Finally, when mortgage companies sell loan commitments to real estate companies, who in turn pass the cost on to the seller by increasing their real estate commission, the loan commitment fee must be included as part of the interest rate of a loan extended by a lender to the borrower-purchaser.

FRANCIS B. BURCH, *Attorney General.*

DANIEL T. DOHERTY, JR., *Assistant Attorney General.*

---

[1] Mortgage Guarantee Insurance Corporation.

CHESAPEAKE BAY BRIDGE

ACCESS TO CONSULTANT REPORT PREPARED IN PREPARATION OF DEFENSE AGAINST CLAIMS AND POSSIBLE ARBITRATION AND LITIGATION INVOLVING THE PARALLEL CHESAPEAKE BAY BRIDGE MAY BE DENIED UNDER THE FREEDOM OF INFORMATION ACT.

July 26, 1973.

Honorable Robert E. Bauman,
State Senate.

In your recent letter, you have asked whether access can be denied pursuant to the Maryland Freedom of Information Act, Article 76A, Sections 1-5, Annotated Code of Maryland, ("Act"), to the Report ("Report") prepared for the Maryland Transportation Authority ("Authority") by an independent engineering consultant firm ("Consultant") to assist the Authority in preparing its defense to claims filed against it by contractors ("Claimants") for the Parallel Bay Bridge. Prior to receipt of the Report, we advised the Chairman of the Authority that access to the Report should be denied, pending determination of the claims, because public knowledge of the contents of the Report might substantially impair the Authority's ability to favorably resolve the claims. If the evaluation of the Report, which is now underway, results in a finding that the Report would not impair favorable resolution of the claims, we would advise the Chairman that he would then be in a position to make the Report public.

Your request for access to the Report must be considered in light of the fact that the claims filed have been based, in part, upon the Claimant's allegation that the contracting engineer, acting as the agent of and engineer for the Authority, did not properly or adequately perform certain aspects of its job resulting in additional costs to the Claimants. The Report was prepared specifically to consider this allegation.

The contract between the Consultant and the Authority requires the Consultant to examine data such as;

a. All contract documents prepared for bid purposes on the second bridge substructure.

b. Subsurface data prepared by the J. E. Greiner Company for the second bridge and either incorporated in the bid documents or otherwise made available to bidders.

c. Data relating to the first bridge such as, contract plans and specifications, borings and boring logs, logs of construction, "as-built" drawings, reports on subsurface conditions, etc.

d. Documents alleged by the Claimant in its claim to have been withheld from bidders on the second bridge.

After examination and evaluation of the above information, the contract requires the Consultant to render opinions as to;

a. The adequacy of the substructure design, generally, on the second bridge.

b. Whether sufficient subsurface explorations were made in the area of the second bridge.

c. Whether the substructure was correctly designed with particular emphasis on the foundation pile design, e.g., the type of piling specified, the length and location of the piling, and other specification requirements related to the placement of the piling.

d. Whether the test pile program specified was deficient.

e. Whether there was any data which was available to bidders which contains significant information not shown on the boring logs and the contract plans.

f. Whether the subsurface data available from the construction of the first bridge was effectively transferred and considered in the subsurface investigation and design of the second bridge.

g. Whether the specification requirements to drive the foundation piling, under the specification tolerances, 25 feet into sand to a bearing capacity of 130 tons and locate the top of pile which contained lugs within the bell pier

form, in either a batter or plumb position, constituted a design deficiency.

In addition to the foregoing opinions, the contract requires the Consultant to comment on;

a. The significance of any subsurface or other information which was either not considered in the design of the second bridge or was not made available to bidders under the second bridge bid invitation.

b. The test pile program actually followed by the Claimant in the eventual abandonment of the programs.

c. The summary of the J. E. Greiner logs, the Claimant's claim summary and Volume I of the Claimant's claim.

While it is true that the data upon which the Consultant's opinions and comments are based are available, generally, for public inspection and any conclusion an inspector wishes to draw from such data, the opinions and comments of the Consultant will be used by us in formulating our opinion as to the liability, if any, for any part or all of the pending claims.

The result of fixing such liability will, after negotiation, arbitration or trial, be expressed in terms of dollars, and premature disclosure of the contents of the report might cause an unnecessary risk to the State in resolving the claims.

Under the Act, access to the Report may or must be denied. Section 3 of the Act provides, generally, for a right of inspection to any public records. However, Section 3(b)(iii) and (v) provides that access may be denied as "contrary to the public interest", to;

> "(iii) The specific details of bona fide research projects being conducted by a State institution [and]
>
> "(v) Interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency."

There have been no decisions by the Court of Appeals interpreting the Maryland Act which are controlling as to the facts presented herein. However, the exemption contained in Section 3(b)(v) is essentially the same as that contained in the Federal Freedom of Information Act, 5 U.S.C. Section 552 (1967). Specifically, Section 552(b)(5) exempts from the public access requirements;

> "... interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The Federal Courts have interpreted this section to mean that a memorandum would or would not be available to the public depending upon its availability through discovery under Rule 26(b) of the Federal Rules of Civil Procedure, e.g., *Consumers Union v. Veterans Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed,* 436 F.2d 1363 (2d Cir. 1971). In particular, the courts have generally held as discoverable under Rule 26(b) documents containing only factual material as opposed to those comprising the administrative reasoning process of the government, *General Services Administration v. Benson,* 415 F.2d 878 (9th Cir. 1969).

While these Federal decisions are, of course, not controlling in Maryland, the approach used is a valuable one in interpreting a substantially similar exemption in the Act. Thus, the question arises as to whether, under the Maryland Rules of Procedures, the Report would be available to a party in litigation with the Maryland Transportation Authority.

Two initial requirements for the use of this exception to the public access requirements can be met. These are (1) that the disclosure would be contrary to public interest, and (2) that the Report is an *intraagency* memorandum. Disclosure of the Report and possible harm to the disposition of the claims resulting in a potentially significant cost to the public is clearly contrary to the public interest. Additionally, Federal cases, which must be looked to for guidance, have specifically extended the internal documents exemption to work prepared by outside consultants or, at least indicated approval of such a position. *K. C. Wu v. National Endowment for Humanities,* 460 F.2d 1030, 1032 (5th Cir., 1972), *Soucie v. David,* 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

This question of the applicability of the exemption of Section 3(b)(v) to the Report depends on its discoverability under the Maryland Rules. Maryland Rule 407b, relating to summons for documentary evidence, provides;

> "The summons may command the person to whom it is directed to produce designated books, papers, documents or other tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 410 (Scope of Examination) but in such event the summons will be subject to the provisions of Rule 406 (Order to Protect Party and Deponent) and Rule 115b (Summons Duces Tecum)."

It is clear that both Rules 406 and 410 must also be considered to determine discoverability. Rule 406, relating to orders of court to protect a party or deponent provides, in subsection (a)(8), that the court may order that "secret processes, developments or research need not be disclosed." In addition, Maryland Rule 410d, a codification of the work product rule of *Hickman v. Taylor,* 329 U.S. 495 (1947), provides that a party or deponent shall not be required to produce or submit for inspection;

> "d.
>
> 1. . . .
>
> A writing, statement, photograph or other object obtained or prepared in anticipation of litigation or in preparation for trial, except as provided in Section c of this Rule, unless the court otherwise orders on the

ground that denial of production or inspection will result in an injustice or undue hardship.

2. . . .

A writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories.

Section c.2. of the Rule 410 provides that a party may by written interrogatory or by deposition require that an opposing party produce or submit for inspection;

"A written report of an expert, *whom the opposing party purposes to call as a witness,* whether or not such a report was obtained by the opposing party in anticipation of trial or in preparation for litigation." [Emphasis supplied.]

Thus, the Report would be discoverable, if at all, only when it is determined that a member of the Consultant will be called as a witness in any litigation which may arise out of the claim. Until such time, access to the Report may be denied pursuant to Article 76A, Section 3(b)(v).

Some commentators have noted that the approach of resorting to Rules of Procedure for a determination of discoverability and thus of right of access to public documents is an impractical one. Charles H. Koch, Jr., "The Freedom of Information Act", 33 *U.Md.L.Rev.* 189 (1972). This commentator argues the "premature disclosure rationale, described in "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act" (1967), reprinted in 20 *Adm.L.Rev.* 263 (1963), is a much more practical approach to interpreting the "internal memorandum" exception. This memorandum states, at page 304;

"[I]t [is] clear that the Congress did not intend to require the production of [internal documents] where premature disclosure would harm the authorized and appropriate purpose for which they are being used."

As noted above, premature disclosure of the Report might necessarily be harmful, and, therefore, under this interpretation could be withheld from public access.

Section 3(b)(iii) of the Act exempts from public access requirements "[t]he specific details of bona fide research projects being conducted by a state institution". A similar provision does not exist in the Federal law, and therefore, there are no cases, either State or Federal interpreting this section, except those cited above holding the work of consultants to be that of the agency or institution itself. The study to which access is requested certainly involved research into the subject matter of the Report and, as a study initiated by a State agency in accordance with its budget and with a contract approved by the Board of Public Works, it is certainly bona fide. Thus, the Report could fall within the exception described in Section 3(b)(iii).

Section 3(c)(v) of the Act might be interpreted as giving additional grounds for denying access to the Report. This section provides that the right of access *shall* be denied to "trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person". This is similar to the Federal provision, contained in 5 U.S.C., Section 552 (b)(4) (1970), exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential". Cases interpreting the Federal provision have held that;

". . . this exemption clearly condones withholding information only when it is obtained from a person outside the agency, and that person wishes the information to be kept confidential."
General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969) Citing S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

However, the Maryland and Federal statutes are not identical in this case. It should be noted that privileged or

confidential is juxtaposed with "person" in the Federal law, perhaps indicating that the privileged nature results from the person or his request. In the Maryland statute, "privileged information" and "confidential . . . data" is exempted generally. This would seem to provide an additional legal basis for denial of access to the Report.

We are, therefore, of the opinion that access to the Report can be denied under the Act at this time.

Your letter raises the additional question of whether the Report should be made available to you as a member of the State Senate even if unavailable to the public generally. The Act applies to all members of the general public and does not make exception for any segment thereof. It should be noted that the Joint Budget and Audit Committee of the Legislature has scheduled a hearing on July 30, 1973, to examine the cost overruns and claims relating to the construction of the Parrallel Chesapeake Bay Bridge.

FRANCIS B. BURCH, *Attorney General.*

J. MICHAEL MCWILLIAMS, *Assistant Attorney General.*

CLERKS OF COURT

EXHIBITS INTRODUCED INTO EVIDENCE — DISPOSITION OF AT CONCLUSION OF THE TRIAL.

March 1, 1973.

Vaughn J. Baker, Clerk
Circuit Court for Washington County.

In your letter you requested general guidance as to the proper disposition of items entered into evidence during trial of cases, particularly criminal cases. It is virtually impossible in our opinion to cover every eventuality which may come to pass, however, we will attempt to outline the proper disposition at least by category. Md. Rule of Procedure 1217 (f) (2) provides as follows:

> "All exhibits introduced into evidence or marked for identification during the trial of a case, and not filed as a part of or with the pleadings, shall be retained by the clerk of court or such other person as may be designated by the court. After either (i) the time for appeal has expired, or (ii) in the event of an appeal, the mandate has been received by the clerk, the clerk shall send written notice to all counsel of record advising them that if no request to withdraw such exhibits is received within ten (10) days from the date of the notice, the exhibits will be disposed of. Unless such a request is received by the clerk within ten (10) days from the date of notice, or unless the court within such period shall order otherwise, the clerk shall dispose of the exhibits in such manner, including destruction, as may be appropriate."

No conviction shall work corruption of blood or forfeiture of estate. Art. 27, Declaration of Rights, Maryland Constitution; Art. 27, §635, Annotated Code of Md. (1971 Repl. Vol.). Therefore, unless otherwise provided by law, and in the absence of a claim filed by some other person, property