

# MAINE STATE LEGISLATURE

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JANET T. MILLS  
ATTORNEY GENERAL



REGIONAL OFFICES:  
84 HARLOW ST., 2ND FLOOR  
BANGOR, MAINE, 04401  
TEL: (207) 941-3070  
FAX: (207) 941-3075

44 OAK STREET, 4TH FLOOR  
PORTLAND, MAINE, 04101-3014  
TEL: (207) 822-0260  
FAX: (207) 822-0259  
TDD: (877) 428-8800

TEL: (207) 626-8800  
TTY: 1-888-577-6690

STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE, 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

March 5, 2009

The Honorable David Trahan  
3 State House Station  
Augusta, ME 04333-0003

Dear Senator Trahan:

You have asked for an opinion as to whether the Policy on Access to Data and Information on State Owned Computer Devices of the Maine Office of Information Technology ("OIT") is in compliance with the Freedom of Access Laws ("FOAL"). In particular, you question whether, by placing responsibility for fulfilling FOAL requests for electronic records on the agency that generated the record, the OIT policy results in an overly narrow interpretation of the public's right to inspect records or otherwise violates the FOAL. For the reasons discussed below, I do not believe that a court would conclude that the OIT policy violates the FOAL.

The OIT policy addresses FOAL requests made of OIT for data or information that has been collected and used by a state agency other than OIT, and describes their respective responsibilities. For purposes of your questions, the central provision of the policy is found in Section IV.B., which provides:

State departments and agencies, as required by the Freedom of Access Act, are responsible for fulfilling requests for access to public records in their possession or custody, including information and data hosted on state-owned computer devices. All responses and decisions regarding the production of such information or data, such as the scope of the search, the redaction or withholding of information, the timing and cost of production, etc., are the sole responsibility of the department or agency.

The legal authority cited in support of this part of the OIT policy is 5 MRSA § 1982(9). Section 1982 sets out the responsibilities of the OIT Director, and subsection 9 states:

9. Protection of information files. The Chief Information Officer shall develop rules regarding the safeguarding, maintenance and use of information files relating to data processing, subject to the approval of the commissioner. The office is responsible for the enforcement of those rules. All data files are the property of the agency or agencies responsible for their collection and use.

Senator David Trahan

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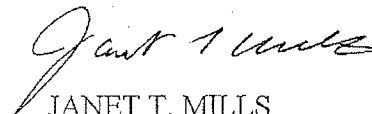
As you note, the FOAL provides the right to inspect and copy public records. Public records are defined by 1 M.R.S.A. §402(3), and the term contains a number of exclusions, including records made confidential by statute. § 403(3)(A). The language of § 408 states, in relevant part, that "every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record." The procedural requirements applicable to requests for records are primarily set out in 1 M.R.S.A. § 408. These procedures anticipate the need for review of records prior to their being made available for inspection in order to separate those records that are not public because they are covered by one or more of the exclusions in § 402(3). Redaction of non-public material may also be appropriate.

The FOAL does not specify who undertakes the review of agency records responsive to a request in order to determine which are public or should be redacted to protect non-public information. The OIT policy designates the agency that has collected the records under 5 M.R.S.A. § 1982(9) as the party responsible for conducting this review and for making decisions necessary to ensure compliance with the FOAL. As a practical matter, this is the agency that is most familiar with the documents as well as the various provisions that may apply to make some of them non-public. Many confidentiality statutes (and other grounds for making records non-public) protect the interests of third parties, and these statutes often contain penalties for improper disclosure. Accurate application of confidentiality statutes protects both the public's right to know as well as the interests of those third parties.

In the case of records that have been received or used by a state agency other than OIT but which are maintained on state-owned computers, both can reasonably be viewed as having "custody" of the records. The fact that OIT may also have custody of another agency's records does not prevent it from requiring that the agency take responsibility for ensuring compliance with the FOAL. The provisions of Title 1, §§ 531-538 concern the Information Resource of Maine ("InforME") and its mission to make public information available electronically; they do not relate to the interpretation of the FOAL.

For these reasons, I do not believe that a court would conclude that the OIT policy violates the FOAL. I hope this information is helpful.

Sincerely,



JANET T. MILLS  
ATTORNEY GENERAL

Cc: Senator Lawrence Bliss and Representative Charles R. Priest,  
Chairs, Joint Standing Committee on the Judiciary  
Richard B. Thompson, Chief Information Officer