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STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Aaron M. Frey, Attorney General



PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2019

February 4, 2020

Brenda L. Kielty, AAG, Ombudsman

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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.

Seven Year Program Trends

The ombudsman activity involving question and complaint resolution has grown over the seven years of the program. A total of 467 contacts were received in 2019 from FOAA requesters and agencies seeking assistance. The number of inquiries and complaints increased by 33 from 2018 to 2019.

Like the activity 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 2019 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. 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.

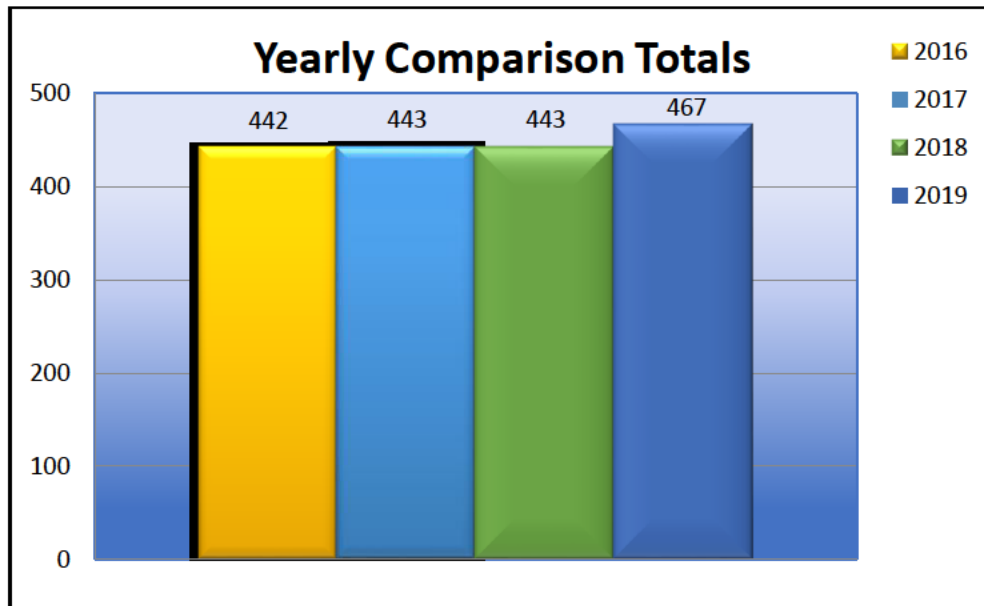
Brenda L. Kielty, Public Access Ombudsman

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).

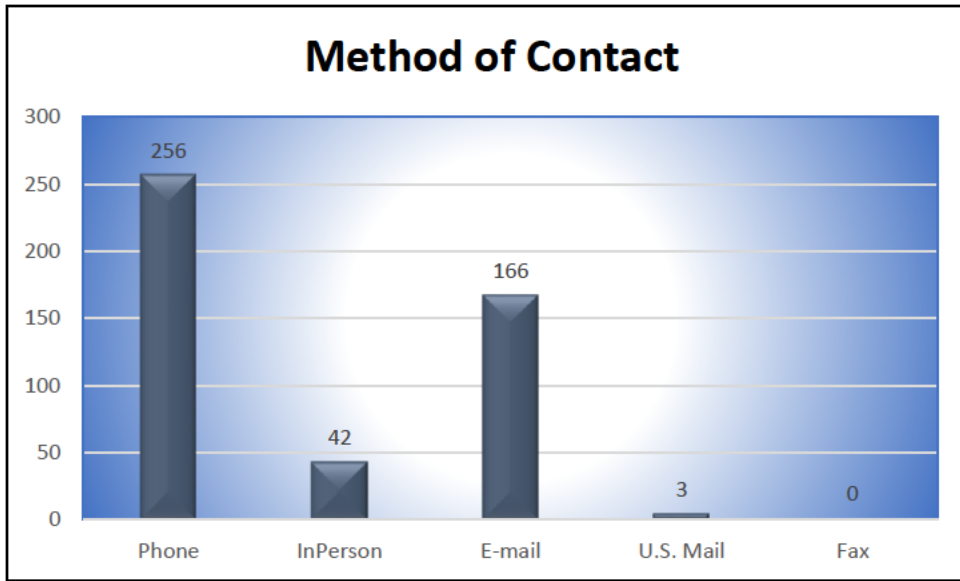
2019 Contacts with the Ombudsman

In 2019 I logged 467 inquiries and complaints. 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.



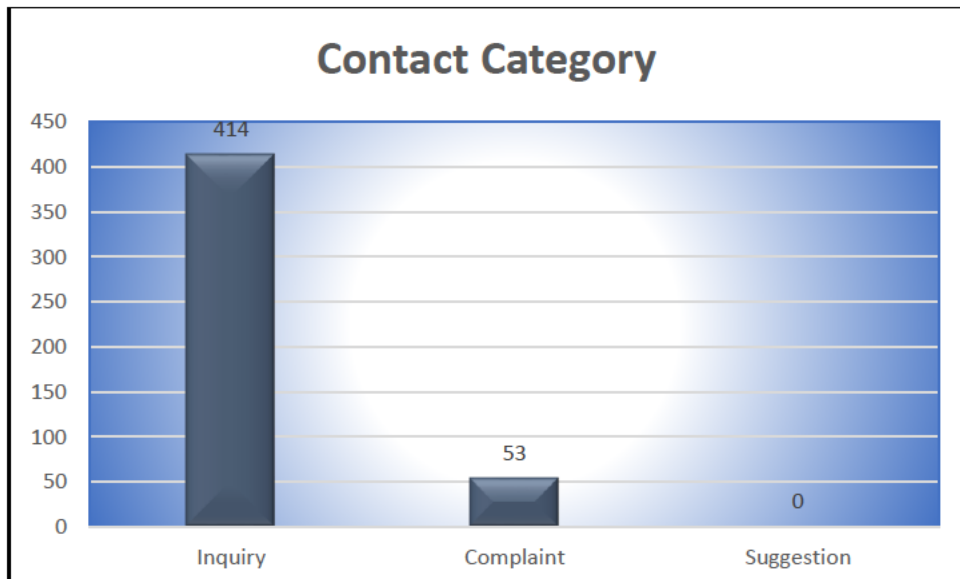
Method of Contact

The bulk of initial contacts was by telephone (256) followed by email (166), in- person (42) and U.S. Mail (3).



Contacts Included Inquiries, Complaints and Suggestions

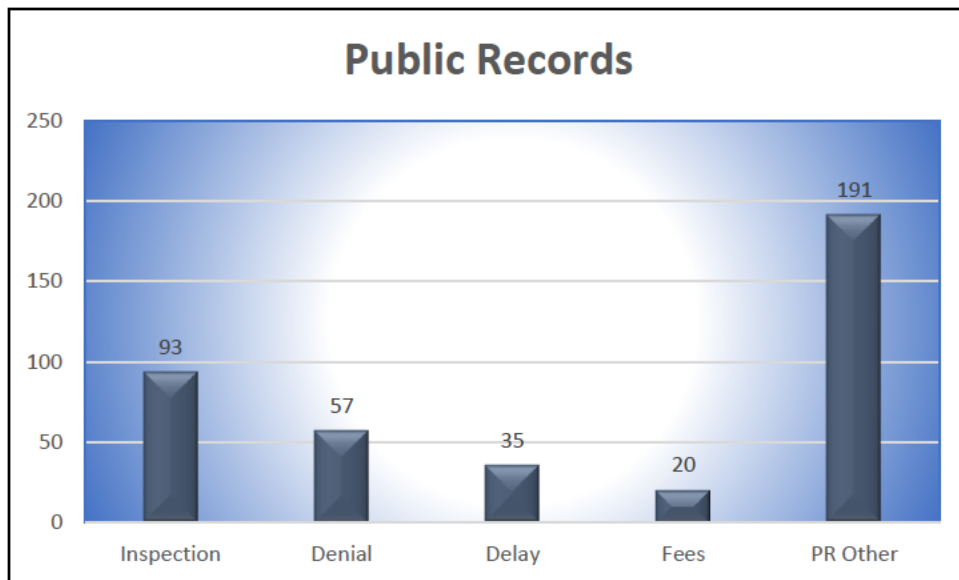
The 467 contacts included general inquiries (414), complaints (53) and suggestions (0). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



Contacts Concerning Public Records

Of the contacts about public records (394), 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



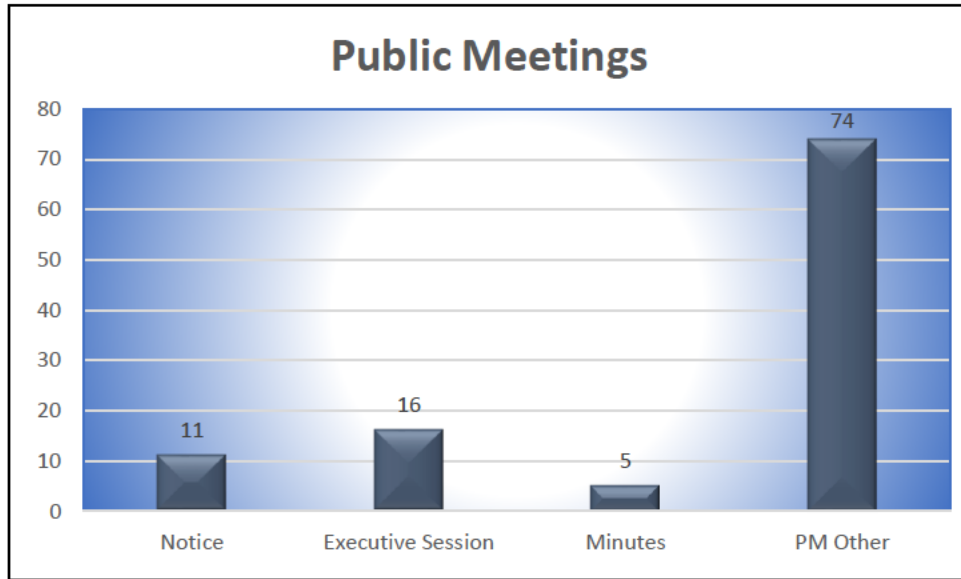
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 (107), most questions concerned:

- Use of executive session
- What constitutes a meeting

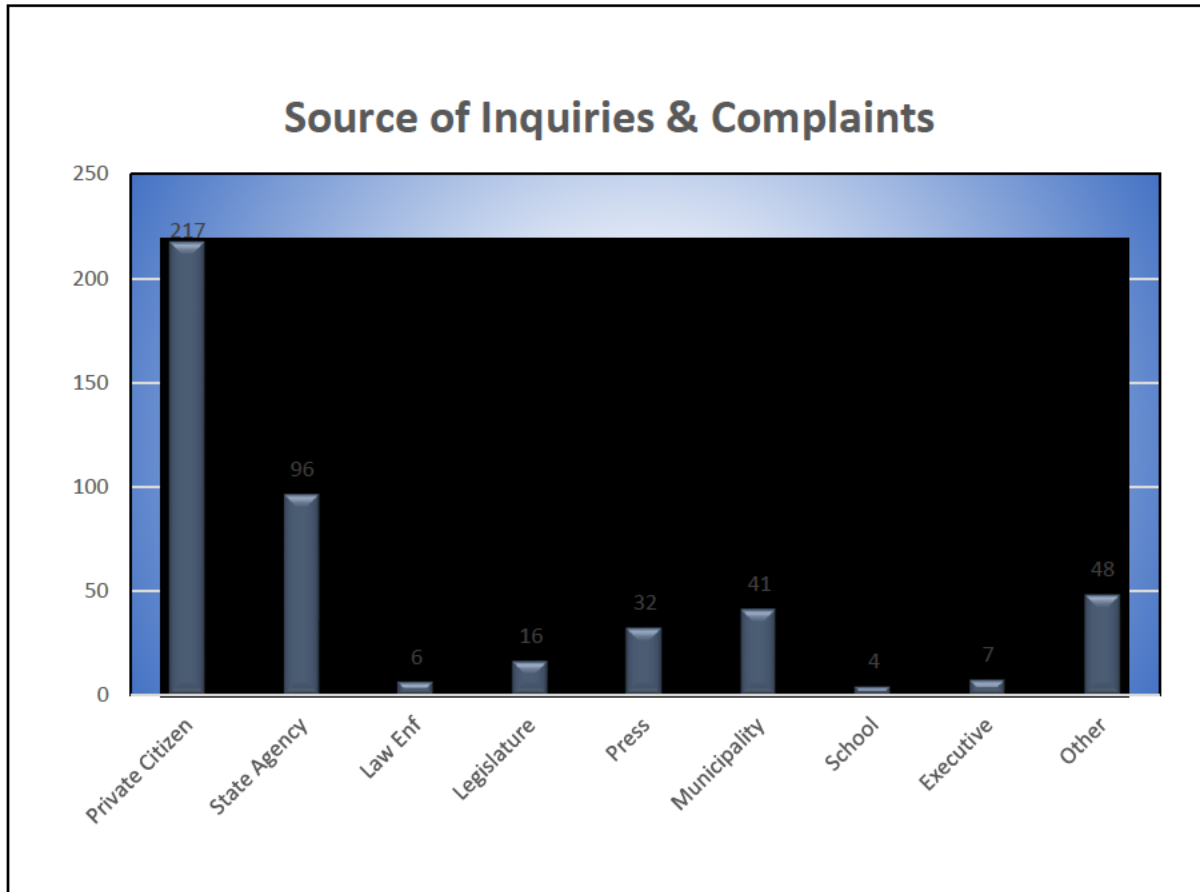


All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 467 inquiries, complaints and suggestions, 217 came from private citizens, 96 from state agencies, 6 from law enforcement agencies, 16 from the Legislature, 32 from members of the media, 41 from municipal officials, 4 from school districts, 7 from the executive branch and 48 from others including attorneys and commercial requesters.

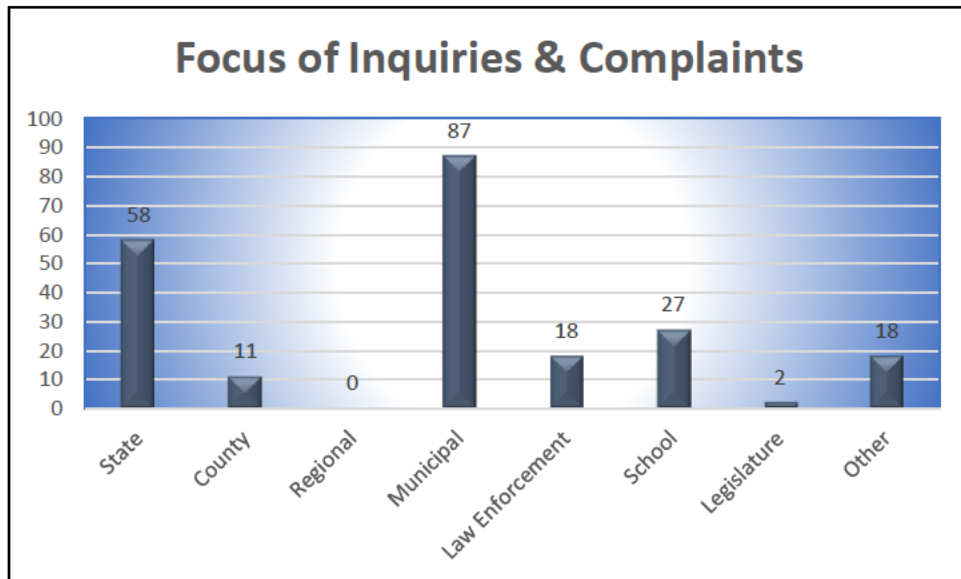


Although these metrics fluctuate each year, there were notable increases from 2018 in contacts from private citizens (+34) and from state agencies (+ 28).

Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (87) and state agencies (58). The remainder concerned law enforcement agencies (18), school administrative units (27), county agencies (11), 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

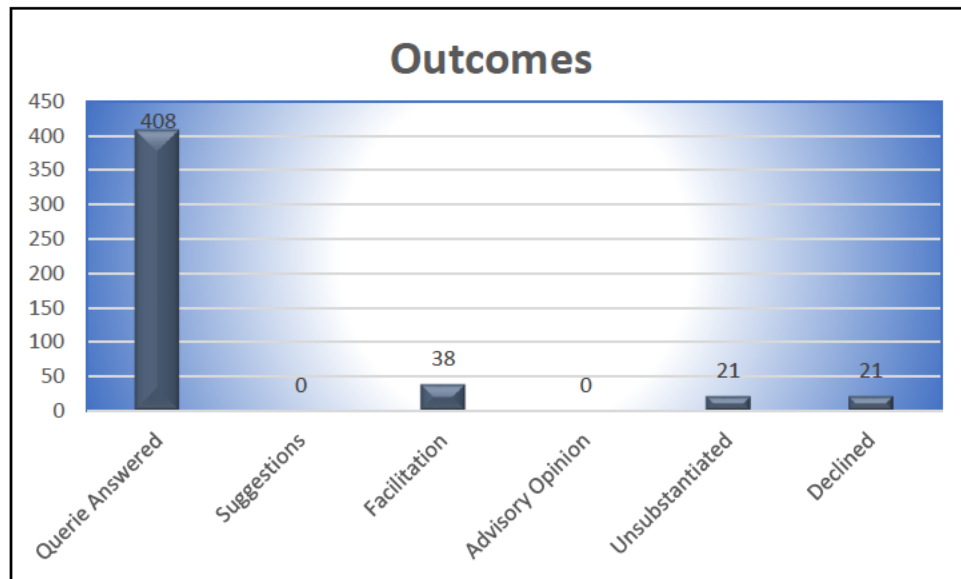
A contact may be logged as “resolved” for the following reasons:

- 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 2019 a total of 21 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 467 contacts included 408 answers to inquiries, 0 observations from citizens for improvements to the law and 38 facilitated resolutions.

There were no advisory opinions issued in 2019.



OUTREACH & TRAINING

In addition to hosting an extern from the Maine Law School for the spring semester, I provided on-site FOAA trainings and presentations to a variety of state and local entities including the following:

- City of South Portland
- WMTW Channel 8 television station reporters and staff
- Maine Department of Education
- Maine Office of the Governor
- Maine Department of Labor
- Maine Department of Administrative and Financial Services
- Maine District Attorneys
- Governor's Office of Policy Innovation and the Future

STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2019 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. This does not include the large volume of requests for information that agencies handle in the normal course of business and that do not implicate the FOAA response 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 2019
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. Response time greater than 6 months
7. Response time greater than 1 year
8. Amount of fees and costs for FOAA requests
9. Amount of agency hours spent responding to FOAA requests

Findings

A total of 4,022 FOAA requests were logged by the fourteen executive branch state agencies in 2019. There was a wide variation in totals between the agencies from four requests for the Department of Economic and Community Development to 2,338 for the Department of Public Safety.

Of the 4,022 total requests, 1,632 were responded to within five days; 558 were responded to in 6-30 days; 137 were responded to in 31-60 days; and 116 were responded to in greater than 60 days. Requests that took more than 6 months and more than one year to complete were tracked

for the first time in 2018. 12 requests were responded to in 6 – 12 months and 2 took more than a year.

The Department of Public Safety numbers increased significantly due to a changed method of calculation. It is not possible at this time to determine how this change affected the reliability of the totals. However, taking all the totals into account except DPS, 48% of requests were produced in less than five days, 36% in six to 30 days, 7.7% in 31 to 60 days, 5.7% in 60 days to six months, 0.3% in six months to one year, and 0.05% in greater than one year.

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. The notes following the chart on the next page include self-reported descriptions of factors that influenced the response times.

STATE AGENCY 2019 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 > 6 Months > 1 Year	FEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2018 REQUESTS
Administrative & Financial Services	75	30	26	6	0 2 1	\$ 315	n/a	10
Agriculture, Conservation & Forestry	133	77	52	4	0 0 0	\$ 1065	190	0
Corrections	102	72	23	1	1 0 0	n/a	n/a	5
Defense, Veterans & Emergency Management	7	3	4	0	0 0 0	n/a	n/a	0
Economic & Community Development	4	2	1	0	1 0 0	\$ 0	2	1
Education	183	87	75	11	5 0 0	\$ 465	227	12
Environmental Protection	139	71	48	9	7 0 0	\$ 1,413	249	4
Health & Human Services	213	44	87	34	40 8 0	n/a	n/a	0
Inland Fisheries & Wildlife	45	20	16	4	2 2 1	\$ 570	62	0
Labor	20	11	7	2	0 0 0	\$ 1,350	188	0
Marine Resources	17	2	7	6	2 0 0	\$ 690	61	0
Professional & Financial Regulation	112	58	27	8	5 0 0	\$300	120	0
Public Safety	2,919	1,129	158	52	53 0 0	\$ 12,757	690	0
Transportation	53	26	27	0	0 0 0	\$ 545	77	0
TOTALS	4,022	1,632	558	137	116 12 2	\$ 19,785	1,866	32

Notes:

DPS: The large increase in numbers for 2019 is due to an agency decision to include all requests processed as FOAA requests, regardless of whether the statute was expressly cited in the requests. In prior years, only requests that actually cited FOAA were reported. There remains some question as to whether the requests counted for 2019 were FOAA requests or requests for information processed in the normal course of business.

DAFS: Three requests were diverted from the normal FOAA process and resulted in unusually long response times.

DEP: All seven of the “greater than 60 days” response time took less than six months. Most are due to lengthy communication gaps from the requester after files were compiled or awaiting approval of method to transfer electronic files. There is a lengthy process for reviewing trade secrets/CBI, including windows for: the submitter of records to produce supporting evidence, Department review, and 30 days to appeal the Department’s determination. The longest request was due to our inability to close the request until the full redacted files were provided.

DPFR: Factors that contributed to longer response times include situations where requesters stopped responding to the Bureau of Insurance; an intentional delay for inclusion of future hearing documents per the requester’s wish; extensive requests that required review and redaction of FOAA materials and consultation with agency legal counsel prior to release; and new law requiring notification to licensee and opportunity to object prior to release of redacted materials.

DOT: Most of the responses took less than an hour therefore there was no charge to the requester. The fees and costs only include the amounts that were charged on requests that took more than an hour.

IF&W: Response times six months and over were all from the same requester, two of which were quite broad in scope. The requester did not respond to cost estimates or attempts to communicate various options to move forward with the request, so work was not completed.

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

I first addressed the need for guidance on remote participation in public meetings in my 2015 Annual Report. As I stated then, 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. I again 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.” Past proposals for legislation by the Right to Know Advisory Committee attempted to balance the need for transparency and public participation with the practical and geographical needs of Maine public bodies. I fully support the Right to Know Advisory Committee’s current recommendation that the Legislature enact this essential amendment to the Freedom of Access Act.

Freedom of Access Act Training for Public Officials

Recently enacted legislation amended 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 provided 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 code enforcement officers, town managers and administrators, planning board members and deputies of municipal clerks, treasurers, managers or administrators, assessors and code enforcement officers. Currently 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.

Since the amendment to the statute eliminated the qualifier “elected” there may be some uncertainty who is an “official” of the school departments for the purposes of FOAA. The term “school official” should be clarified to include school superintendents, assistant superintendents and school board members.

State Agency FOAA Resources

The interest in public information and requests for records continues to climb and responding thoroughly and promptly to these requests is a core function of government. Yet, the activities involved in responding to FOAA requests for records are generally performed by state employees whose primary job description does not include FOAA. In other words, the work of searching, compiling, reviewing and producing records is an “additional” task beyond the employee’s daily duties.

A dedicated full-time equivalent position in the Office of Information Technology should be created to provide technical FOAA expertise to agencies. Although there is currently some support provided by OIT to the agencies for FOAA responses, the complexity of requests, the magnitude and variety of electronic records warrant consideration of increasing this critical support.

This would be a solid first step in ensuring that state government can provide timely and complete access to public records as we move into an even more complex records environment in the future.

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 13¹. 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 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 January 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 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 2017 Second Regular Session of the 128th Legislature.