.*

DEAR MR. KINGSLEY:

In your letter of September 10, 1956, referring to the refusal of the Branch County Road Commission to permit inspection of a list of its employees, you asked the meaning of the terms "public records," "lawful purpose," and "any person," within the meaning of Section 492, Act 328, Public Acts of 1931, the applicable language of which is as follows:

> "Inspection and use of public records — Any officer having the custody of any county, city or township records in this state who shall when requested fail or neglect to furnish proper and reasonable facilities for the inspection and examination of the records and files in his office and for making memoranda of transcripts therefrom during the usual business hours, which shall not be less than 4 hours per day, to any person having occasion to make examination of them for any lawful purpose shall be guilty of a misdemeanor, * * *"[1]

Definitions of the term, "public records," relied upon in other jurisdictions vary in degree of liberality as to both fairly include and fairly exclude the record here involved, though no case involving precisely a record of this nature has been discovered.

> "A public record is, strictly speaking, one made by the public officer in performance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference."[2]

> "Whenever a written record of a transaction of a public officer in his office is a *convenient*, and *appropriate* mode of discharging the duties of his office, and is kept by him as such, whether required by express provision of law or not, such a record is a public record."[3]

The Michigan court has treated this matter on numerous occasions,[4] but has not furnished a definition of the term "public records." However, the *Nowack*[5] case recognized that the common law right of inspection of public records stems from the public interest in the matter to which the records relate,[6] specifying that the proper management of a public office is of public interest and records relating thereto are public records. This clearly involves somewhat more than a strict definition of the term "public records."

It would seem reasonable to suggest, therefore, that a valid inquiry into the management of a public office may involve a consideration of the office employees; that the public interest fairly extends to knowledge of identities of employees; that a list of such employees is a public record subject to inspection by the public.

Neither possible abuse nor office inconvenience may be presupposed, in the event the right of inspection is recognized, because the statute authorizes the

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[1] C.L. 1948, Sec. 750.492; Mich. Stat. Ann. Sec. 28.760.
[2] *People ex rel. Stenstrom v. Hartnett*, 226 N.Y.S. 238.
[3] *Conover v. Bd. of Ed. of Soho School District*, 1 Utah 375, 267 P. 2d 768.
[4] *Nowack v. Auditor General*, 243 Mich. 294; *Burton v. Tuite*, 78 Mich. 263; *Brown v. Knapp*, 54 Mich. 132; *Kalamazoo Gazette v. Kalamazoo County Clerk*, 148 Mich. 490.
[5] *Nowack v. Auditor General*, ibid.
[6] A.G.O. 2713, Oct. 12, 1956.

officer in question to make reasonable rules and regulations with reference to the inspection.[7]

In respect to the statutory phrase "lawful purpose," our court has said:

> " * * * It is no answer to say * * * that the purpose intended * * * is not a commendable or proper one, so long as it is not criminal * * * "[8]
>
> " * * * It is also contended that the relator's business is disreputable; that he is a 'tax-title shark,' and is therefore not entitled to the examination of this book for a 'lawful purpose.'
>
> " * * *
>
> "The relator's business is lawful, and recognized and encouraged by the tax laws; * * *"[9]
>
> " * * * His business is a *lawful* one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? * * *"
>
> " * * * It is plain to me that the Legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. * * *"[10]

The court has indicated, then, that where the purpose of the inspector involves a pursuit of his business interests, such business being lawful, the qualification of "lawful purpose" is met. The word "business" in this context refers not only to commercial enterprise, but includes any legitimate interest.

Finally, we must consider whether the right of inspection applies to a party who is not a citizen of the community where the records are kept. The statute provides that "any person" may inspect. It does not limit such right to citizens or taxpayers of the locality where the records are kept, and no good reason to so interpret the plain language of the statute presents itself.

It remains only to be pointed out that this particular question is further complicated by the nature of the remedy which serves to enforce the right. Michigan has adopted the policy of denying mandamus in the absence of a special interest, mandamus being a discretionary writ. But, cases refusing the writ are rare, and, in the *Nystuen* case, the court held that where refusal would hamper and injure petitioner's business interest, that was sufficient to warrant relief.

We conclude as follows:

Within the meaning of Sec. 402, Act 328, Public Acts of 1931 (Sec. 28.760, Mich. Stat. Ann.), the term "public record" includes a list of county road commission employees; "lawful purpose" means such purpose as subserves any legitimate interest; and, "any person" means all persons whether or not they are citizens or taxpayers of the community.

Very truly yours,

THOMAS M. KAVANAGH,
*Attorney General.*

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[7] *Burton v. Twite*, 78 Mich. 373.
[8] *Brown v. Knapp*, 54 Mich. 133.
[9] *Aitchison v. Huebner*, 90 Mich. 645.
[10] *Burton v. Twite*, ibid.

February 3, 1972

Mr. Thomas Kizer, Jr.
Prosecuting Attorney
634 West Grand River
Howell, Michigan 48843

Dear Mr. Kizer:

Re: City Employees' Salary,
Disclosure of

Answering your letter concerning disclosure of individual salary figures of city employees to a newspaper reporter, you state that the reporter has been refused access to such figures. From the enclosures it appears that the city council at one time voted unanimously to withhold the figures from the press. The city is described as contending that furnishing a salary schedule or plan showing various categories and steps without disclosing the identity of occupants thereof is sufficient. Protection of the privacy of the individual employee is also a concern of the city.

The press, on the other hand, contends that individual salary figures are public information under the law and should be available, with other city records, for public inspection, to permit analysis of existing and proposed budgets.

Review of the governing statutes does not reveal any basis for excluding from public records those pertaining to the individual salaries of individual public employees. Since these are public records of public employees paid from public funds, it is my conclusion that the press is clearly entitled to see said records.

In Nowack v Auditor General, 243 Mich 200 (1928), it was held that a newspaper editor, wishing to inspect records of the auditor general relating to entertainment expenses incurred

in an annual governor's conference, is a citizen having a special interest in the material and has a common-law right to inspect said records, which right is enforceable by mandamus. At p. 208, the court said:

> "....He is the manager and editor of a newspaper. It is published and circulated in Michigan....In a proper and lawful manner, he has a right to publish matters of public interest. The citizens and taxpayers of this state are interested in knowing whether the public business is being properly managed. By denying him access to the public records for the purpose of securing such information, he is deprived of legal rights for which he is entitled to redress by the writ of mandamus...."

The ruling was recently re-emphasized in Booth Newspapers, Inc. v Muskegon Probate Judge, 15 Mich App 203 (1968), holding that a newspaper has the right to inspect the will of a decedent filed in the probate court. At p. 205, citing the Nowack case, the court said:

> "The fundamental rule in Michigan on the matter before us...is that citizens have the general right of free access to, and public inspection of, public records...."

I would add, however, that requests to review individual salary records should be made at reasonable times during business hours in such a manner as not to interfere with the conduct of public business, and that further, the private dossier of individual employees containing personal and family information should not be disclosed, where such disclosure might inflict harm or injury to the employee, unless the employee has given permission, except upon court order.

The amount of salary paid to each employee of the city, in short, is a legitimate concern of the public which pays his salary, constitutes a part of the city's public records, and when requested to be viewed by a member of the press, must be made available.

Yours sincerely,

FRANK J. KELLEY
Attorney General

MBV:ss