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ADMINISTRATIVE LAW AND PROCEDURE: Investigatory files.

ADMINISTRATIVE PROCEDURES ACT: Public inspection of files.

RECORDS AND RECORDATION: Investigatory files.

Investigatory files of administrative agencies are open to public inspection unless there is a concrete likelihood of enforcement proceedings and there is no relevant statutory exemption from the requirement that the records be made available to the public. Where such investigatory files are in the custody of an administrative agency, it is within the discretionary authority of the agency to determine whether there is, in fact, a concrete likelihood of enforcement proceedings.

Opinion No. 4890 December 3, 1975.

Mrs. Beverly J. Clark, Director
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You have requested my opinion on the following question:

> "Unless otherwise provided in a particular licensing law, are closed investigation reports concerning licensees subject to inspection by the general public?"

The Administrative Procedures Act, 1969 PA 306; Chap 2, §§ 21-23; MCLA 24.221-24.223; MSA 3.560(121-123), requires state agencies to make available information for public inspection unless that information falls within a specific exemption. Such exemptions are specifically detailed in 1969 PA 306, § 22(1), *supra*, of the act, which provides:

> "This chapter does not apply to:
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> "(a) Material exempted from disclosure by statute.
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> "(b) Interagency or intra-agency letters, memoranda or statements which would not be available by law to a party other than an agency in litigation with the agency and which, if disclosed, would impede the agency in the discharge of its functions.
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> "(c) Material obtained in confidence from a person, matter privileged by law and trade secrets.
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> "(d) Financial and commercial information relating to a specific regulated person prepared by or for the use of an agency responsible for the regulation or supervision of the person.
>
> "(e) Investigatory materials compiled or used for regulatory or law enforcement purposes except to the extent available by law to a party to a contested case.
>
> "(f) Material the disclosure of which would constitute an unwarranted invasion of privacy."

The only reported appellate decision in Michigan dealing with any of the above quoted sections is *Citizens for Better Care* v *Department of Public Health*, 51 Mich App 454; 215 NW2d 576 (1974), in which the court

noted the similarity between the Michigan act and the Federal Freedom of Information Act, 5 USCA 552. Although faced with the lack of state authority, the court stated:

> ". . . Fortunately, the absence of Michigan case law interpreting the pertinent provisions of the recently enacted Administrative Procedures Act of 1969 does not, as would be expected, deprive this Court of precedential guidance. For, as the trial court correctly noted, the APA provisions in question are, in both substance and form, strikingly similar to the Federal Freedom of Information Act, 5 USCA 552. Thus, Federal decisions interpreting the latter, though of course not binding on this Court, provide some guidance in our attempt properly to construe the former." p 463

The analysis of your question is likewise aided by reference to federal cases dealing with an exemption in the Federal Freedom of Information Act which parallel that found in section 22(1)(e). That section states as follows:

> "(b) This section does not apply to matters that are—
>
> "* * *
>
> "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The federal cases dealing with 5 USCA 552(b)(7)[1] reveal a clear split of authority. *Bristol-Myers* v *FTC*, 424 F2d 935 (1970); *cert den* 400 US 824 (October 12, 1970), is the leading case for the proposition that investigatory files are subject to public inspection unless the administrative agency can demonstrate a concrete likelihood of enforcement proceedings. *Frankel* v *SEC*, 460 F2d 813 (1972); *cert den* 409 US 889 (October 10, 1972), is representative of a line of cases which holds that an investigatory file is not open to public inspection even after the investigation and enforcement proceedings have terminated.

In *Bristol-Myers*, plaintiff sought access to a FTC staff investigation prepared in the course of rule-making proceedings by the agency. The

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[1] Public Law 93-502, §§ 1-3, amended this section November 21, 1974. 88 Stat 1561-1564 read:

> "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

The six specified grounds for exemption of investigatory files generally reflect judicial interpretations of former section 555(2)(b)(7). Thus, congressional approval of previous court interpretations of investigatory file exemptions is evidenced.

investigation file included a 2-year-old investigation of plaintiff concerning alleged deceptive advertising practices. The FTC had filed and subsequently withdrew a complaint against Bristol-Myers based on the material gathered in the investigation. The United States Court of Appeals remanded the case to the District Court for determination of whether the prospect of enforcement is sufficiently concrete to bring into operation the exemption of investigatory files. Significantly, the court required an *in camera* inspection at the lower court level, thus asserting the court's ultimate power to decide exemption questions. In so ruling the court stated:

> ". . . Congress intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law. The exemption prevents a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly. * * *' But the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date. . . ." p 939

The rationale employed by the court in *Bristol-Myers* may be traced to *Cooney v Sun Shipbuilding & Drydock Co,* 288 F Supp 708, 712 (1968), which allowed the plaintiff in a wrongful death action to obtain an accident report from the Secretary of Labor over a claim by the government of investigatory file exemption. The court noted that the United States Attorney General had declared the purpose of the exemption was to avoid premature disclosure of an administrative agency's case when engaged in law enforcement activities. Accepting the Attorney General memorandum as a sound interpretation of this section, the court stated:

> ". . . For in cases in which an agency hearing or judicial litigation is impending, the situation is often rife with possibilities for a defendant to intimidate witnesses, or anticipate and avoid the government's case; thus, a rule limiting disclosure in such cases has an obvious rationality. But in a situation such as is presented here, long beyond the time in which investigation would have culminated in action, the rationale of the above-cited cases has no relevance. . . ."

The court then continued to discuss the claim for information under case law existing prior to the Freedom of Information Act. In analyzing prior cases dealing with the general doctrine of governmental privilege, the court employed a balancing test: whether the absolute non-disclosure of the contents of governmental investigative reports in the interest of furthering the effective enforcement of governmental safety programs by encouraging full and frank disclosure of all accident information outweighed liberal disclosure of all relevant nonprivileged information to litigants in civil actions. In the court's opinion, the revelation of an accident report where the agency did not intend enforcement action would not impair the government's ability to obtain full and frank disclosure from all parties to that accident or as to future accidents.

In contrast, the second line of federal cases represented by *Frankel* holds that investigative files are exempt without regard to the likelihood of law enforcement proceedings.

The plaintiff in *Frankel* sought to obtain an investigation file concerning Occidental Petroleum which had been gathered by the Securities & Exchange Commission to support a complaint under section 10(b) of the Securities Exchange Act of 1934, 15 USC 78(j)(b) (1970). Although the SEC and Occidental eventually settled the complaint, plaintiff requested the information in support of a class action on behalf of Occidental shareholders. The court denied plaintiff access to the file. The opinion cites various Senate and House of Representatives reports to support the proposition that investigatory material exemption has two purposes. First, it prevents premature disclosure of the government's case when the agency is involved in litigation or enforcement proceedings. Second, it prevents public exposure of the procedures by which the agency conducted its investigation and by which it obtains information. Thus, the court determined:

> "The conclusion that the § 552(b)(7) exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated is supported both by the authority of the cases decided under the Act and by consideration of the policies underlying the Act in general and the investigatory files exemption in particular. In Evans v. Department of Transportation, 446 F.2d 821, 824 (5th Cir.), petition for cert. filed, 40 U.S.L.W. 3625 (U.S. Nov. 24, 1971) (No. 71-698), the court said:
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> > " 'We are of the further opinion that Congress could not possibly have intended that such [matter] should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the [agency] of something which might justify investigation.' " p 817

However, the court left the door partially open to the plaintiff by stating:

> "Of course our decision does not mean that appellees are completely barred from obtaining information contained in the requested documents. In their suit against Occidental and Hammer appellees are entitled to the usual remedy of discovery under the discovery provisions of the Federal Rules of Civil Procedure. In the discovery procedure a district judge will be able to balance the need for the documents with the need for confidentiality." p 818

While the majority opinion in *Frankel* apparently ignored the *Bristol-Myers* case decided two years earlier, the dissent filed in *Frankel* cited *Bristol-Myers* and suggests that the *in-camera* view required by *Bristol-Myers* would adequately protect the governmental interest sought to be protected by the investigatory file exemption.

Neither *Bristol-Myers* nor *Frankel* has been overruled or reconciled by succeeding cases.

As previous opinions I have issued make clear, my review of Michigan law in this important area has consistently led me to the conclusion that the policy of this state is to encourage disclosure of public records whenever possible. Thus, I believe that the rationale of *Bristol-Myers* is applicable in Michigan. In reaching this conclusion, I am particularly mindful of the position of the court in *Burton* v *Tuite,* 78 Mich 363; 44 NW 282 (1889), in which it is stated that:

> ". . . It is plain . . . 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. . . ." p 375

Nowack v *Auditor General,* 243 Mich 200; 219 NW 749 (1928), carried this idea forward adding:

> ". . . 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. . . . 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. . . ."
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> "* * *
>
> "There is no question as to the common-law rights 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." pp 203-204

And more recently, in *Booth Newspapers, Inc* v *Muskegon Probate Judge,* 15 Mich App 203; 166 NW2d 546 (1968), the court summarized Michigan law on this subject as follows:

> "The fundamental rule in Michigan on the matter before us, first enunciated in the case of *Burton* v *Tuite* (1889), 78 Mich 363, is that citizens have the general right of free access to, and public inspection of, public records. This is contrary to the English common-law rule which permitted inspection but prohibited private use, by providing no remedy in the absence of a showing of special interest specifically concerning litigation. . . .
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> "The case of *Nowack* v *Auditor General* (1928), 243 Mich 200 (60 ALR 1351), remains the definitive law of this State and has been employed by other jurisdictions. . . ." p 205

In the *Booth Newspapers* case, the Court of Appeals summarized the *Nowack* case by quoting from an earlier Attorney General's opinion that the *Nowack* decision has:

> ". . . placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest

possible effect." OAG, 1961-1962, No 3590, pp 581, 587 (November 14, 1962)

Nevertheless, as noted by the above quote from *Booth Newspapers, Inc,* whether a record in the custody of a public official is available for public inspection depends upon its nature and purpose. In addition, individuals are protected by the constitutional right of privacy, which is defined in *Earp* v *City of Detroit,* 16 Mich App 271, 275-276; 16 NW2d 841 (1969)[2] to be:

> " '[T]he right of an individual to be let alone, or to live a life of seclusion, or to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.' 77 CJS, Right of Privacy, § 1, pp 396, 397."

Earp, supra, p 276, went on to state that this right is not absolute, recognizing that:

> " 'In determining the extent of the right of privacy, it is essential to consider it in the light of duties imposed on individuals as citizens of a free country and in the light of an individual's relation to the community of which he is a member, and such right does not extend so far as to subvert those rights which spring from social conditions, including business relations, or to prohibit the publication of matter which is of public or general interest or benefit.' 77 CJS, Right of Privacy, § 3, pp 401, 402."

One of the recognized limitations on the right of public inspection was dealt with by the Michigan Court of Appeals in *Grayson* v *Board of Accountancy,* 27 Mich App 26; 183 NW2d 424 (1970). In this case the court refused to order the disclosure of the names and addresses of applicants for certified public accountant examinations where a statute prohibited disclosing this information.[3]

Thus noted, the Michigan Administrative Procedures Act contains specific exemptions which are applicable. For example:

—information obtained from a confidential informant may qualify as exempt under section 22(c) as "material obtained in confidence from a person"

—information involving professional relationships may fall within matters privileged by law, under such familiar doctrines as doctor-patient and attorney-client privileges. These matters are also exempted under section 22(1)(c).

—material the disclosure of which constitutes an unwarranted invasion of privacy is exempted under section 22(1)(f).

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[2] *Roe* v *Wade,* 410 US 113, 152; 93 S Ct 705; 35 L Ed 2d 147 (1972) and *Griswald* v *Connecticut,* 381 US 479, 484-485; 85 S Ct 1678; 14 L Ed 2d 510 (1965) are in accord with this definition of the right of privacy.

[3] MCLA 338.503; MSA 18.3.

The individual's right of privacy was given clear recognition in Michigan in *Pallas* v *Crowley, Milner & Co,* 322 Mich 411; 33 NW2d 911 (1948). Recently the United States Supreme Court reaffirmed the right of privacy in the face of conflicting governmental interests in *Roe* v *Wade,* 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973).

In determining whether the disclosure of closed investigative reports is appropriate, the guidance provided by the following cases must be carefully considered:

> ". . . also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v *Georgia,* 394 US 557, 564 (1969)
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> "The makers of our Constitution * * * sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v *US,* 277 US 438, 478; 48 S Ct 564, 572; 72 L Ed 944 (1928), Justice Brandeis dissenting.
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> "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. * * *" *Getman* v *NLRB,* 450 F2d 670, 674 n 10 (1971)

Additionally, reference must be made to other statutes affecting disclosure of information. For example, section 22(1)(a) provides for withholding materials exempted from disclosure by statute. By way of example, recent amendments to the various licensing acts of healing arts boards limit accessibility of the public to board files. Therefore, before determination is made to disclose information, reference must be made to other statutes affecting accessibility.

As you note in your question, some statutes contain specific disclosure requirements which override the Administrative Procedures Act, *supra.* OAG, 1971-1972, No 4370, p 95 (June 16, 1972), held that investigative reports compiled by the Department of Licensing and Regulation relating to licensees holding themselves out as residential builders, maintenance and alteration contractors or real estate brokers and salesmen must be disclosed to the public where the investigation has been completed.

To sum up, the administrative agency in which the particular statute vests control must determine in the first instance whether the materials sought constitute a closed investigatory file and, if so, whether there exists a concrete likelihood of enforcement proceedings. *Bristol-Myers* clearly indicates that although the ultimate determination will be made by the court after an *in camera* inspection, the administrative agency must answer the threshhold question as to whether the closed investigative file relates to anything that can fairly be characterized as an enforcement proceeding.

If there is in fact no concrete likelihood of enforcement proceedings, then the administrative agency must decide what material within the closed investigative file is nonetheless otherwise exempted from disclosure under other parts of 1969 PA 306, § 22, *supra,* or other relevant statutes. In making this determination, you are advised that the burden rests with the administrative agency to demonstrate the applicability of an exemption from disclosure.

I am convinced that the public interest is best served when state agencies willingly abide by the intent and spirit of the public disclosure provision of the Administrative Procedures Act, subject only to such limitation as is imposed by that statute's specific exemptions from disclosure and the protection of the right of privacy.

Therefore, you are advised that, unless an administrative agency can demonstrate either (1) a concrete prospect of enforcement proceedings or (2) a specific statutory exemption or (3) an unwarranted invasion of an individual's right of privacy, the exemptions set forth in sub-sections 22(e) and (f) covering closed investigative files are not applicable. As the *Bristol-Myers* case noted, an administrative agency may not "protect all its files with the label 'investigatory,' and a suggestion that enforcement proceedings will be invoked at some unspecified future date."

FRANK J. KELLEY,
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751209.1

COUNTIES: Records.

RECORDS AND RECORDATION: Personnel Files.

Personnel files of county employees are not subject to public inspection.

County officials having custody of personnel files of county employees have discretion as to whether to disclose information in such files but may not disclose information that would constitute an unwarranted invasion of privacy.

Opinion No. 4905 December 9, 1975.

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You have requested my opinion on the following:

> "What legal obligation does Genesee County have with respect to answering requests by private concerns (i.e., collection agencies, credit unions) and/or governmental agencies for information contained in the personnel files (i.e., address, length of employment, and other items of information) maintained by the county regarding its em-