

FORMAL OPINION

September 5, 1974

ALAN SAGNER, *Commissioner*  
Department of Transportation  
1035 Parkway Avenue  
Trenton, New Jersey

FORMAL OPINION NO. 5-1974

Dear Commissioner Sagner:

You have requested an opinion as to whether an audit report prepared by the staff of the Department of Transportation, which contains financial data pertaining to the operations of the Transport of New Jersey, may be withheld from public disclosure.

You have advised that an audit report was prepared by the staff of the Department of Transportation as a means to determine whether the financial position of the Transport of New Jersey warranted a \$2,000,000 subsidy of the motor bus carrier by the Commuter Operating Agency (COA). You have further indicated that the subsidy granted to TNJ was in fact based in whole on the financial data and analysis of the audit of operations of the TNJ.

On February 13, 1974 a contract was executed between TNJ and COA which indicated that TNJ was "in imminent danger of terminating bus operations" and that the continuation of its commuter and transit operations "are essential to the health, safety and welfare of the citizens of New Jersey." The contract thereupon provided a subsidy by COA of the continued operations of TNJ on the basis that "all payments are subject to audit and the availability of funds" and that COA shall have the right to inspect "all the books, records and accounts . . . which relate to contracted service accounts, revenues and costs . . ." It is, therefore, clear from the terms of the arrangement with the TNJ that the COA, as a condition to subsidizing the bus operations of the motor carrier, would exercise a right to audit and make a financial examination of the records and costs of the TNJ.

The essential issue posed is whether such an "audit report" may be withheld from public disclosure or from disclosure to a motor bus carrier, Hudson Transit Lines, Inc., in competition with TNJ for subsidies from the COA. You have advised that the Hudson Transit Lines, Inc. has made a specific request upon you for disclosure of the audit report prepared as a condition to the award of a subsidy to TNJ.

The analysis of the right of the public to inspect such an "audit report" must consider the so-called "common law right" as well as the right to public disclosure arising under the recently enacted Right to Know law. N.J.S.A. 47:1A-1 *et seq.* Recent judicial interpretation in both of these areas in *Irval Realty, Inc. v. Board of Public Utilities*, 61 N.J. 366 (1972), provides substantial guidance to resolving the present inquiry. In *Irval*, two plaintiffs were suing for property damage and personal injury as a result of a gas explosion on their property. Both plaintiffs brought a proceeding to compel the disclosure of a report prepared by the gas company itself and submitted to the Board of Public Utility commissioners containing significant information relating to the gas explosion, and a report customarily prepared by a staff member of the Board of Public Utilities including the same kind of data listed in the gas company report. The court held that a person seeking access to public records may assert a common law right as a citizen to inspection of such records, subject to

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the proviso that he "be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem even though his individual interest may have been slight . . ." *Irval Realty, Inc. v. Board of Public Utilities, supra*, at 372.

The Supreme Court cited with approval the case of *Josefowicz v. Porter*, 32 N.J. Super. 585 (App. Div. 1954), wherein a public record was defined for purposes of the common law as:

" . . . one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law or directed by law, to serve as a memorial and evidence of something written, said or done, or a written memorial made by a public officer authorized to perform that function, . . ."

Thus, it is fair to assume that an audit report prepared and maintained by the Department of Transportation as a prerequisite to a subsidy grant to a motor bus carrier is a public record necessary to be kept by the agency in the discharge of its responsibilities. It is also apparent that the Hudson Transit Lines, Inc. would have a particular interest in examining the audit report to discern the financial criteria upon which a substantial subsidy was granted to TNJ by the COA and as an aid to enable it to compete for similar subsidies or assistance from the COA.

In *Irval*, the Supreme Court concluded that the Right to Know Law, N.J.S.A. 47:1A-1 *et seq.*, did not require the demonstration of any showing of interest in the material sought for public disclosure. The public record sought to be inspected merely had to be "required by law to be made, maintained or kept on file by any department . . . of the State." N.J.S.A. 47:1A-2. In the present situation, the preparation of an audit report by the staff of the Department of Transportation is a necessary incident to the exercise of the COA's statutory power to grant a subsidy. For example, the COA may enter into contracts with a motor bus carrier to operate passenger service and to make payments based on the actual cost of such service to the motor bus carrier plus a 6% return on the investment. N.J.S.A. 27:1A-19. In order to carry out this responsibility, the agency has been empowered to investigate any matters concerning any carrier under contract to the COA and shall have access to, and a motor bus carrier shall make available, its property, books, records or documents. N.J.S.A. 27:1A-25 (b). Thus, the preparation, examination and maintenance of an audit report as a precondition to a subsidy from the COA may conceivably be construed to be a public record "required by law" within the Right to Know law and thereby properly in the public domain. Whether the audit report prepared by members of the staff of the DOT squarely meets this definition is less than clear, but need not be decided here, since it certainly qualifies as a public record within the scope of the common law rule.

There, furthermore, does not appear to be any bona fide consideration of confidentiality in furtherance of the public interest expressed in either the statutory exclusions to the Right to Know Law, Executive Order No. 9 (1963),\* or in the confidentiality regulations of the Department of Transportation promulgated pursuant thereto, N.J.A.C. 16:1-2.1. In fact, we are advised that the same or comparable financial data is filed annually by the TNJ with the Board of Public Utilities

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for other purposes. There is, consequently, no clearly defined public interest in maintaining the confidentiality of these audit reports.

For these reasons, you are advised that an audit report prepared by the DOT of the financial status of the TNJ as a prerequisite to the grant of substantial bus subsidies to the TNJ to minimize certain operating deficits is a public record within the "common law" rule. It is, therefore, subject to inspection by a person with a well defined interest in the subject matter of bus subsidies in this State. You are also advised that there is serious concern that such audit report is subject to public disclosure under the provisions of the Right to Know law, as well, especially since there is no precise consideration of confidentiality which would outweigh the public's right to be familiar with the disbursement of public funds through bus subsidies to motor bus carriers.

Sincerely yours,  
WILLIAM F. HYLAND  
*Attorney General*

By THEODORE A. WINARD  
*Assistant Attorney General*

\* In accordance with the provision of the Right to Know law, Governor Hughes issued Executive Order No. 9 which established the various records which were not to be deemed public records under the Right to Know Law. In addition, Executive Order No. 9 empowered the head or principal executive of each department of State government to adopt and promulgate regulations setting forth which records under his jurisdiction shall not be deemed public records.

September 5, 1974

WILLIAM M. LANNING, *Chief Counsel*  
*Legislative Services Agency*  
State House  
Trenton, New Jersey 08625

FORMAL OPINION NO. 6 - 1974

Dear Mr. Lanning:

You have inquired whether the State Constitution allows an appropriation to provide legislators with office space in their home districts. It is concluded on the basis of constitutional and judicial precedent that such an appropriation would be valid. It would be important, however, for any such program to be coordinated with the State Treasurer because of his specific responsibilities in the area of space procurement and allocation and for the additional purpose of formulating appropriate controls over procedures.

The provision of the 1947 New Jersey Constitution directly applicable is Art. IV, § IV, par. 7, which provides in pertinent part: