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# **STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL**

**Janet T. Mills, Attorney General**



**PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2016**

**February 28, 2017**

**Brenda L. Kielty, AAG, Ombudsman**

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## MESSAGE FROM ATTORNEY GENERAL JANET T. MILLS

February 2017

“Government ought to be all outside and no inside. . . . Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.”

- Woodrow Wilson

Many years ago, if you said you wanted to “FOA” somebody, you might have been arrested for threatening to commit a crime. Today, the word “FOA”—as a noun, as a verb—has become an integral part of our vocabulary, particularly for people who work in government and in the news media. For some the term represents a threat; for others, a nuisance, the basis for a news story, the start of a lawsuit, a glimpse into a decision or into the purpose of a meeting.

Since 1967 citizens have enjoyed the right to acquire information from the federal government by statute. Other countries, even non-democratic regimes, have followed suit. Since 1975 Maine has provided a statutory right of access to governmental information and governmental meetings. We have become accustomed to participation. We resent stalling. We expect full access.

After all, what would our government be like if it operated in secret—without access, without public participation or public knowledge? Many believe that nothing is more fundamental to our democracy than transparency in government, in its documents, actions and deliberations.

This right is not absolute, of course. Our statutes still shield matters of personal privacy, trade secrets, investigative information, personnel records, and the like. When you file a form with the government containing personal information, do you expect that others outside that agency will see the information, even if you had no choice about filing that form with the government, that your name might be listed in the newspaper or on a social network as holding a particular license from the government?

The balancing of public access with legitimate privacy interests is what our laws strive to achieve. It is the reason we have a “Right to Know Advisory Committee,” made up of news people, lawmakers and regular citizens. It is the reason we require the Legislature’s Judiciary Committee to review the myriad confidentiality statutes on the books each year to see if they still make sense. It is the reason we now have a fulltime “Public Access Ombudsman” in the Office of the Attorney General.

We hope this Report of the Ombudsman sheds light not only on the volume and type of work performed already, including several recent controversies with the Department of Inland Fisheries & Wildlife and the Department of Education this past year, but also on the challenges of achieving that important balance between competing interests of personal privacy and transparency, each of equal importance to the citizens of this state. While government may never be “all outside, no inside,” we are determined to make our government more “outside” than ever before, while protecting the legitimate “inside” for which citizens have every right to expect protection.

## SUMMARY

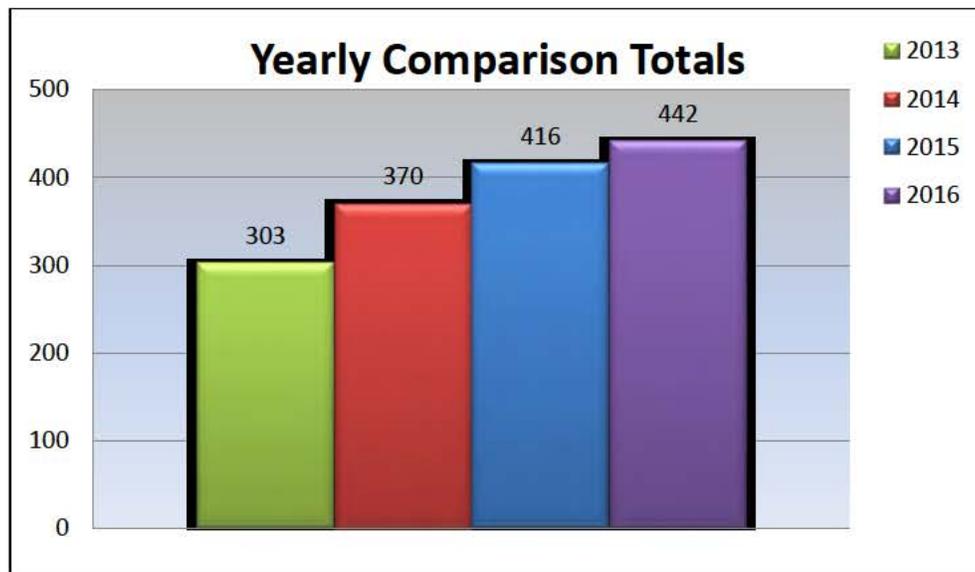
Maine's Freedom of Access Act (FOAA) recognizes that government must be accountable to the people and provides a statutory right of access to public meetings and public records. While the principles of open government, transparent deliberations and access to public information are fundamental to FOAA, these interests must be balanced with the need for government to maintain the confidentiality of information to protect personal privacy, security and other legitimate interests.

In 2007 the Legislature created the public access ombudsman position within the Office of the Attorney General. The statute authorized the ombudsman to educate the public and government officials about the requirements of the State's freedom of access law, provide dispute resolution services, answer inquiries and make recommendations for improvements to the law. In 2012 the Legislature funded a full-time ombudsman position.

The ombudsman performs an unusual role in government. Although the ombudsman receives complaints from the public, the ombudsman's job is not to be either an advocate for the complainant or a defender of the government. An ombudsman is an impartial intermediary who provides information, who informally resolves disputes and encourages full compliance with the spirit and the letter of the law.

### Four Year Program Trends

The ombudsman activity involving question and complaint resolution has grown over the four years of the program. A total of 442 contacts were received in 2016 from FOAA requesters and agencies seeking assistance, representing a 46% increase from the 303 contacts in 2013.



As was the case in previous years, the bulk of the contacts were telephone inquiries from private citizens regarding access to public records held by municipal government agencies.

Inquiries and complaints from members of the media more than doubled from 25 in 2015 to 51 in 2016.

**State Agency Annual FOAA Reporting**

The Ombudsman Report for 2016 includes data on the annual number of FOAA requests, average response time and the costs of processing FOAA requests for each of the executive branch State agencies. This is the second year that this information has been compiled. Although incomplete data was reported on some of the indicators, this snapshot of FOAA activity should help inform policy makers and the public on how each agency is generally responding to FOAA requests over the course of a year. This data also illuminates the volume of FOAA requests for these state agencies collectively.

I would like to thank the state agency public access officers for their time in compiling the data necessary for this report and their continued dedication to providing access to public records.

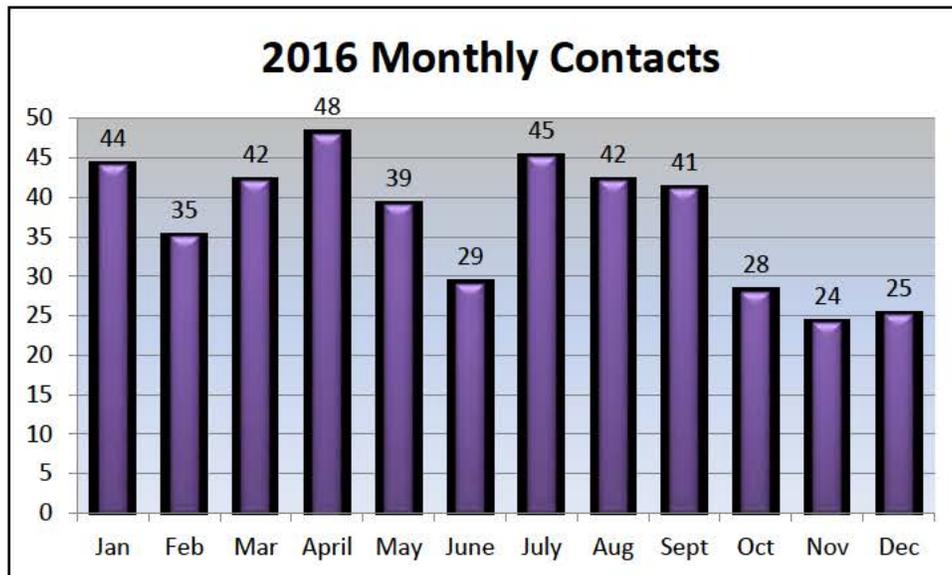
Brenda L. Kielty, Public Access Ombudsman

## ANSWERING INQUIRIES & RESOLVING DISPUTES

“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S. § 200-I(2)(A) and (B).

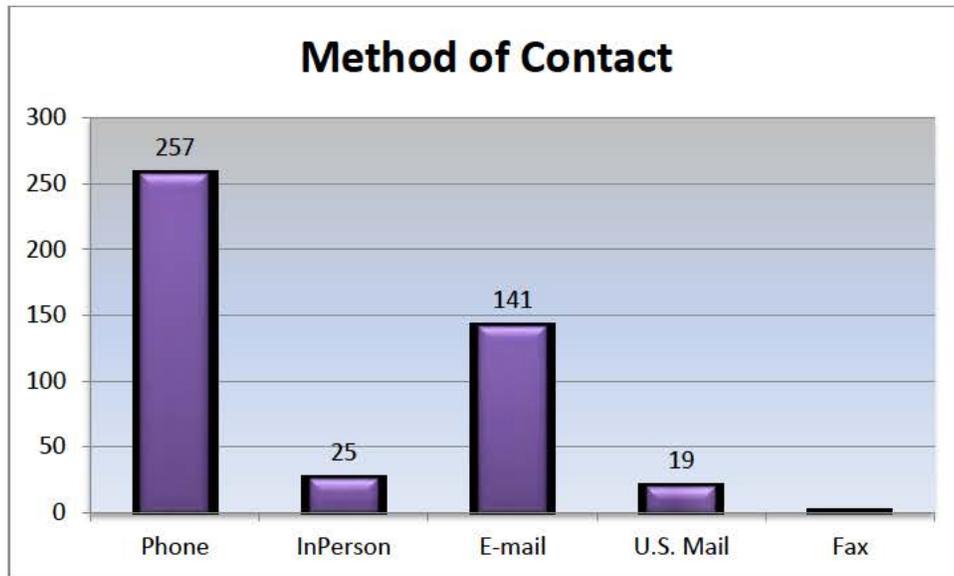
### 2016 Contacts with the Ombudsman

In 2016 I logged 442 inquiries, complaints and suggestions. Requests for help ranged from questions about how to file a FOAA request to more complex inquiries regarding situations in which the FOAA issues were only part of a larger dispute or where some fact-finding was necessary before appropriate advice could be given.



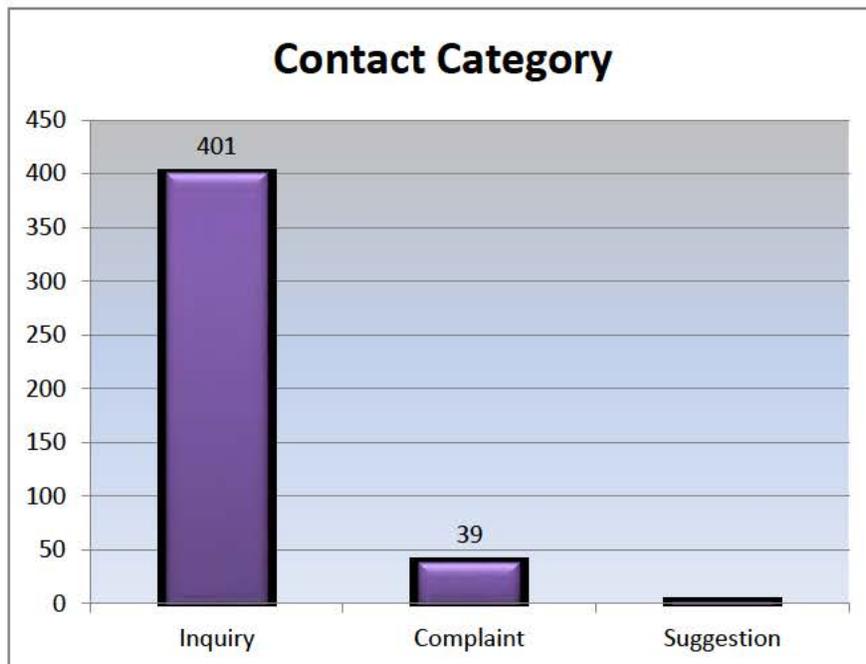
**Method of Contact**

The bulk of initial contacts was by telephone (257) followed by email (141), in- person (25) and U.S. Mail (19).



**Contacts Included Inquiries, Complaints and Suggestions**

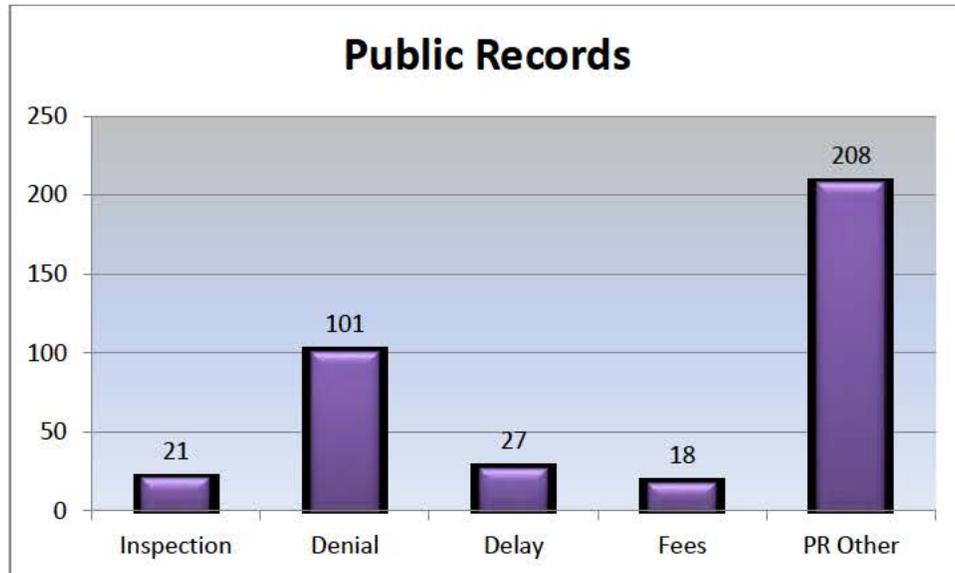
The 442 contacts included general inquiries (401), complaints (39) and suggestions (2). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



## Contacts Concerning Public Records

Of the contacts about public records (366), the most common questions concerned:

- Basis for a denial
- Confidentiality exceptions
- Reasonable response times and delay
- Production or inspection of public records
- Fees and costs for public records



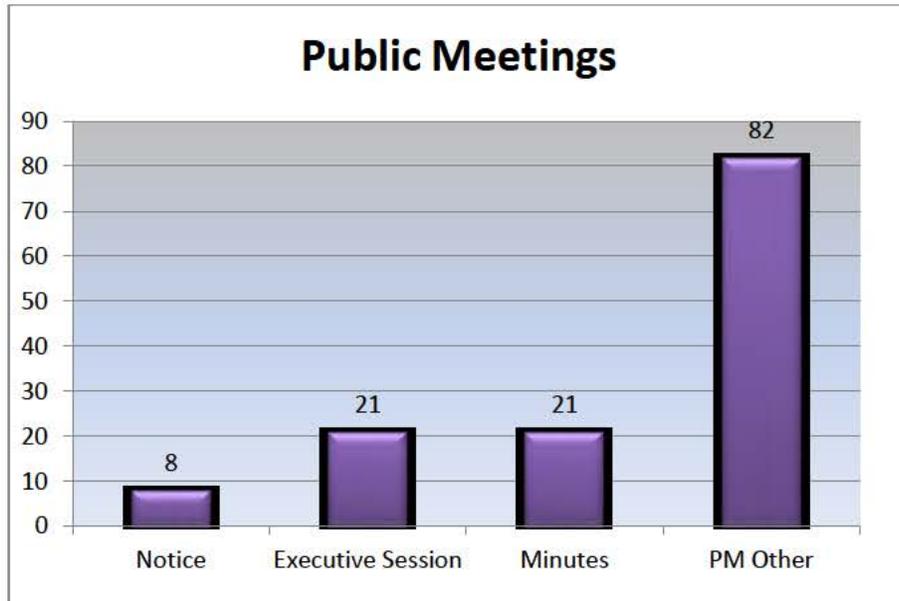
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The "Other" category includes the following kinds of questions:

- Retention and destruction of records
- Confidentiality of specific documents prior to a FOAA request being made
- Access to records normally part of discovery
- General information on making a FOAA request
- Mandatory FOAA training for officials
- Whether an entity is subject to FOAA
- Asking for a document rather than asking for the answer to a question
- Legislation and case law
- Asking an agency to compile data or create a document
- Burdensome FOAA requests
- Due diligence of an agency in searching for records

## Contacts Concerning Public Meetings

Of the contacts concerning public meetings (112), most questions concerned:

- Use of executive session
- What constitutes a meeting
- Minutes



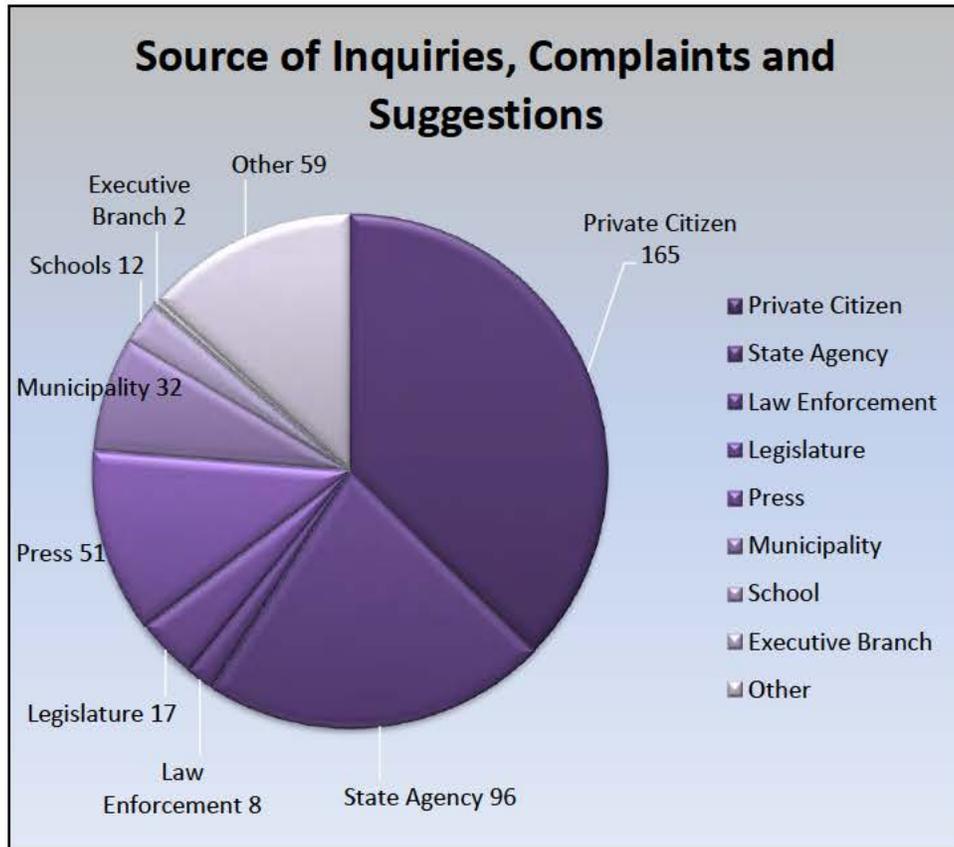
All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

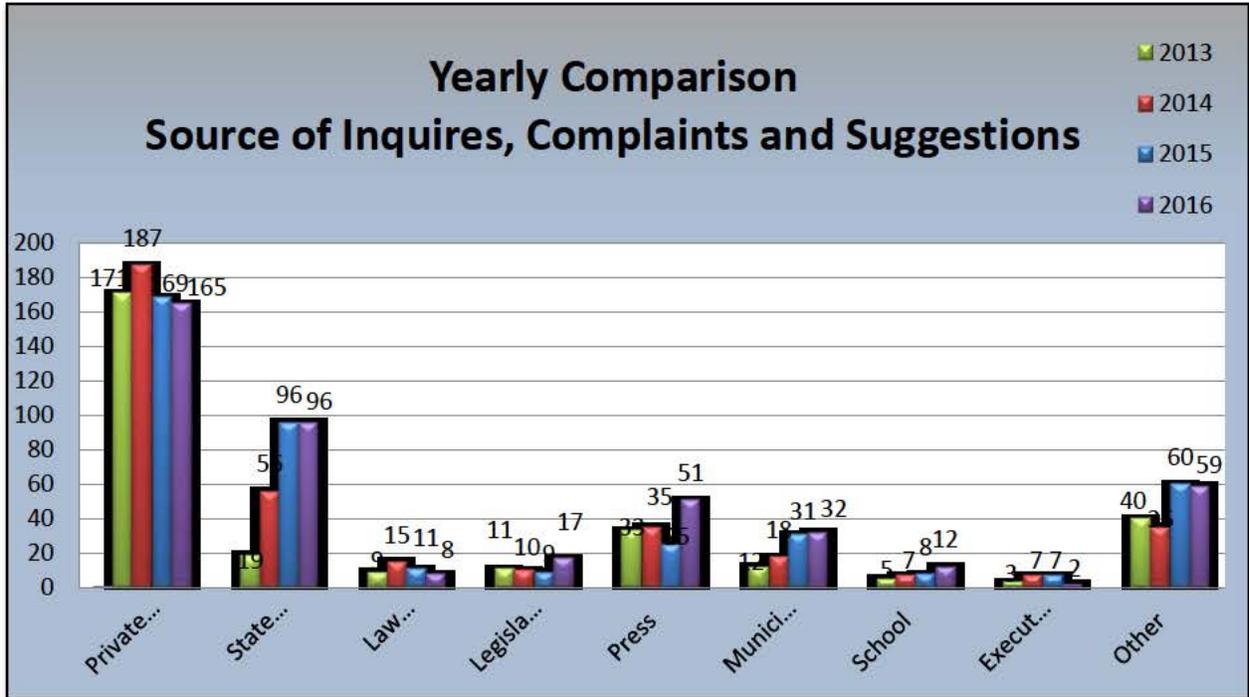
- Whether an agenda is required
- Public comment period during public meetings
- Remote participation by members of a public body
- What entities are subject to FOAA

*In State of Maine v. Commission to Reform Public Education Funding and Improve Student Performance in Maine*, the Attorney General brought a civil action in Augusta District Court against an advisory commission created by the legislature to study educational issues. The suit alleged that the commission’s chairperson violated the Freedom of Access Act’s open-meetings requirement by holding the first meeting of the commission in a location that was not open to the public. The suit sought a civil penalty against the commission pursuant to 1 M.R.S. § 410, which subjects government entities to civil penalties for willful violations of the Freedom of Access Act by their officers or employees. In response to the suit, the defendant commission admitted the violation and paid the maximum fine of \$500.

### Source of Inquiries, Complaints and Suggestions

Of the 442 inquiries, complaints and suggestions, 165 came from private citizens, 96 from state agencies, 8 from law enforcement agencies, 17 from the Legislature, 51 from members of the media, 12 from school districts, 2 from the executive branch and 59 from others including attorneys and commercial requesters.

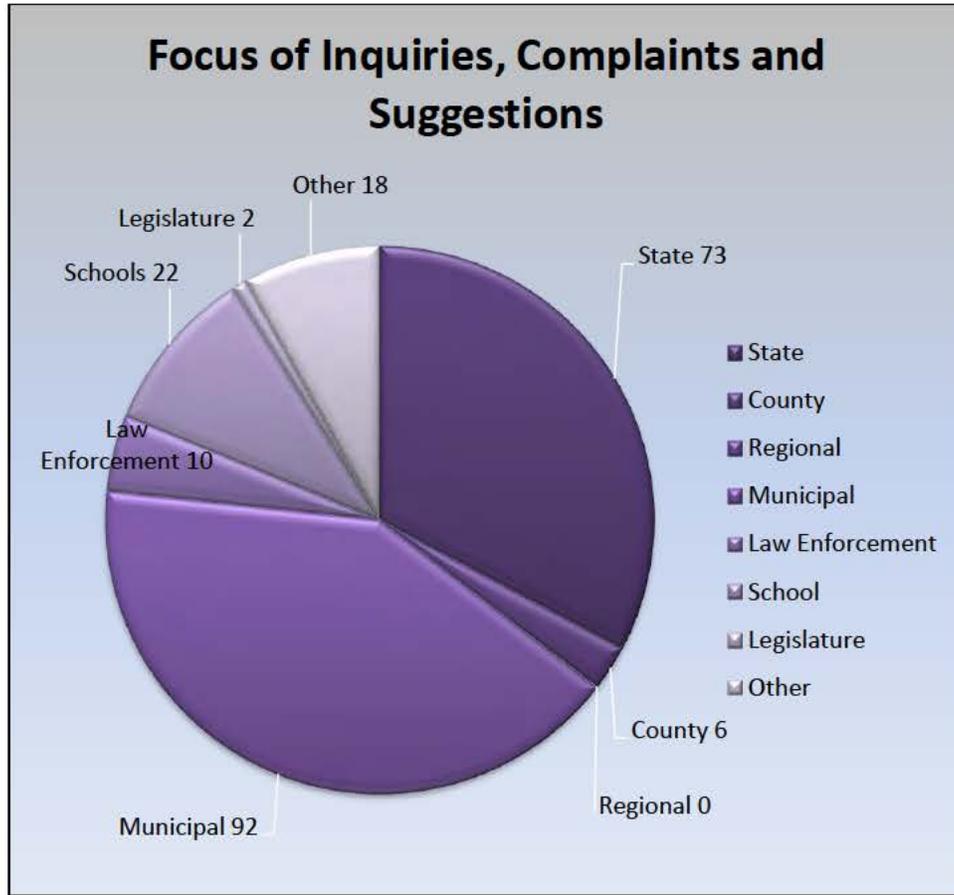


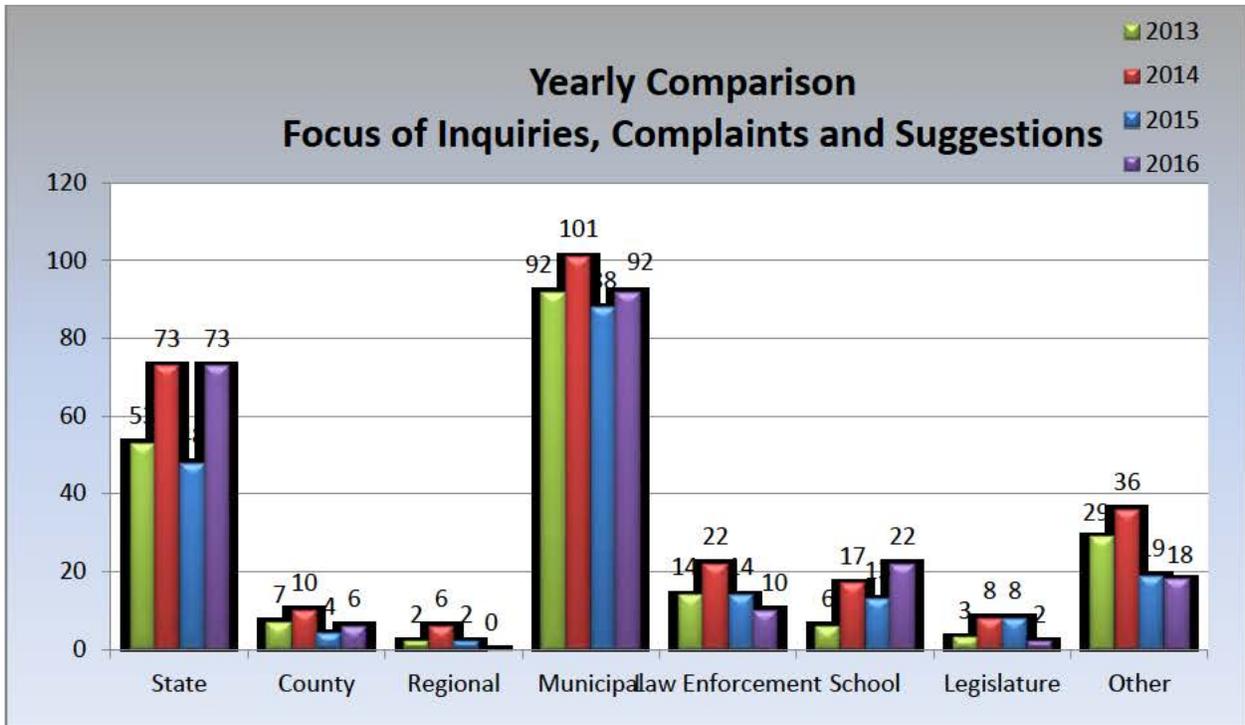


The number of inquiries and complaints remained relatively stable from 2015 to 2016 except for the press category, which saw the number of contacts more than double. Of the 51 press contacts in 2016, only six were complaints. Media requests for information about the law and guidance on how best to utilize FOAA account for most of the increase in contacts.

**Focus of the Inquiries, Complaints and Suggestions**

Most of the inquiries and complaints concerned municipalities (92) and state agencies (73). The remainder concerned law enforcement agencies (10), school administrative units (22), county agencies (6), and the Legislature (2). Others (18) concerned individual requesters, commercial requesters and various quasi-municipal and public entities.





The focus of the inquiries and complaints continues to be dominated by municipalities, as could be expected based on the sheer number of municipal entities in the state.

### Outcomes Reached as Result of Contact with Ombudsman

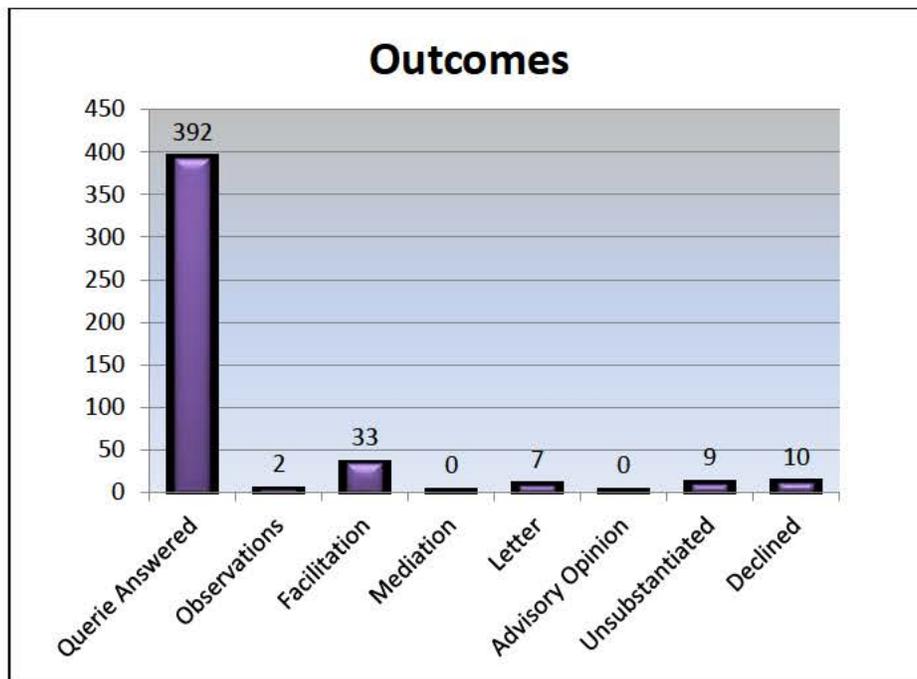
A contact may be logged as “resolved” for the following reasons:

- Complaint was deemed unsubstantiated
- Informal discussions or facilitation resulted in an agreement on how to proceed
- Agency offered an acceptable remedy
- Complaint was withdrawn
- Complainant failed to produce requested information
- Ombudsman determined there was other good cause not to proceed

A contact may be logged as “declined” if the subject of the dispute was outside the scope of authority of the ombudsman or related to a matter that was the subject of an administrative or judicial proceeding. In 2016 a total of 10 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 442 contacts included 392 answers to inquiries, 2 observations from citizens for improvements to the law including limiting the discretion of an agency to grant a fee waiver and development of a flow chart for use with intelligence and investigative information exceptions, 33 facilitated resolutions, and 7 letters addressing cases of substantial controversy.

There were no advisory opinions issued in 2016.



## OUTREACH & TRAINING

I provided on-site FOAA trainings and presentations to a variety of state and local entities including the following:

- Maine Department of Inland Fisheries & Wildlife
- Maine Department of Health and Human Services
- Maine Department of Marine Resources
- Maine Department of Economic & Community Development
- Maine Department of Labor
- Maine Executive Branch Agency Public Access Officers Roundtable
- Maine Legislative Branch Supervisor Training
- 128<sup>th</sup> Maine State Legislature
- Maine County Commissioners Association
- Maine Municipal Tax Collectors' & Treasurers' Association

In addition to general FOAA trainings, I teamed up with Eric Stout from the Maine Office of Information Technology to present a series of hands-on email search workshops to state agency personnel. A controversy early in the year about the completeness of Inland Fisheries & Wildlife Warden Service responses to FOAA requests for emails demonstrated the need for improved search methods and skills training. After presenting at multiple trainings for IF&W staff and state agency public access officers, we scheduled on-site workshops with small groups of state agency personnel. Additional workshops are planned for 2017 and easy-to-follow video instructions are now available for all state employees online.

The May 2016 edition of the Maine Municipal Association monthly publication, the Maine Townsman, included my article entitled “Devil’s in the emails: How to manage Freedom of Access requests.” This article covers the electronic search method and process for building an estimate for municipal agencies.

The State FOAA website, [Your Right to Know: Maine’s Freedom of Access Act](#) provides contact information and links to a variety of resources including a Frequently Asked Questions page that serves as a self-administered training for public officials. I update and maintain the website to reflect changes in the law.

## STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2016 includes data on the number of FOAA requests, average response time and the costs of processing FOAA requests for each of the executive branch State agencies.

### **Method**

Each reporter was asked to submit data on key FOAA response indicators and include any other explanatory information relevant to their FOAA program. The absence of uniform FOAA tracking across agencies, variations in data collection and incomplete reporting limit the accuracy of the compiled data for some indicators.

Although the statute refers to “requests for information” which could include a set of data much broader than FOAA requests, reporting was limited to requests that were processed within an agency’s FOAA procedures.

The “average” response time was reported based on the set of timeframes listed below.

The “costs” of processing requests could include multiple criteria to assess the use of agency resources. As a baseline the data included the amount billed as fees for FOAA requests.

Agencies that were able to calculate the actual hours spent responding to FOAA requests included that data.

### Key FOAA Response Indicators

1. Number of FOAA requests received in 2016
2. Response time 0 – 5 days
3. Response time 6 – 30 days
4. Response time 31 – 60 days
5. Response time greater than 60 days
6. Amount of fees and costs for FOAA requests
7. Amount of agency hours spent responding to FOAA requests

### **Findings**

A total of 1,067 FOAA requests were logged by the fourteen executive branch state agencies in 2016. This reflects an increase of 98 requests from 2015. There was a wide variation in totals between the agencies from six requests for Defense, Veterans & Emergency Management to 353 for the Department of Health and Human Services. Although 498 requests were responded to within five days, 54 took 60 days or more to fulfill. There can be a number of reasons for the length of response times including the scope and complexity of the request, earlier pending requests and the availability of employees to shift from operational duties to FOAA. This relatively small data set does not provide sufficient information to determine why some requests took longer than others.

Agencies reported a total of \$15,573 of fees charged for responding to FOAA requests. This indicator does not include hourly fees and costs that could have been charged and were waived.

Several agencies did not report on this metric and the actual total would certainly be greater with complete data.

Agency staff hours spent responding to FOAA requests totaled 1,207 hours with several agencies not reporting this indicator. The Department of Health and Human Services had the greatest number of requests (353) and the Department of Environmental Protection had the greatest number of hours spent on FOAA responses (231) while the Department of Defense, Veterans & Emergency Management had the least number of requests (6) and the Department of Economic & Community Development had the least number of hours spent on FOAA responses (1) among all the agencies.

## STATE AGENCY 2016 FOAA REPORTING

AGENCY	FOAA REQUESTS RECEIVED	RESPONSE TIME 0-5 DAYS	RESPONSE TIME 6-30 DAYS	RESPONSE TIME 31-60 DAYS	RESPONSE TIME >60 DAYS	FEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2016 REQUESTS
<b>Administrative &amp; Financial Services</b>	<b>111</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>24</b>
<b>Agriculture, Conservation &amp; Forestry</b>	<b>48</b>	<b>20</b>	<b>14</b>	<b>4</b>	<b>3</b>	<b>\$3,004</b>	<b>120</b>	<b>1</b>
<b>Corrections</b>	<b>92</b>	<b>59</b>	<b>27</b>	<b>1</b>	<b>5</b>	<b>n/a</b>	<b>n/a</b>	<b>0</b>
<b>Defense, Veterans &amp; Emergency Management</b>	<b>6</b>	<b>2</b>	<b>2</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>158</b>	<b>1</b>
<b>Economic &amp; Community Development</b>	<b>8</b>	<b>7</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>\$ 0</b>	<b>1</b>	<b>0</b>
<b>Education</b>	<b>69</b>	<b>33</b>	<b>26</b>	<b>6</b>	<b>2</b>	<b>\$ 465</b>	<b>223</b>	<b>2</b>
<b>Environmental Protection</b>	<b>76</b>	<b>39</b>	<b>30</b>	<b>3</b>	<b>1</b>	<b>\$ 2,125</b>	<b>231</b>	<b>1</b>
<b>Health &amp; Human Services</b>	<b>353</b>	<b>201</b>	<b>29</b>	<b>32</b>	<b>31</b>	<b>\$4,818</b>	<b>176</b>	<b>0</b>
<b>Inland Fisheries &amp; Wildlife</b>	<b>58</b>	<b>21</b>	<b>27</b>	<b>8</b>	<b>2</b>	<b>\$1,546</b>	<b>114</b>	<b>0</b>
<b>Labor</b>	<b>11</b>	<b>6</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>\$ 1,834</b>	<b>77</b>	<b>0</b>
<b>Marine Resources</b>	<b>19</b>	<b>1</b>	<b>1</b>	<b>11</b>	<b>6</b>	<b>\$ 225</b>	<b>23</b>	<b>0</b>
<b>Professional &amp; Financial Regulation</b>	<b>93</b>	<b>82</b>	<b>9</b>	<b>1</b>	<b>1</b>	<b>\$ 342</b>	<b>84</b>	<b>0</b>
<b>Public Safety</b>	<b>73</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>	<b>n/a</b>
<b>Transportation</b>	<b>50</b>	<b>27</b>	<b>21</b>	<b>2</b>	<b>0</b>	<b>\$ 1,214</b>	<b>n/a</b>	<b>0</b>
<b>TOTALS</b>	<b>1,067</b>	<b>498</b>	<b>190</b>	<b>69</b>	<b>54</b>	<b>\$15,573</b>	<b>1,207</b>	<b>29</b>

Notes:

Professional and Financial Regulation: Affiliated boards received an additional 35 FOAA requests and board members or agency staff spent at least 213 hours responding to those requests.

Public Safety: Some data provided did not distinguish between record requests made pursuant to FOAA and all other requests for information.

## RECOMMENDATIONS

The ombudsman is in a unique position to suggest improvements to the FOAA process and is mandated by statute to make recommendations concerning ways to improve public access to public records and proceedings.

### **Prepayment of the Estimate**

The Freedom of Access Act allows for certain fees to be charged by an agency or official for the time and costs associated with responding to a FOAA request. An estimate is provided to the requester early in the process. After the responsive records have been assembled and reviewed, a final bill is generated. It is common for an agency to require payment of the final bill prior to delivery of the records.

When the estimated costs to complete the request exceed \$100, or the requester has previously failed to pay for a FOAA request, the agency can require payment of all or a portion of the estimate prior to even beginning the search for the records.

There has been some confusion between requiring payment of an estimate prior to gathering the records and requiring payment of the final bill prior to production of the records. A recent Superior Court case added to the confusion by reading a “payment in advance” provision in FOAA to preclude an agency from requiring payment of a final bill prior to mailing the documents to the requester.

I recommend that the Right to Know Advisory Committee take up the question of payment of the estimate and payment of a final bill when they convene in 2017.

## APPENDIX

5 M.R.S.A. § 200-I

### § 200-I. Public Access Division; Public Access Ombudsman

**1. Public Access Division; Public Access Ombudsman.** There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13<sup>1</sup>. The Attorney General shall appoint **the Public Access Ombudsman, referred to in this section as “the ombudsman,”** to administer the division.

**2. Duties.** The ombudsman shall:

**A.** Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;

**B.** Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;

**C.** Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;

**D.** Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;

**E.** Make recommendations concerning ways to improve public access to public records and proceedings; and

**F.** Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests.

**3. Assistance.** The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

**4. Confidentiality.** The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency

or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

**5. Report.** The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A.** The total number of inquiries and complaints received;
- B.** The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;
- C.** The number of complaints received concerning respectively public records and public meetings;
- D.** The number of complaints received concerning respectively:
  - (1)** State agencies;
  - (2)** County agencies;
  - (3)** Regional agencies;
  - (4)** Municipal agencies;
  - (5)** School administrative units; and
  - (6)** Other public entities;
- E.** The number of inquiries and complaints that were resolved;
- F.** The total number of written advisory opinions issued and pending; and
- G.** Recommendations concerning ways to improve public access to public records and proceedings.

**6. Repealed.** Laws [2009, c. 240, § 7, eff. June 2, 2009.](#)

## Credits

[2007, c. 603, § 1; 2009, c. 240, § 7, eff. June 2, 2009; 2013, c. 229, §§ 1, 2, eff. Oct. 9, 2013.](#)

## Footnotes

1

[1 M.R.S.A. § 401 et seq.](#)

5 M. R. S. A. § 200-I, ME ST T. 5 § 200-I

Current with legislation through the 2013 Second Regular Session of the 126th Legislature.

The Second Regular Session convened January 8, 2014 and adjourned May 2, 2014. The general effective date is August 1, 2014.

# Devil's in the emails: How to manage Freedom of Access requests

*Maine's top expert on the Freedom of Access Act cites, as a top priority, the need for municipal email to be treated with care. She outlines helpful search steps when FOA requests are received.*

**By Brenda Kielty, Public Access Ombudsman,  
Maine Attorney General's Office**

Freedom of Access Act requests for the email communications of local government staff and elected or appointed officials have become commonplace. As the requests for email swell, the volume, complexity and problems managing these public records grow. Despite the predictability of requests for email, some are caught off guard and react with little more than an impromptu response.

In a perfect world of local government email, staff and officials would share a common understanding of the responsibilities, policies and procedures covering the life cycle of email from creation through disposition. Responding to a request for emails would be less of a headache and more of a routine function guided by a common sense protocol.

Any good email protocol must address the practical considerations in conducting a search and creating an estimate for such a search.

The Freedom of Access Act (FOAA) defines searching, retrieving, compiling, reviewing, redacting and converting as actions an agency or official may charge a requester in responding to a FOAA request. Of all of these activities, the search for records can be the most challenging. Especially with broad or vague FOAA requests for email, figuring out how to proceed with a search that will be complete but not pose an undue burden on the normal operations of staff or officials can be troublesome. A systematic approach that is reasonably calculated to uncover all relevant emails will save time, avoid haphazard results and prevent due diligence from coming into question.

The FOAA search is one step in a five-part process that begins with the proper preservation of public records and ends with the timely delivery of a responsive but not confidential subset of documents. To be useful in practice, any protocol for responding to a request for emails should include instructions for the retention, search, assembly, review and production of the records.

## **1. Retain: Preserve the entire pool of emails subject to public records law.**

Email communications in the possession or custody of staff, elected or appointed officials that concern the transaction of government business are public records and must be retained according to state retention schedules. Preservation of public records in a recordkeeping system sanctioned and maintained by the municipality ensures control of the public email of both current and former employees and officials.

Access to email is obviously hindered by the use of personal email accounts for public business. Requiring public email, regardless of origin, to be maintained on the municipal server protects against the loss or destruction of these records.

## **2. Search: Collect a raw subset of relevant emails.**

Clarifying the request with the requester to narrow the time frame, content area and possible staff or officials who may have communications will help make relevant emails easier to find.

Custodians are individuals who are likely to be in possession or custody of emails responsive to the FOAA request. Identification of custodians is crucial to targeting the location of potentially responsive records within the larger pool of emails that have been retained.

After the custodians have been named, their repositories containing potentially responsive records are identified. This includes all sources and formats of email and any attachments that may be stored on the local network mail server, in a remote mail server, in a web-based account such as Yahoo or Gmail, or in locally saved Personal Storage (PST) or individual files.

Once the repositories have been identified, filter criteria such as the date range of the request and relevant keywords can be used to winnow out a subset of records that are responsive. The subset of records produced from this initial electronic search will include “hits” that are responsive but also some emails that are outside the request parameters. These raw search results are collected in a working file for the next step in the process.

## **3. Assemble: Process the selected emails to create a subset for review.**

A secondary search is conducted by the custodian to remove nonresponsive emails and duplicates. The review set of responsive emails can then be exported from the custodian to the person designated as the reviewer.

## **4. Review: Identify and redact confidential or privileged information.**

The review set of documents is checked for confidentiality and redactions or denials are marked as appropriate. The subset of responsive, non-confidential emails is prepared for production.

## **5. Access: Production of responsive, non-confidential subset of records.**

The production set of public records is exported or sent to the requester. If the scope of the first production set is too narrow, the criteria for an expanded search can be determined for a subsequent response.

### **How to build an estimate**

The Freedom of Access Act requires that a good faith estimate of time and cost be provided within a reasonable period of time. For complex email requests, trying to accurately forecast how long it will take to respond can be as challenging as collecting the records. Although the estimate is non-binding, problems arise with estimates that are either too low or too high. A low estimate sets expectations and upward adjustments often generate opposition from the requester. A high estimate can simply be prohibitive or appear to be an intentional barrier to access. The best estimate will forecast a range close enough to the actual time and cost so that changes made as the request is clarified or the search progresses will be incremental.

Each FOAA request is unique; requests for email fall somewhere on a scale from narrow and specific to broad and vague. It is faster and easier to respond to a request for one individual’s email about a specific topic during a recent period of time. It is much more difficult to respond to a sweeping request for “information from anyone who has ever had anything to do with” a wide-ranging topic. Despite the

different levels of complexity presented by email requests, using a consistent methodology for creating estimates demonstrates good faith and produces estimates that are closer to the actual billed time and cost.

Once a request has been clarified and narrowed to the extent possible, six factors can be considered to create the estimate.

The scope of the request will determine the number and identity of key custodians. Depending on the recordkeeping system, the status of the identified custodians as either staff, elected or appointed officials may determine the location and accessibility of custodian repositories. A system where all public business transacted by email is stored on a municipal server with a global search capacity allows for the fastest and most cost effective search. Where some of the public email is stored on the local network and some is stored in a web-based webmail repository, such as personal Gmail or Yahoo accounts, individual accounts must be searched separately.

The specificity of the requested content area and the number of search terms used to find responsive records is a key driver in the time estimate. Except in simple requests, the search process is not an exact science and often involves trial and error to target the most relevant subset of records. A “country doctor” approach of a little of this and a little of that is sometimes the only way to settle on the most fruitful keywords.

The time frame of the FOAA request will affect the time needed to find, load and search files. The custodian’s current mailbox for email may have a limited amount of storage. Personal Storage (PST) archive files that are stored outside the user’s active mailbox may have to be located, attached and indexed before being search-ready.

The skill level of the person conducting the search will affect not only the time needed, but the quality of the resulting set of records. A custodian without technical training and support may search by manually rummaging through their email and trying to remember what they have that is relevant to the request. Even a person with medium skills may not know how to search archive files or assemble the results for review. The time needed to conduct the search will be difficult to predict and the results are likely to be incomplete.

The volume of responsive records determines how much time is needed to assemble, review and redact confidential information. The number of custodians searching will affect the assembly and review time needed to process the results. The complexity of confidentiality laws covering information in the records will impact the time reviewing each document. Prior to determining how many responsive emails will be collected, the estimate for the time needed to review is little more than a guess.

Production of the emails in paper or electronic format can be another significant factor in the estimate depending on the volume of responsive records.

As long as email is used to transact business, managing and producing these public records will continue to be a core function of government staff and officials. Yet, the training and skill of custodians to conduct searches and produce the public records varies considerably.

Asking the requester to bear the cost is fair when it is based on the time a competent person could conduct a search in a reliable and complete manner. A standardized estimate for the search shifts the burden to the public agency to ensure that staff and officials have the resources needed to efficiently perform these duties.

Significant discrepancies between the estimate and actual search time should not be charged to the requester if the skill level of the person conducting the search does not meet a minimum level. A sample email search schedule might set 15 minutes for the search of a single, active mailbox with one search term; 30 minutes for the search of a single, active and archived mailbox with one search term; and one hour for the search of a single, active and archived mailbox with up to five search terms.

**Conclusion**

According to a 16th Century Italian proverb, "Perfect is the enemy of good." With that principle in mind, there is nothing to impede even a small, practical step toward good email management and access.

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