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STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Aaron M. Frey, Attorney General



PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2021

January 27, 2022

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.

Program Trends

The ombudsman activity involving question and complaint resolution has grown over the course of the program. A total of 584 contacts were received in 2021 from FOAA requesters and agencies seeking assistance. The number of inquiries and complaints is a significant increase from the 2020 total of 464.

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

State Agency Annual FOAA Reporting

The Ombudsman Report for 2021 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.

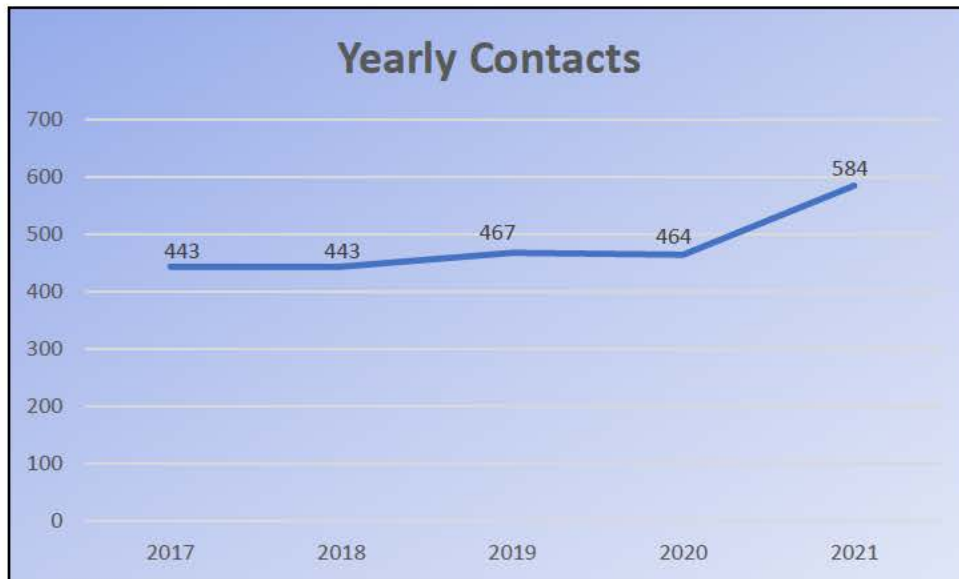
Brenda L. Kielty, Public Access Ombudsman

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).

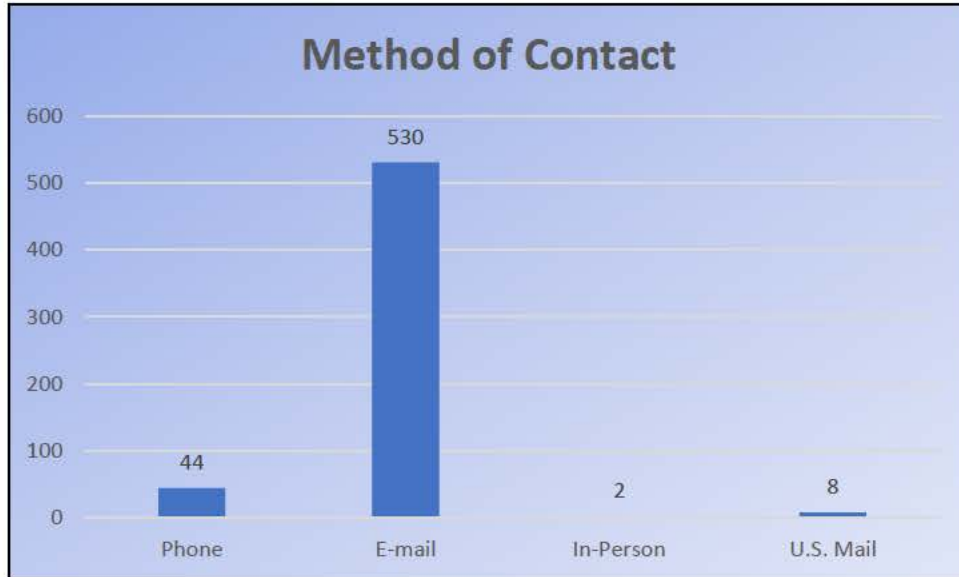
2021 Contacts with the Ombudsman

In 2021 I logged 584 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.



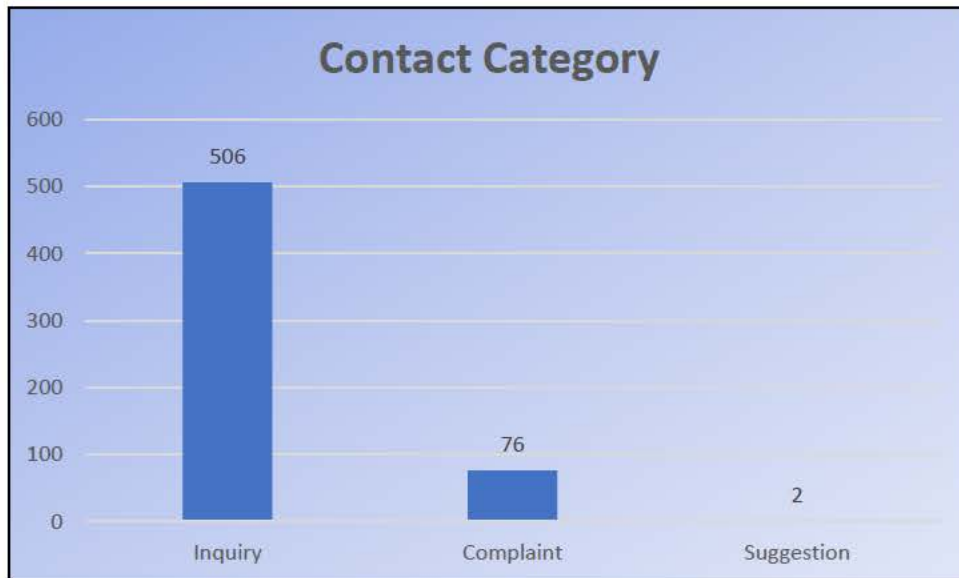
Method of Contact

The bulk of initial contacts was by email (530) followed by telephone (44) U.S. Mail (8) and in-person (2). Direct telephone contact was limited and redirected mainly to email due to the remote working conditions instituted after the COVID-19 state of emergency declaration.



Contacts Included Inquiries, Complaints and Suggestions

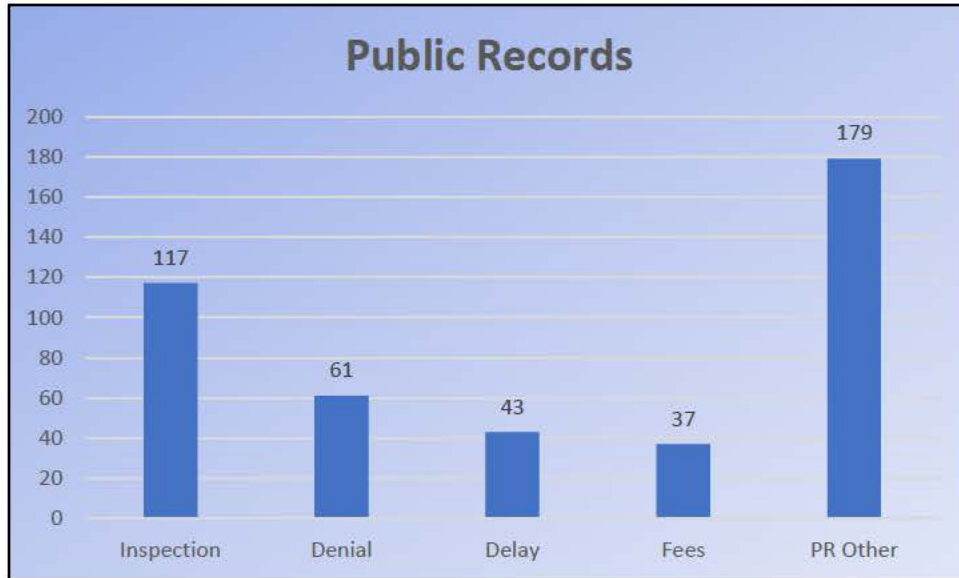
The 584 contacts included general inquiries (506), complaints (76) and suggestions (2). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



Contacts Concerning Public Records

Of the contacts about public records (437), 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



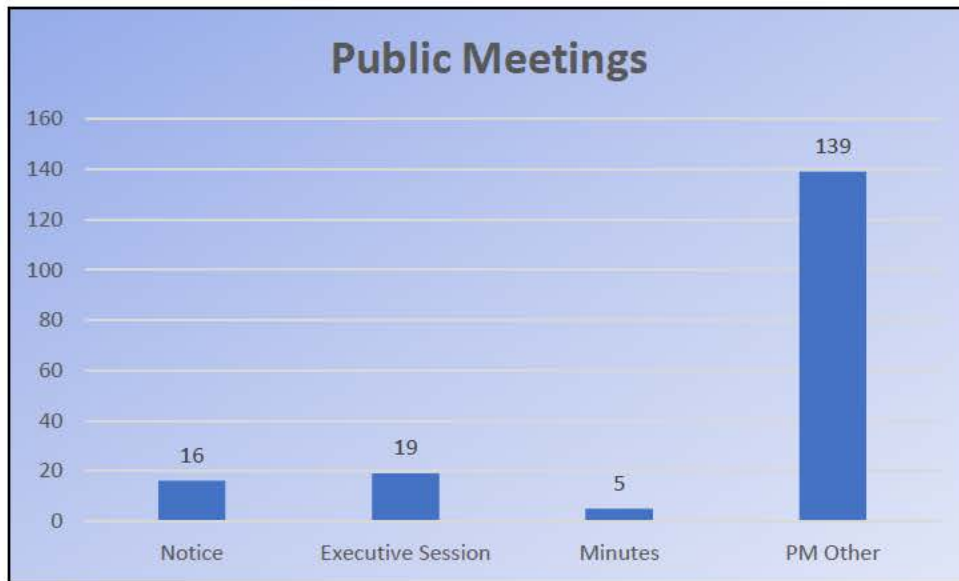
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 (179), most questions concerned:

- Use of executive session
- Remote participation notice and attendance
- 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
- What entities are subject to FOAA

Source of Inquiries, Complaints and Suggestions

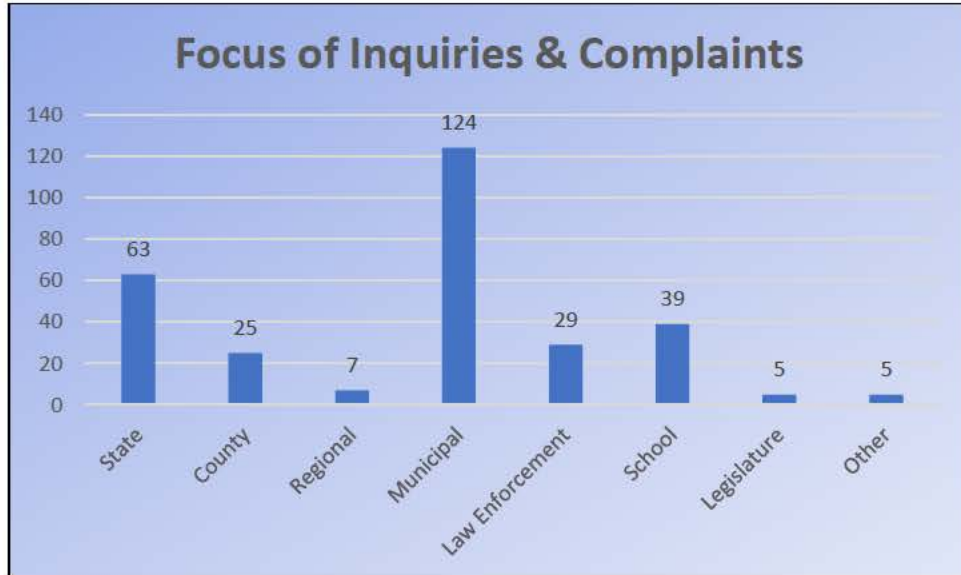
Of the 584 inquiries, complaints and suggestions, 262 came from private citizens, 109 from state agencies, 8 from law enforcement agencies, 16 from the Legislature, 64 from members of the media, 57 from municipal officials, 6 from school districts, 2 from the executive branch and 61 from others including attorneys and commercial requesters.



Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (124) and state agencies (63). The remainder concerned school administrative units (39), law enforcement agencies (29), county agencies (25), regional agencies (7) and the Legislature (5). Others (5) 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 number of municipal entities in the state.



Outcomes Reached as Result of Contact with Ombudsman

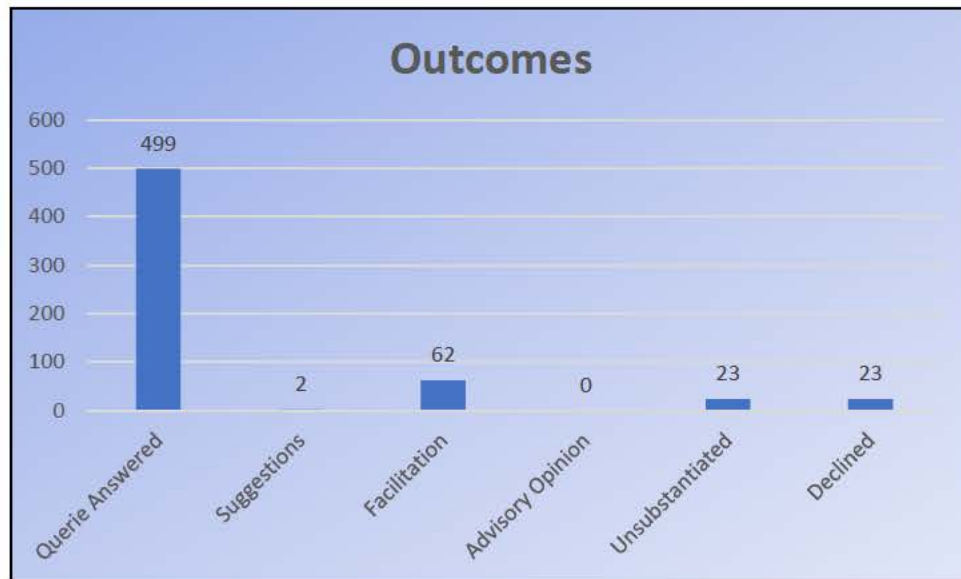
A contact may be logged as “resolved” for the following reasons:

- 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 2021 a total of 23 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 584 contacts included 499 answers to inquiries, 2 observations from citizens for improvements to the law and 62 facilitated resolutions.

There were no advisory opinions issued in 2021.



OUTREACH & TRAINING

I provided remote FOAA trainings and presentations to a variety of state and local entities, such as the Office of the Attorney General, the City of South Portland, and Maine State employees. As with last year, there was more demand for one-on-one training resources this year and those are logged as inquiries in the data.

This year I was appointed as the Attorney General's designee to the [Maine Archives Advisory Board](#). The Board serves in an advisory role to the Maine State Archivist and reviews proposed records retention schedules and issues related to proper records management for both Maine state and local government. The right of access to public records provided in the Freedom of Access Act is dependent on the capture, preservation and management of public records. I am grateful to be able to participate in the work of ensuring that our records management systems serve the needs of not only government and persons seeking records today, but also future generations who will witness in the permanent archival collections the aspirations and challenges of our era.

STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2021 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 2021
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:

The continued COVID-19 remote work environment and operational demands created unique conditions for agency FOAA responses in 2021. The notes following the chart on the next page include self-reported descriptions of factors that influenced the response times.

STATE AGENCY 2021 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 2021 REQUESTS
Administrative & Financial Services	112	18	1	3	9 9 10	n/a	n/a	83*
Agriculture, Conservation & Forestry	78	53	20	3	2 0 0	\$ 1,357	148.5	2
Corrections	101	68	23	3	1 6 0	n/a	30 per week	6
Defense, Veterans & Emergency Management	7	4	3	0	0 0 1	n/a	94.5	1 (2020)
Economic & Community Development					0 0 0			
Education	136	56	53	8	11 3 0	\$ 345	178.5	1
Environmental Protection	138	69	42	10	8 0 0	\$ 6,742	449.5	9
Health & Human Services	218	67	34	21	41 55 0	n/a	n/a	0
Inland Fisheries & Wildlife	29	11	12	1	2 1 0	\$ 3,634	30	2
Labor	23	6	4	3	8 2 0	\$ 52	177	5
Marine Resources	44	18	12	6	8 0 0	\$ 570	n/a	0
Professional & Financial Regulation	89	38	36	7	4 1 0	\$ 570	91	2
Public Safety	2,052	1,011	167	107	35 5 0	\$ 11,982	399	0
Transportation	33	11	13	1	0 0 0	\$ 990	95	0
TOTALS	3,060	1,430	420	173	129 82 22	\$ 26,242	3,223	111

Agency comments related to their 2021 FOAA response data:

DPS: The data reported for 2021 is based on FOAA request-related tracking data provided by the multiple bureaus, units, and offices at DPS that track and report FOAA request-related tracking data each year. Not all requested data points were tracked by those data sources, primarily due to staffing, time, and technological limitations, which make the ability of each data-reporting source to track information challenging. In short, the data reported is incomplete.

A number of FOAA requests that DPS received during 2021 were of such complexity and/or breadth that multiple department employees needed to meet and discuss the requests simply to determine the most effective and efficient way to ascertain the records and/or information being sought through the requests. Other agencies (for example, the Office of the Attorney General and the Office of Information Technology) also needed to be consulted with respect to some of the requests the department received during 2021.

DVEM: The pending 2020 request relates to MEMA correspondence regarding COVID. Upon receipt of the request we were in the height of the pandemic and all hands were in emergency response mode. We notified the requestor we would attend to their request once the State of Emergency was rescinded. Of course, this went on much longer than we had hoped or expected and are still in the middle of it from the federal perspective. Regardless we found time this past summer to give the request some attention and determined due to the magnitude of the request, we had to split the response into Blocks 1, 2, & 3. A partial response batch 1 of 3 has been provided to the requestor. Since the request involves correspondence between MEMA and other agencies relative to the COVID emergency, which is still ongoing, MEMA established a cut-off date and is preparing batches 2 and 3 based on inclusive dates in 2021. Batch 1 included correspondence from February 2020 through September 2021, 579 days, and resulted in 65.5 hours of staff time. We chose not to charge fees for the 2020 request since it took so long to respond and the response was electronic. These numbers are included in the data reported for 2021.

DOL: As is true with all State of Maine agencies, the Maine Department of Labor (MDOL) experienced unprecedented demands for service during the COVID-19 pandemic. MDOL leadership is proud that acknowledging FOAA requests remained a priority and that the Department was responsive to those who made requests. Information in response to the inquiries was provided as soon as it was readily available.

DOC: Our office makes every effort to respond as quickly as possible. Circumstances that impact our response process include having to wait for resources, time needed to gather information, confidentiality review, operational demands, employee availability and redirection of resources due to COVID.

DOT: The majority of our responses took less than an hour and there was no charge. Fees and costs only included amounts charged on requests over an hour. We had six requests from companies or students doing research that were withdrawn due to costs. Each of those requests

were monumental and would have consumed in excess of 20 staff hours each. Two requests were referred to other agencies.

DAFS: DAFS remains on the frontlines of the response to COVID-19, ensuring the safety and wellbeing of State employees while also deploying financial and other strategies to ensure the continued delivery of State services. Nonetheless, we remain committed to transparency and accountability and have kept FOAA workflows moving as consistent with other operational responsibilities. We are in pursuit of a better system for accurately tracking staff hours and/or fees related to the execution of these duties and remain hopeful about capturing those details moving forward.

*Of the pending requests, 29 are from 2019 or earlier and 4 are from 2020. Of the 100-plus requests received in 2021, approximately half are unfilled; of these, a large number were received in the second half of the year and we anticipate fulfilling most within 60 days or less.

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 fully support the Right to Know Advisory Committee's current recommendation that the Legislature address the issue in the remote participation provision of FOAA that requires an in-person meeting to adopt a remote meeting policy. For some bodies that did not previously adopt a remote meeting policy or bodies that were formed recently, the extended COVID-19 environment raised questions about the safety of in-person meetings. There should be a way for such bodies to convene a meeting remotely based on emergency conditions, hear from the public, deliberate and vote on such a policy. The amendment allows the chair to convene the body and requires that members vote on whether the conditions exist to meet remotely to adopt a policy. If that vote passes, then the body can move on to consider such a policy.

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 2021 First Regular Session of the 130th Legislature.