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

**Janet T. Mills, Attorney General**



**PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2017**

**January 25, 2018**

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

# TABLE OF CONTENTS

	<b>Page</b>
MESSAGE FROM ATTORNEY GENERAL JANET T. MILLS.....	2
SUMMARY .....	3
ANSWERING INQUIRIES & RESOLVING DISPUTES .....	5
OUTREACH & TRAINING .....	14
STATE AGENCY ANNUAL FOAA REPORTING .....	15
RECOMMENDATIONS .....	19
APPENDIX.....	20
5 M.R.S. § 200-I .....	20

## MESSAGE FROM ATTORNEY GENERAL JANET T. MILLS

January 2018

Since 1975 Maine law has provided a statutory right of public access to governmental information and government meetings. Since 1967 all Americans have enjoyed a similar right to acquire information from the federal government under law. Other countries, even non-democratic regimes, have followed suit. “FOA” has become part of our everyday parlance, an integral part of our vocabulary and of our public service ethic.

Our citizens have become used to public participation in meetings and public access, without question or challenge, to government documents. We expect full and open access. We resent stalled responses. We believe that nothing is more fundamental to our democracy than transparency in government.

At the same time, the law shields trade secrets, investigative information, personnel records, and matters of personal privacy. Redacting documents for these matters has become routine but sometimes time-consuming.

The balancing of public access with legitimate privacy concerns is exactly what our laws strive to achieve, and this balancing is not easy. It is the reason we have a “Right to Know Advisory Committee,” whose report you are reviewing simultaneously with this one. It is the reason the Joint Committee on the Judiciary reviews a myriad of confidentiality statutes on the books every year to see if those privacy concerns are still valid. And it is the reason we now have a fulltime “Public Access Ombudsman” in the Office of the Attorney General, a position fully funded in 2012.

This report is the sixth annual report of Public Access Ombudsman Brenda Kielty, who is in her sixth year of service in this position. In carrying out her duties, Ms. Kielty has become the go-to person in state government for questions pertaining to public meetings and access to documents. She fielded 443 inquiries, complaints and suggestions in 2017, more than in any previous year. She has dealt with sometimes contentious communications from private citizens and public officials patiently and intelligently, answering questions and resolving disputes every day while maintaining the detailed documentation contained in this report.

I commend Ms. Kielty’s work to you and I invite your constructive commentary to this data. Suggestions for improvement and better public understanding of the law are always welcome.

Thank you.

## SUMMARY

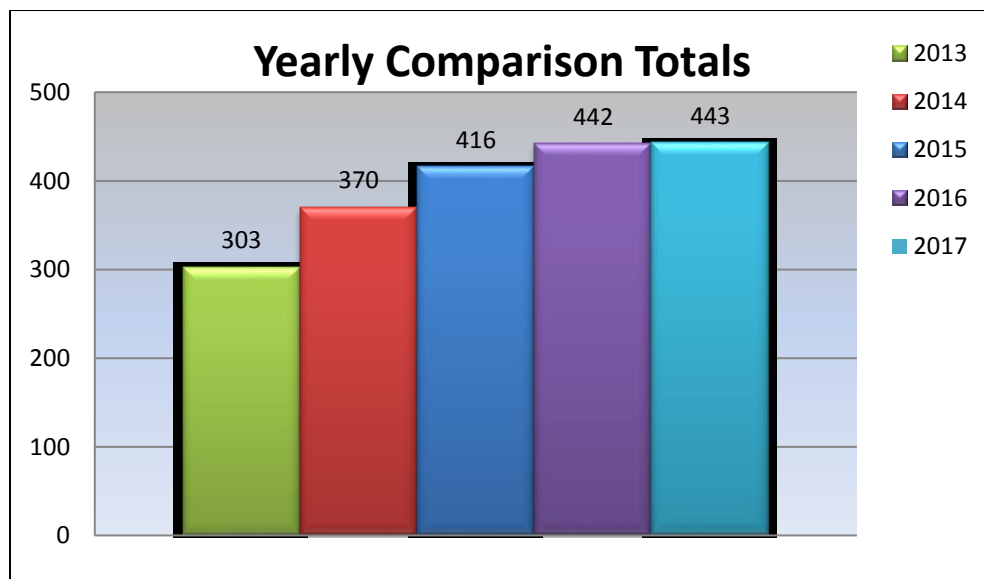
Maine's Freedom of Access Act (FOAA) recognizes that government must be accountable to the people and provides a statutory right of access to public meetings and public records. While the principles of open government, transparent deliberations and access to public information are fundamental to FOAA, 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.

### Five Year Program Trends

The ombudsman activity involving question and complaint resolution has grown over the five years of the program. A total of 443 contacts were received in 2017 from FOAA requesters and agencies seeking assistance, representing a 46% increase from the 303 contacts in 2013. The number of inquiries and complaints remained stable from 2016 to 2017.



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.

### **State Agency Annual FOAA Reporting**

The Ombudsman Report for 2017 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 third 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

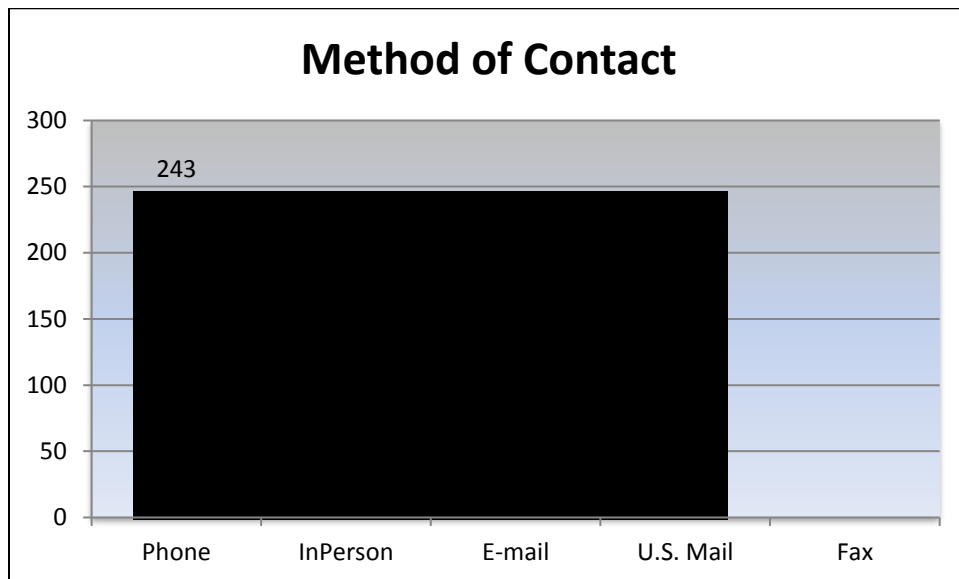
“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S.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

### 2017 Contacts with the Ombudsman

In 2017 I logged 443 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.

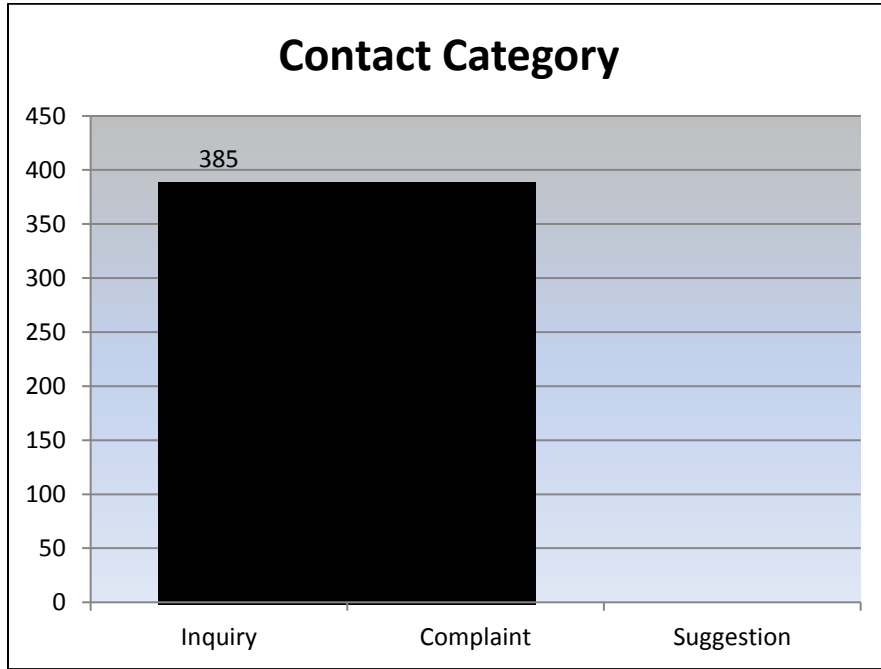
### Method of Contact

The bulk of initial contacts was by telephone (243) followed by email (156), in- person (31) and U.S. Mail (13).



**Contacts Included Inquiries, Complaints and Suggestions**

The 443 contacts included general inquiries (385), complaints (58) and suggestions (0). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.

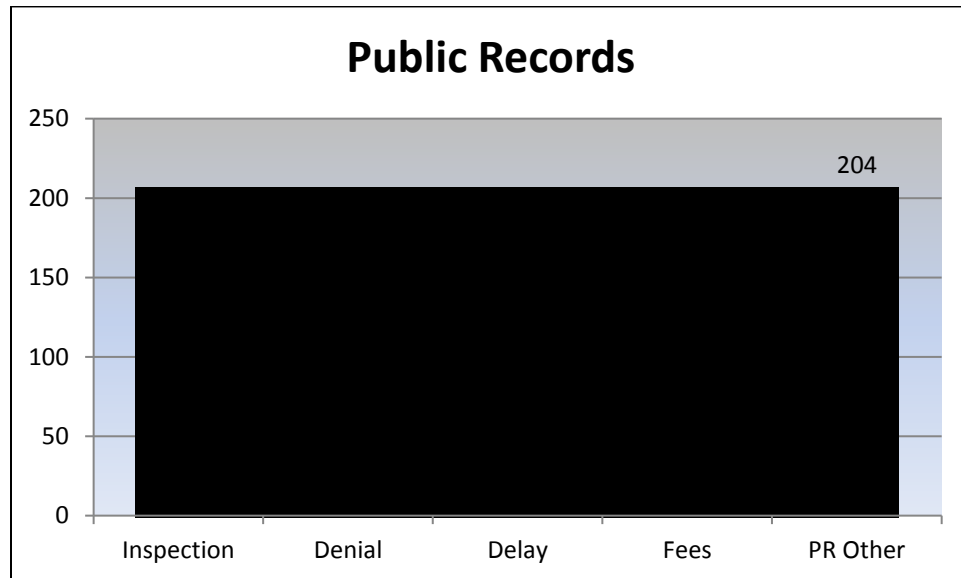




## Contacts Concerning Public Records

Of the contacts about public records (363), 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



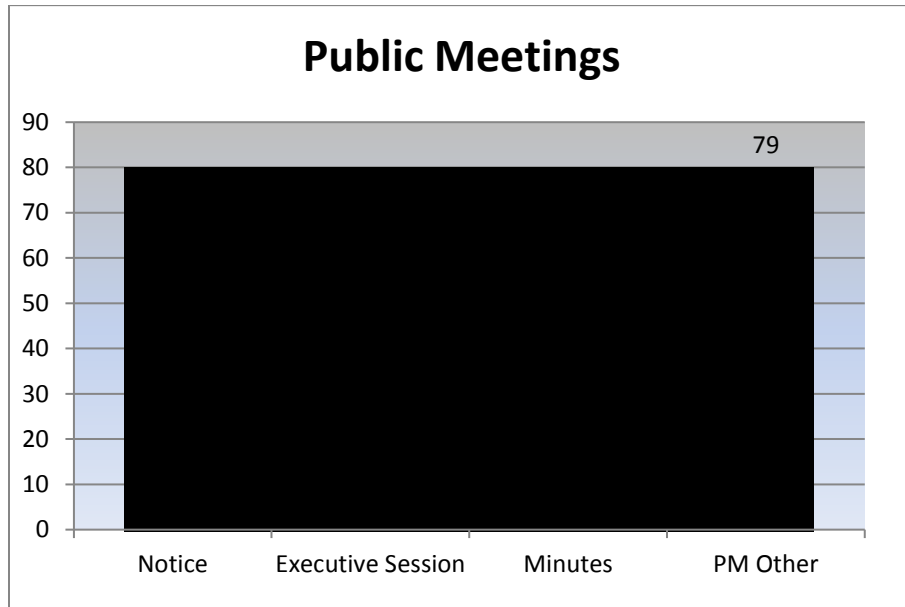
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 (122), most questions concerned:

- Use of executive session
- What constitutes a meeting

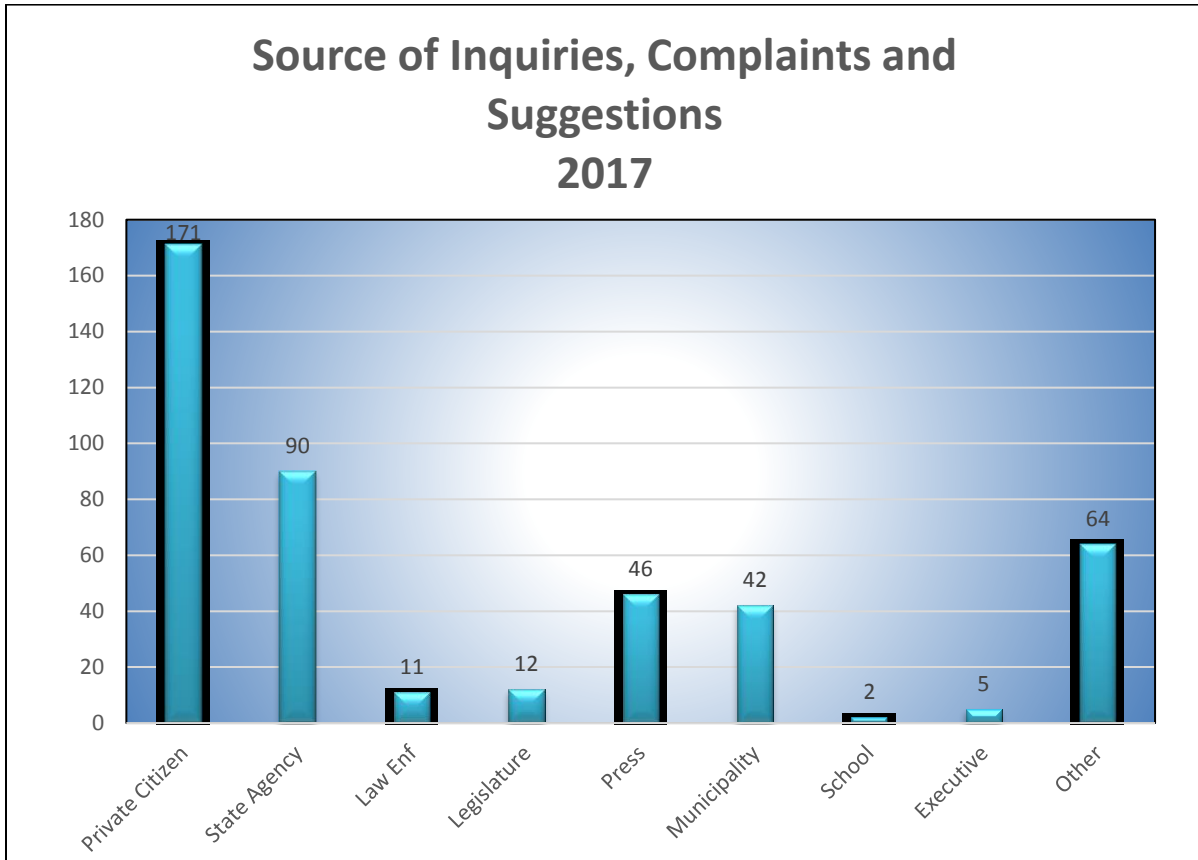


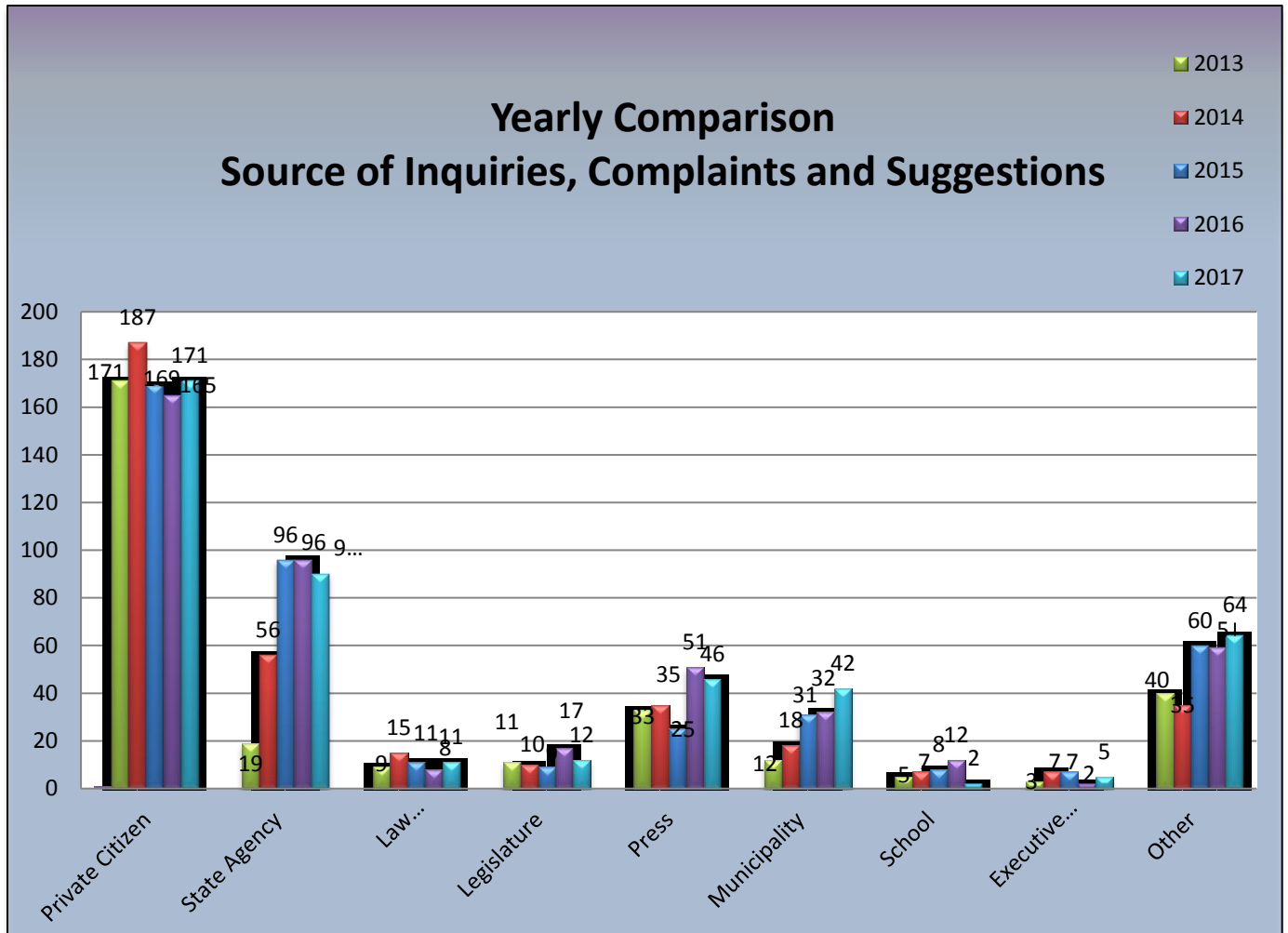
All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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

### Source of Inquiries, Complaints and Suggestions

Of the 443 inquiries, complaints and suggestions, 171 came from private citizens, 90 from state agencies, 11 from law enforcement agencies, 12 from the Legislature, 46 from members of the media, 42 from municipal officials, 2 from school districts, 5 from the executive branch and 64 from others including attorneys and commercial requesters.





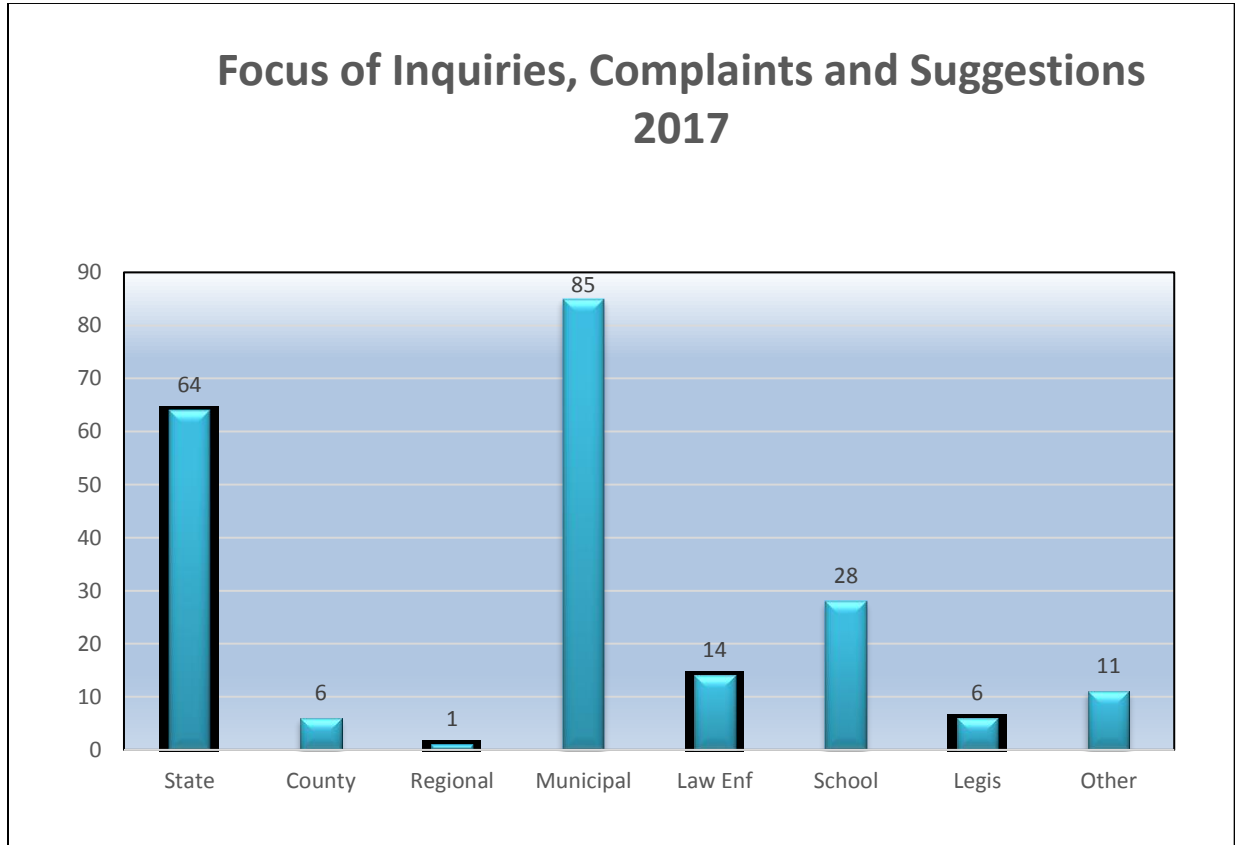
Although these metrics fluctuate every year, there were notable increases in contacts from municipal government officials (10) and attorneys (13) and a decrease in contacts from school officials (10) that merit further attention. Many of the contacts from town officials are coming early in the FOAA response process, reflecting an intent to head off compliance problems that could arise later. The increase in contacts from attorneys representing local government entities also points to more activity in the early stages of the FOAA process. There appears to be a growing perception that the ombudsman’s state-wide perspective on the gray or ambiguous areas in the FOAA law can be useful to local counsel grappling with a FOAA problem.

The significant decrease in school contacts (10) is concerning, as the number of school district complaints increased in 2017. One goal of the program for 2018 will be to gather more information about the current level of FOAA activity for school officials, generate discussion about what school districts need to remain compliant and tailor training opportunities specifically to school districts.

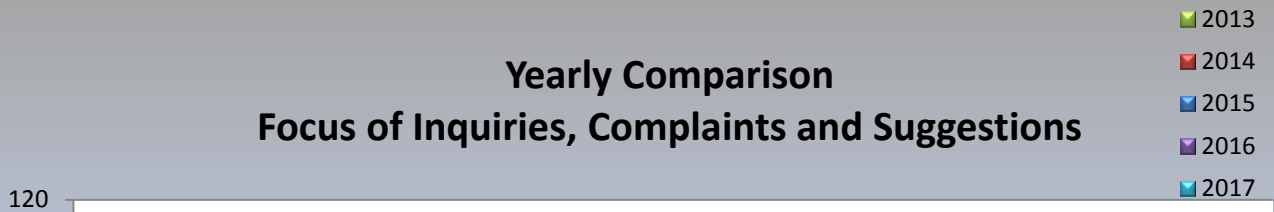
### Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (85) and state agencies (64). The remainder concerned law enforcement agencies (14), school administrative units (28), county agencies (6), and the Legislature (6). Others (11) 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.



## Yearly Comparison Focus of Inquiries, Complaints and Suggestions



Category	2013	2014	2015	2016	2017
State	53	73	48	73	64
County	7	10	4	6	6
Regional	2	6	2	0	1
Municipal	92	101	88	92	85
Law Enforcement	14	22	14	10	14
School	6	17	13	22	28
Legislature	3	8	8	2	6
Other	29	36	19	18	11

### Outcomes Reached as Result of Contact with Ombudsman

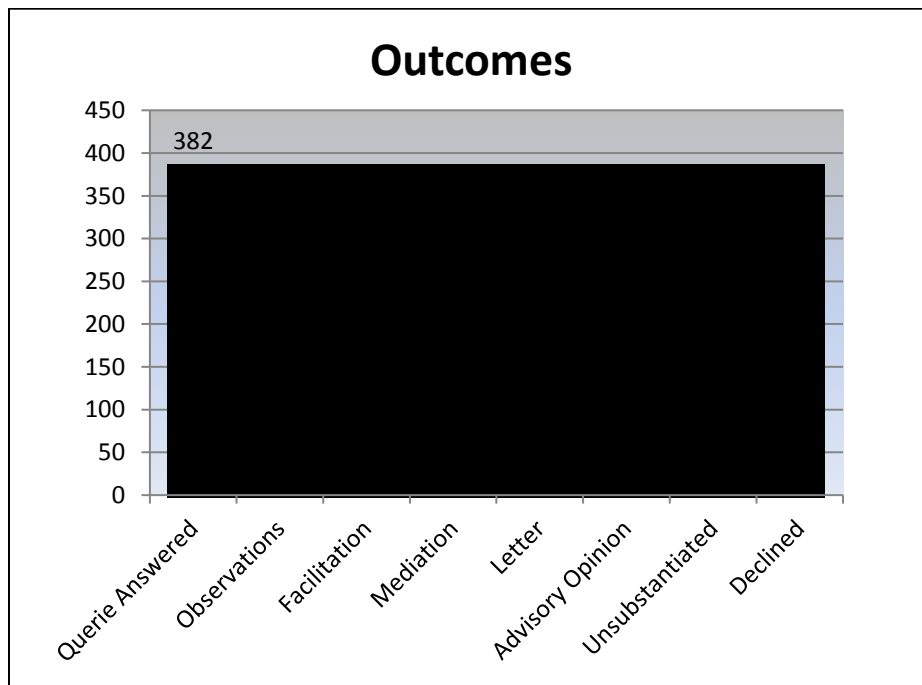
A contact may be logged as “resolved” for the following reasons:

- 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 2017 a total of 15 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 443 contacts included 382 answers to inquiries, 0 observations from citizens for improvements to the law, 44 facilitated resolutions, and 2 letters addressing cases of substantial controversy.

There were no advisory opinions issued in 2017.



## **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 Professional and Financial Regulation
- Maine Department of Transportation
- Office of the Attorney General
- Maine Water Utilities Association
- The Regional Organization of Municipal Attorneys
- Norway Memorial Library Celebration of James Madison's Birthday



## STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2017 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 could calculate the actual hours spent responding to FOAA requests included that data.

### Key FOAA Response Indicators

1. Number of FOAA requests received in 2017
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 1,238 FOAA requests were logged by the fourteen executive branch state agencies in 2017. This reflects an increase of 171 requests from 2016. There was a wide variation in totals between the agencies from six requests for Defense, Veterans & Emergency Management to 395 for the Department of Public Safety.

To get accurate percentages for the response time parameters, the DPS total of 395 is subtracted since this agency did not report response times. Of the remaining 843 total requests, 363 (43%) were responded to within five days; 224 (27%) were responded to in 6-30 days; 53 (6.3%) were responded to in 31-60 days; and 73 (8.7%) were responded to in greater than 60 days.

There can be many 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. However, it is a concern that the number of reported responses greater than 60 days has increased from 54 to 73 since 2016.

Agencies reported a total of \$13,757 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 1,105 hours with several agencies not reporting this indicator. The Department of Public Safety had the greatest number of requests (395) and the Department of Professional & Financial Regulation had the greatest number of hours spent on FOAA responses (348) 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 (4) among all the agencies.

## STATE AGENCY 2017 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	FEEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2017 REQUESTS
Administrative & Financial Services	111	36	22	11	13	\$ 0	155	n/a
Agriculture, Conservation & Forestry	51	32	16	2	1	\$ 817	65	0
Corrections	90	30	25	5	12	n/a	n/a	15
Defense, Veterans & Emergency Management	6	2	2	0	0	\$ 0	32	1
Economic & Community Development	9	3	4	0	2	\$ 0	4	2
Education	70	34	23	1	9	\$ 702	116	3
Environmental Protection	74	52	15	2	4	\$ 1,197	166	1
Health & Human Services	187	41	42	19	17	\$ 2,034	n/a	0
Inland Fisheries & Wildlife	29	14	6	3	4	\$ 108	29	0
Labor	22	19	3	0	0	\$ 75	46	0
Marine Resources	12	3	8	3	1	\$ 390	18	0
Professional & Financial Regulation	149	85	43	4	9	\$1,574	348	0
Public Safety	395	n/a	n/a	n/a	n/a	\$ 5,405	n/a	n/a
Transportation	33	12	15	3	1	\$ 1,455	126	2
<b>TOTALS</b>	<b>1,238</b>	<b>363</b>	<b>224</b>	<b>53</b>	<b>73</b>	<b>\$13,757</b>	<b>1,105</b>	<b>24</b>

**Notes:**

**DAFS:** For some requests an invoice was provided to a requester and they elected not to proceed with their request, not to proceed with their request as initially submitted, or the estimated costs were waived.

**DACF:** 18-20 hours administrative time spent in addition to hours billed.

**DOC:** Department has gone from receiving approximately 10 FOAA requests to 100 FOAA requests per year. The FOAA responsibilities have turned into a full-time position which the Department has not been allotted. 2017 saw longer response times due to an immense increase in the length and depth of requests, the retirement of the agency AAG and transition to new legal counsel, changes in the agency FOAA process, sick, vacation times, and other unforeseen circumstances.

**DOE:** Several of the FOAA requests in the over 60-day category were because the agency was waiting for payment from the requester before considering the request closed.

**DVEM:** One of the six requests were referred to DAFS.

**DPS:** The nine bureaus of DPS together received at least 5,726 record requests during CY2017. The average number of days required to complete record request processing was approximately 14 days. The agency is unable to provide an average time to respond for only record requests that cited FOAA. The total actual costs incurred to process record requests was, at a minimum, approximately \$ 19,419 and the total fees charged were, at a minimum, \$ 13,021. The agency is unable to provide total actual cost and total fees charged for only record requests that cited FOAA.

## 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.

### **Remote Participation in Public Meetings**

My 2015 Annual Report included a recommendation to the Legislature to address remote participation in public meetings. The widespread confusion regarding whether and under what circumstances members of a public body may participate in a public meeting through remote means has only increased since then. Now, I restate my position that “Local and state public bodies in Maine need guidance on how and when to permit remote electronic participation by their members.” The proposed legislation by the Right to Know Advisory Committee should be carefully considered as it balances the need for transparency and public participation with the practical and geographical needs of Maine public bodies.

### **Freedom of Access Act Training for Public Officials**

The Right to Know Advisory Committee Report for 2017 includes recommended legislation to amend 1 M.R.S. § 412 to require municipal officials to complete the FOAA training when appointed to offices for which training is required if elected to those offices. This legislation simply provides equal training for persons in the same position, whether elected or appointed. This important step should be followed by an expansion of the list of municipal officials who must complete the training to include, at the least, planning boards, appeals boards, appointed subcommittees and commissions. These officials are performing crucial local government functions with legal implications for their municipality without a state-wide requirement that they know about the public’s right to access the records they create or their deliberations or actions in meetings.

Although some municipalities provide training for all elected or appointed officials, this training is voluntary and does not ensure a consistent understanding of the basics of FOAA compliance across the state.

### **Social Media and Electronic Communication**

There is a pervasive lack of understanding about the use of social media and other forms of electronic communication by public officials. Are these communications public records that must be retained? When do these kinds of communications become prohibited out-of-meeting deliberations between members of a public body? I recommend that the Right to Know Advisory Committee consider the issues presented by social media and electronic communication when they convene in 2018.

## 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.