

§1311-A. Protective orders; confidential information

Records placed under a protective order by the commission pursuant to the Maine Rules of Civil Procedure, Rule 26 (c) in accordance with this section, are within the scope of a privilege against discovery within the meaning of Title 1, section 402, subsection 3, paragraph B and are not public records while under the protective order. [PL 1997, c. 691, §5 (AMD); PL 1997, c. 691, §10 (AFF).]

1. Issuance of protective orders. The following provisions govern the commission's issuance of protective orders.

A. The commission may issue protective orders to protect the interests of parties in confidential or proprietary information, trade secrets or similar matters as provided by the Maine Rules of Civil Procedure, Rule 26 (c). When issued, a protective order must be served on the party seeking the order. Service must be in accordance with the Maine Rules of Civil Procedure, Rule 5 (b). A requirement to disclose information pursuant to a protective order does not take effect until 24 hours after service of the protective order on the party seeking the protective order. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

B. In granting protective orders, the commission shall balance the need to keep the information confidential with the policies of conducting its proceedings in an open and fair manner where all parties have the right and opportunity to participate effectively as provided under the Maine Administrative Procedure Act, the Maine Rules of Civil Procedure, the Maine Rules of Evidence and the Maine freedom of access laws. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

C. The party requesting a protective order bears the burden of demonstrating the need for protection. The commission may partially and temporarily grant a request for a protective order, consistent with the provisions of paragraph D, to expedite the release of confidential information to certain parties, but the party seeking protection bears the burden of demonstrating that release of the information to other parties should be restricted. The commission may not issue a final order prohibiting or restricting access to a party without notice and an opportunity to be heard. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

D. If the commission issues a protective order that denies a party access to information, the commission shall provide the information to the party's attorney, if any, subject only to the restriction that the attorney use the information solely for the purpose of the proceeding and not disclose the information to others, except that:

- (1) The commission may deny an attorney access to information relating to bids if the attorney represents a party that made a competing bid; and
- (2) The commission may impose further limitations if the commission finds that an attorney has a direct, personal and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information.

Unless the commission finds that the conditions of subparagraph (1) or (2) are met, the obligations of attorneys under the ethical rules, including the obligation to decline representation in certain cases, the authority of the commission to discipline attorneys who appear before the commission, including the authority, under section 1502, to punish for contempt persons who fail to comply with a protective order, and the commission's ability to recommend sanctions by other bodies, including the discipline of attorneys by the courts and the Board of Overseers of the Bar, is sufficient security to permit the attorney to have access to information in order to represent a party before the commission. [PL 2023, c. 646, Pt. A, §42 (AMD).]

E. The commission may prohibit or restrict the disclosure of information under protective order to a party's independent consultant only for compelling reasons and to the least extent necessary,

except that the commission may require that the information be used only for the purposes of the proceeding in which it is disclosed and may prohibit disclosure of the information by the independent consultant to others. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

F. Notwithstanding any other provision of this subsection:

- (1) The commission may deny all parties, including the commission and its staff, access to information if the commission finds that the potential for harm from disclosure of the information outweighs its probative value in the proceeding;
- (2) The commission may deny an attorney access to information under protective order if the commission finds that the attorney's request for access to the information is not made in good faith or that the attorney will not respect the terms of the protective order; and
- (3) The commission may deny or limit access by an attorney to information under protective order in a proceeding involving one or more special contracts under section 703 if:
 - (a) The information is customarily regarded as confidential business information and relates to the reasons for the parties' entering into the special contract; and
 - (b) The party represented by the attorney is not a party to the special contract with the utility.

The commission may deny or limit access to information by any attorney under this subparagraph after providing the attorney with an opportunity to be heard and upon finding that the potential for harm from disclosure of the information outweighs the need for disclosure. [PL 2023, c. 64, §1 (AMD).]

[PL 2023, c. 646, Pt. A, §42 (AMD).]

2. Appeal. A party required to disclose information pursuant to a protective order issued by a hearing examiner in accordance with subsection 1 may appeal to the commissioners sitting as the commission in accordance with this subsection.

- A. The basis for an appeal brought pursuant to this subsection is that the potential for damage resulting from the disclosure of the information in accordance with the protective order clearly exceeds the probative value of the information in the proceeding. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]
- B. A party bringing an appeal pursuant to this subsection must file the appeal within 24 hours of service of the protective order. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]
- C. If a party appeals in accordance with this subsection, the party is not required to disclose the information during the pendency of the appeal. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]
- D. The commission shall render a decision on the appeal brought pursuant to this subsection within 7 business days of the filing of the appeal. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]
- E. Notwithstanding subsection 1, the commission may impose limits on the disclosure of information beyond the limits imposed by the protective order issued in accordance with subsection 1 only if the commission finds that potential for damage resulting from disclosure of the information in accordance with the protective order clearly exceeds the probative value of the information in the proceeding. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

For purposes of this subsection, the term "hearing examiner" means a commission staff person authorized to issue a protective order in a commission proceeding. [PL 1997, c. 691, §5 (NEW); PL 1997, c. 691, §10 (AFF).]

SECTION HISTORY

PL 1993, c. 535, §1 (NEW). PL 1997, c. 691, §5 (AMD). PL 1997, c. 691, §10 (AFF). PL 1999, c. 127, §D5 (AFF). PL 2023, c. 64, §1 (AMD). PL 2023, c. 646, Pt. A, §42 (AMD).

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