

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-AP-2020-00003

THE HERSHEY COMPANY, et al.,)
)
 Petitioners,)
)
v.)
)
STATE TAX ASSESSOR,)
)
 Respondent.)

ORDER RESOLVING RULE 26(g)
DISCOVERY DISPUTE INVOLVING
REDACTION OF CORPORATE TAX
INFORMATION

The redaction issue in dispute arises from the tension between the confidentiality provision of 36 M.R.S. § 191, which provides for the broad confidentiality of tax records (albeit with numerous exemptions), and the Maine Rules of Electronic Court Systems (“MRECS”), which seek to maximize public access to court records (albeit with certain exceptions). Likewise, there is tension between a public policy of confidentiality in tax records and the common law presumption in favor of public access to judicial records. Petitioner The Hershey Company (“Hershey”) seeks to redact certain financial information from five key documents (the Assessor’s brief, several statements of material facts, and a 30(b)(6) transcript) which are part of its appeal against Respondent the State Tax Assessor (the “Assessor”).

ANALYSIS

36 M.R.S. § 191: Confidentiality of Tax Records

The Court begins its analysis with the statute. Under Title 36 M.R.S. § 191(1), certain tax information is confidential and it is unlawful “for any person who, pursuant to this Title, has been permitted to receive or view any portion of the original or a copy of any report, return or other

information provided pursuant to this Title to divulge or make known in any manner any information set forth in any of those documents or obtained from examination or inspection under this Title of the premises or property of any taxpayer. This prohibition applies to both state tax information and federal tax information filed as part of a state tax return.” This language “creates a broad sweep that protects all information, from whatever source, provided pursuant to Title 36.” *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, ¶ 14, 86 A.3d 30.

The broad protection of Section 191(1), however, is subject to numerous exemptions. One of the exemptions set forth is 36 M.R.S. § 191(2)(C), which provides that the section does not prohibit “the production in court or to the board on behalf of the State Tax Assessor. . . of so much and no more of the information as is pertinent or to the action or proceeding.” Hershey acknowledges that its tax returns (and information contained therein) are pertinent to the proceeding, and so Section 191(2)(C) applies. Moreover, Section 191(2)(C) “does not compel the sealing of such information and material if filed in court.” *Apple Inc. v. State Tax Assessor*, 2021 ME 8, ¶ 39 n.4, 254 A.3d 405. Section 191 recognizes that court records are “presumptively public” via the exemption in Section 2(C), and thus “the proponent of sealing such material has the burden to justify the request through a showing of need for confidentiality, typically through affidavits if the sealing request is opposed by another party or questioned by the court.” *Id.* The Hershey Company has not submitted affidavits in support of its requested redactions, but contends affidavits are unnecessary by operation of MRECS. The Court thus turns its attention to the MRECS.

Maine Rules of Electronic Court Systems

The Maine Supreme Judicial Court adopted the MRECS on August 21, 2020. The MRECS are instructive and controlling on issues of sealing court records and they apply to how the Court

determines what information is available to non-parties. *See* Order on Bloomberg L.P.’s Motion to Intervene and to Unseal Records, *Templet v. Cartwright*, No. BCD-CV-2020-06 (Bus. & Consumer Ct. Dec. 7, 2020, *Murphy, J.*). The preamble to the MRECS reads as follows:

These Rules of Electronic Court Systems are intended to **facilitate public access** to and use of the courts in the electronic environment, while providing **maximum reasonable public access to court records** and **minimizing the risk of harm to individuals and entities involved in court proceedings**. In developing these rules, the Maine Judicial Branch has carefully considered and weighed the importance of both public access and protection of privacy in court records in the context of an electronic case management and filing system.

(emphasis added). MRECS Rule 1 describes the principles upon which the rules are based:

Public access to court records is restricted in certain instances by law. When public access to court records is not controlled by law, these rules will control public access, and every judge, justice, and magistrate applying these rules shall consider the principles listed below in doing so:

- (1) Public access to records can inform and educate the public about the workings of government, support accountability, and advance public safety;
- (2) Persons who use the courts have a legitimate expectation of privacy. Providing access to personal details in court records can put the parties at risk and create a disincentive to use the courts;
- (3) The public can be informed of court activity without having access to all of the personal details in a court record; and
- (4) When digital information or data are made accessible by the public remotely, neither the Maine Judicial Branch nor any other entity or person has the practical ability to control its dissemination or use.

The definition of “court record” under MRECS Rule 2(17)(A)(i) includes “[p]leadings, motions, briefs and their respective attachments, correspondence, and documentary evidentiary exhibits submitted with court filings.” The information which Hershey seeks to redact is thus part of a “court record” and subject to MRECS.

MRECS Rule 3(A)’s “General Access Policy” provides that electronic court records “are accessible by the public except as provided by law, including these rules, or by court order.”

Therefore, Hershey must show that an exception exists which would justify redacting the information. They must show a rule or law under which the information is redactable as a matter of law or convince this Court that it should issue an order redacting the information in the interest of justice.

In this regard, Hershey points to MRECS Rule 4, which enumerates items which are nonpublic as a matter of law under MRECS, without the need for affidavits or any other showing. In reliance on MRECS Rule 4(e)(10), Hershey argues that “tax documents” filed in a civil case, including the data and information contained in those tax documents, are nonpublic as a matter of law. Hence, argues Hershey, it was entitled to redact from the five documents at issue in this case, the financial information derived from its tax documents.


Hershey’s reliance on MRECS Rule 4(e)(10), however, is misplaced. Rule 4(e)(10) provides that when filed in a civil case, “[p]ersonal financial documents, including financial statements, tax documents including W-2s, paystubs, bank statements, account statements, and payment histories” are considered nonpublic. By its text, MRECS Rule 4(e)(10) applies only to personal financial documents of an individual, not corporate financial documents. Thus, the reference in Rule 4(e)(10) to “tax records” refers to the personal tax records of an individual, not corporate tax records. Since corporate tax records filed in a civil case are not automatically considered nonpublic pursuant to MRECS Rule 4(e)(10), information derived from those records, such as the corporate financial information at the center of this dispute, is not automatically entitled to redaction. Indeed, the public has an interest in high-level financial information of corporations doing business in Maine, particularly when that information is subject to a suit against the Assessor in an effort to reduce the corporation’s tax burden to the State.

The Assessor argues that the appropriate procedure to apply in this matter is contained in MRECS Rule 10, and the Court agrees. Rule 10 provides the procedure for sealing or impounding court records and requires in Paragraph (a)(2)(A) that a party seeking to seal court records must file a motion to seal “accompanied by an affidavit stating the basis upon which the movant has standing, including a statement describing the harm that is alleged will occur should the motion be denied.” This rule dovetails with the process clarified by the *Apple Inc.* footnote 4 favoring disclosure and requiring some showing by the proponent of sealing.¹ In order to support its argument for redaction, therefore, Hershey should have provided an affidavit or affidavits as provided in MRECS Rule 10(a)(2).

CONCLUSION

Since there was uncertainty about application of the MRECS to this dispute, and the need for an affidavit, the Court reserves deciding the dispute. The Court provides Hershey with 10 days from the date of this Order to provide the required affidavit, if it chooses to do so. The information will remain nonpublic until further order of the Court.

Date: July 29, 2022



Michael A. Duddy, Judge
Business and Consumer Court

Entered on the docket: 07/29/2022

¹ There is thus no difference in the outcome between an MRECS court using electronic filing, such as the BCD, and a court still using paper filing.