

MAINE STATE LEGISLATURE

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December 5, 2006

Members-elect
123rd Maine Legislature
State House Station
Augusta, ME 04333

RE: Maine Freedom of Access Law

Dear Members-elect of the 123rd Maine Legislature:

During the upcoming Legislative Session, you may have questions about what meetings are required to be public, or what documents are considered public records. Attached is my office's attempt to answer the questions that are most frequently asked in this area, and to distill for you the key provisions of Maine's Freedom of Access law, which is codified in Title 1 of the Maine Revised Statutes, sections 401 to 410.

Please feel free to contact my office if you need clarification on any of these questions. You can contact me at 626-8599 or Chief Deputy Attorney General Linda Pistner at 626-8820. Thank you.

Sincerely,

A handwritten signature in cursive script that reads 'G. Steven Rowe'.

G. STEVEN ROWE
Attorney General

GSR/ajo
Enclosures

FREQUENTLY ASKED FREEDOM OF ACCESS QUESTIONS

The Freedom of Access Act ("FOAA") is a state statute that requires that state and local government be conducted in a manner that is accessible to the public by ensuring that "public records" and "public proceedings" of government bodies and agencies are open. These are some of the most commonly asked questions about how this law applies to the activities of legislators.

<p>What is a public record?</p>	<p>"Public records" include all material in possession of public agencies, staff and officials if the materials were received or prepared for use in, or relate to, the transaction of public or governmental business. The breadth of this definition means that most, if not all, papers and electronic records relating to legislative business are public records unless they fall within one of the specified exceptions. 1 M.R.S.A. § 402(3).</p>
<p>Are personal documents on my state computer public? What documents on my personal computer are public?</p>	<p>Under the Freedom of Access Act, only those records on state computers that were received or prepared for use in transaction of governmental business are public. This definition would not include personal emails or other personal documents, <i>but</i> statutes governing state computer use state that any document created or stored on a State Government computer is a public record and must be made available in accordance with Title 1, chapter 13 unless specifically exempted by that chapter. 1 M.R.S.A. § 1976(2). Legislators should assume that they may be required to produce personal documents on state computers.</p> <p>On the other hand, <i>personal</i> documents on a personal computer are not public records. However, records that are received or prepared for use in the transaction of public business, such as constituent inquiries and correspondence about legislative matters, are public records even if they are created or kept on your home computer.</p>

<p>What records of the Legislature are confidential?</p>	<p>Generally, legislative records are public unless they fall within one of the exceptions to the definition of public record. One of these exceptions is specific to legislative records and covers two categories of documents or electronic records: 1) legislative papers and reports (e.g. bill drafts, committee amendments and the like) are not public records until signed and publicly distributed; and 2) working papers, drafts, records, and memoranda used to prepare proposed legislative papers or reports are not public records until the end of the legislative session in which the papers or reports are prepared or considered or to which they are carried over. 1 M.R.S.A. § 402(3)(C). Legislative committees occasionally have records that are made confidential by statute, which are also excepted from the definition of public records. 1 M.R.S.A. § 402(3)(A).</p>
<p>How do I make a request for public records? Does it have to be in writing? Do I have to explain why I want the records?</p>	<p>Each public body or agency responds individually to requests for its own records. Once you have determined which agency is likely to hold the records you want, you may submit a written or oral request. Each state agency has a designated Freedom of Access contact; the list of these contacts can be found at http://www.maine.gov/foaa/contactlist/index.htm.</p> <p>The law does not require that a request for public records be made in writing, although some agencies may ask for a written description of the records for purposes of clarity. You do not have to explain the purpose for your request.</p>

<p>What proceedings or meetings does the public have a right to attend? When does the public have a right to speak?</p>	<p>The law requires that all “public proceedings” be open to the public, and that any person be permitted to attend. A public proceeding is defined as the transaction of any functions affecting any or all of the citizens of the State by any of the following entities:</p> <ul style="list-style-type: none"> • the Maine Legislature, its committees and subcommittees; • any board or commission of a state agency or authority including the University of Maine and the Maine Community College System; • any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision; • the full membership meetings of any association comprised exclusively of municipalities, counties, school districts, or other political or administrative subdivisions, or their boards, commissions, agencies or authorities; or • any advisory organization established, authorized or organized by law, resolve or executive order. <p>1 M.R.S.A. § 402(2). The Freedom of Access Act does not require that members of the public be given an opportunity to speak at a public proceeding, simply that the public be permitted to be present. The body conducting the proceeding may provide a public comment period, and in some cases a right to be heard is provided by statute or rule (such as in the case of adjudicatory hearings).</p>
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<p>When can an executive session be held during a public meeting?</p>	<p>A closed or executive session may be held on subjects specified by statute after a public recorded vote of 3/5 of the members present. Executive sessions are permitted, for example, to discuss certain personnel matters, suspension or expulsion of a student, or for consultations between a body and its attorney. The content of discussions during an executive session is strictly limited to the matters specified by statute, and the motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of statutory or other authority for the executive session. 1 M.R.S.A. § 405.</p>
<p>Are meetings of a caucus of legislators of a political party public?</p>	<p>The law is silent on this question. The Office of the Attorney General has advised that such a caucus may choose (but is not required) to close its meeting to the public, since it is not a committee or subcommittee of the Legislature. A court could disagree.</p>
<p>Must there be at least three public officials present before a meeting is required to be public?</p>	<p>There is considerable confusion about this issue, which arises from the fact that the Freedom of Access Act requires that public notice be given for all public proceedings that are "a meeting of a body or agency consisting of 3 or more persons." However, any attempt to transact business that affects any or all of the public by any of the governmental bodies covered by the law (see list above) must be conducted in public regardless of the number of people involved.</p>
<p>Are draft documents excepted from public access?</p>	<p>Drafts are public records unless their content makes them confidential on some basis specified under 1 M.R.S.A. § 402(3).</p>
<p>Can a committee conduct deliberations by phone or email?</p>	<p>Business of a body that is required to be conducted in public cannot be accomplished by phone or email communications because the public cannot be given access at the time the business is being conducted.</p>

If there is no record, are officials required to tell what they know or put it in writing?	Public officials and agencies covered by the Freedom of Access Act are required to produce existing records upon request. They are not required to create a record.
Where can I direct constituents who have questions about access to public records and proceedings?	For state agencies, the contacts listed on the website http://www.maine.gov/foaa/contactlist/index.htm are a good resource. There is a more detailed list of commonly asked questions on the INforME website, found at http://www.maine.gov/foaa/faq/index.shtml . Legislators may also call the Office of the Attorney General for assistance.