

RIGHT TO KNOW ADVISORY COMMITTEE
Improve FOAA Subcommittee

Wednesday, December 4, 2019
10:00 a.m.
State House Room 438

Meeting Agenda

1. Introductions
2. Warrants for tracking, content and location information
 - Judicial Branch update
 - Draft language of recommendation to Judiciary Committee – review
3. Review drafts of recommendations
 - Cap copying charges at 10¢ per 8.5x11 B&W page
 - Expanded training
 - Request to Public Access Ombudsman for suggestions to enhance and improve training
 - Remote participation preamble
 - Emerging technology study
4. Discussion of responding to requests
 - Information from other states related to costs
 - Maine state and local experiences
5. Review and discussion of questions raised in LD 1575 and additional improvement suggestions (not discussed on November 13th)
 - Prohibit use of electronic devices during public proceeding by member of body/agency
 - Additional factors in consideration of public records exceptions
 - FOAA request reporting requirements
 - Other suggestions
6. Any future meeting dates?
7. Adjourn

G:\STUDIES\STUDIES 2019\RTKAC\Meeting Agendas\Draft 12-4-19 Agenda Improve FOAA Subcommittee.docx (11/21/2019 3:26:00 PM)

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION CONCERNING INFORMATION ABOUT
SPECIFIC SEARCH WARRANTS
*REFLECTS DECISIONS MADE AT NOV. 13TH MEETING***

The Right to Know Advisory Committee was directed by Public Law 2019, chapter 489, Section 18 to review the laws concerning the application for and issuance of search warrants authorizing the installation and monitoring of tracking devices and seeking content and location information under the Maine Revised Statutes, Title 16, chapter 3, subchapters 9-A, 10 and 11 and to make recommendations concerning the public's right to know aggregate information about warrants, including warrants in which the application for the warrant included a request for an order to waive notice of the issuance of the warrant. After reviewing the existing practices and procedures surrounding these warrants, the Advisory Committee recognizes that the information is not collected in any central system by the Judicial Branch, but is tracked at each court location independently. As the Judicial Branch develops and fully embraces electronic records and practices, this process could change. The Advisory Committee agrees that the information identified in Section 18 would be useful if it existed in aggregate form. As Section 18 refers to a record that does not yet exist (aggregated data), the Advisory Committee is uncomfortable assuming the authority to direct that new activities must be undertaken to create such a record. In short, the Advisory Committee believes the decision as to whether to establish a duty to collect and report the warrant information is a policy decision better resolved by the Judiciary Committee through its consultations with the Judicial Branch as the electronic records system moves forward.

#3
①

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO CAP COPYING COSTS
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

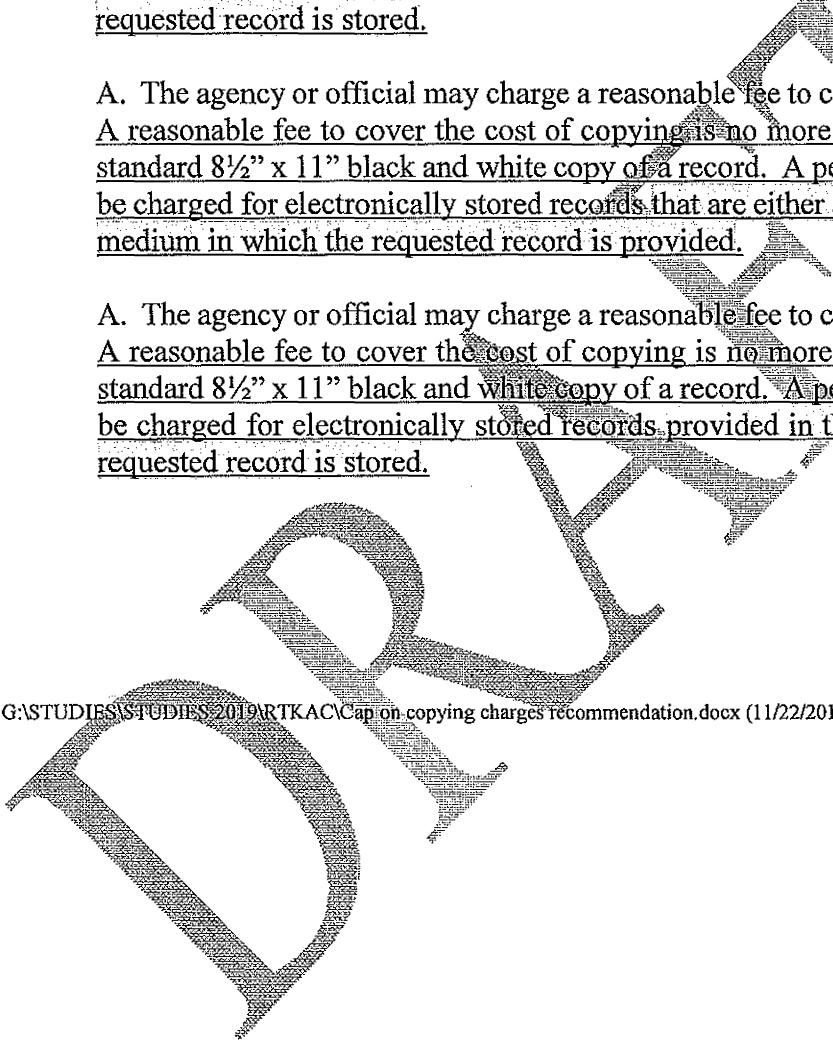
OPTIONS

Sec. 1. 1 MRSA §408-A, sub-§8, ¶A is amended to read:

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8½” x 11” black and white copy of a record. A per page copy fee may not be charged for electronically stored records available in the medium in which the requested record is stored.

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8½” x 11” black and white copy of a record. A per page copy fee may not be charged for electronically stored records that are either available or stored in the medium in which the requested record is provided.

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8½” x 11” black and white copy of a record. A per page copy fee may not be charged for electronically stored records provided in the medium in which the requested record is stored.



#3
②

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO AMEND FOAA TRAINING LAW
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

Sec. 1. 1 MRSA §412 is amended to read:

§412. Public records and proceedings training for certain elected officials and public access officers

1. Training required. A public access officer and an official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or public access officer shall complete the training not later than the 120th day after the date the official ~~takes the oath of office to assume~~ assumes the person's duties as an elected official or the person is designated as a public access officer pursuant to section 413, subsection 1.

2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings;
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and
- C. Penalties and other consequences for failure to comply with this chapter.

An official or a public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The official shall keep the record or file it with the public entity to which the official was elected or appointed. A public access officer shall file the record with the agency or official that designated the public access officer.

4. Application. This section applies to a public access officer and the following officials:

- A. The Governor;
- B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;
- C. Members of the Legislature elected after November 1, 2008;

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED RECOMMENDATION TO IMPROVE TRAINING LAW
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

Recommendation (vote 9-0): That the Right to Know Advisory Committee direct the Public Access Ombudsman to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the UMaine Law School Extern and to report back to the Advisory Committee in 2020. The Public Access Ombudsman shall consider:

1. Changes to strengthen the scope and depth of online training; and
2. Methods to make the online training more interactive.

DRAFT

#3
④

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO ADDRESS REMOTE
PARTICIPATION (NEW PREAMBLE)
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

Whereas, the Freedom of Access Act makes clear that public proceedings exist to aid in the conduct of the people's business, and that government actions are to be taken openly and that deliberations be conducted openly;

Whereas, the Freedom of Access Act expresses Legislative intent that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of Act;

Whereas, the Freedom of Access Act explicitly states that the Act is to be liberally construed and applied to promote its underlying purposes and policies;

Whereas, because the Freedom of Access Act does not specifically mention whether remote participation in a public proceeding by members of a public body supports the underlying purposes and policies of government transparency;

Whereas, there are multiple opportunities for abuse of remote participation but there may also be situations in which participation by a member of a public body in a public proceeding from a remote location is appropriate, beneficial and effective;

Whereas, without clear guidance in the statute, remote participation can be misused in circumstances in which it should not be employed, and not used out of caution in situations in which the participation of the member remotely would benefit the public proceeding while still ensuring complete openness of the participation to the public;

Whereas, the use of remote participation by public bodies at the State level should be governed by statute and major substantive rules;

Whereas, the use of remote participation by municipalities, counties, school boards and other non-state public bodies should be governed by the constituents the public bodies serve,

Whereas, this legislation establishes a process to approve or reject the use of remote participation by members of public bodies which must be followed if remote participation is exercised, unless the statute provides an alternative process,

Be it enacted by the People of the State of Maine as follows:

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO ADDRESS REMOTE
PARTICIPATION (NEW PREAMBLE)
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

matters other than those requiring immediate action in a public proceeding held pursuant to this subsection when a quorum is not physically present. Every member must be physically present for at least one proceeding each year;

C. Each member of the public body who is participating in the public proceeding remotely identifies for the record all persons present at the location from which the member is participating. The member shall note for the record when any person enters or leaves the location throughout the course of the public proceeding;

D. All votes taken during the public proceeding are taken by roll call;

E. A member of the public body who is not physically present at the location identified in the notice required by section 406 does not participate and does not vote in an adjudicatory proceeding; and

F. Each member of the public body who is participating in the public proceeding remotely receives any documents or other materials presented or discussed at the public proceeding in advance or when made available at the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action of the body.

2. State public bodies. The policy under subsection 1 applicable to a state public body must be adopted by the public body as a major substantive rule under the Maine Administrative Procedure Act.

3. County and municipal public bodies. A county or municipality may by ordinance require stricter requirements than those set out in this section and may prohibit remote participation by any public body under its jurisdiction.

4. Elected public bodies. A public body consisting of elected members may adopt a policy under subsection 1 only after the constituents of the public body have voted to authorize the public body to adopt the remote participation policy. The public body must provide notice and hold a hearing before adopting the remote participation policy.

5. Exceptions. The following public bodies are exempt from the provisions of this section and a member of the following bodies may participate in a public proceeding of the public body when the member is not physically present:

A. The Finance Authority of Maine, as provided in Title 10, section 971;

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO ADDRESS REMOTE
PARTICIPATION (NEW PREAMBLE)
REFLECTS DECISIONS MADE AT NOV. 13TH MEETING**

subsection 2 and to report back to the committee of jurisdiction. A proposed remote participation authorization or proposed change that affects the accessibility of a public proceeding may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed remote participation authorization or proposed limitation on accessibility from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed remote participation authorization should be enacted:

- A. Geographic distribution of members;
- B. Demonstrated need based on emergency nature of action;
- C. Demonstrated need based on exigent circumstances, such as a natural disaster or an emergency declaration by the Governor directly related to the activities of the body; and
- D. Any other criteria that assist the review committee in determining the value of the proposed remote participation authorization as compared to the public's interest in all members participating.

3. Report. The review committee shall report its findings and recommendations on whether the proposed remote participation authorization or proposed limitation on accessibility to public proceedings should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

SUMMARY

This bill clarifies when members of public bodies may participate remotely in public proceedings of those bodies. It prohibits a body subject to the Freedom of Access Act from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication unless the body has adopted a written policy that authorizes remote participation in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the meeting notice to hear all members of the body.

#3
⑤

**Right to Know Advisory Committee
Improve FOAA Subcommittee**

**PROPOSED DRAFT LEGISLATION TO RECOMMEND STUDY ON
EMERGING TECHNOLOGIES
*REFLECTS DECISIONS MADE AT NOV. 13TH MEETING***

Recommendation (vote 9-0): That the Legislature establish a study committee of appropriate stakeholders to examine the specific challenges of ensuring public access to public records in the face of new and emerging technologies and develop recommendations that are designed to preserve communications that can be accessed by the public. In conducting its review, the committee shall specifically examine:

1. The effect of the increasing reliance on the use of text messaging to conduct governmental business and how text messaging fits within the parameters of the Freedom of Access Act;
2. How to ensure the preservation of public records when the use of technology that does not create a permanent record, such as Snapchat, is increasing; and
3. Strategies to encourage public agencies and public officials to adopt business practices that are specifically designed to preserve public records that are subject to the Freedom of Access Act.

DRAFT

Selected State Laws Related to Costs and Fees for Responding to Records Requests
--

Alaska:

- Agency may establish a fee for copying that may not exceed the standard unit cost of duplication
- If the time to produce records for a requester in one calendar month exceeds 5 hours, an agency shall require the requester to also pay the personnel costs to complete the search and copy the records

Arkansas:

- Fees may not exceed "actual costs of production"
- Agency may not charge a fee for the agency personnel time associated with searching for, retrieving, reviewing or copying records
- Agency required to provide itemized breakdown of costs
- Agency bears any costs of redaction of records

Colorado:

- Fee established as not more than 25 cents per page or not to exceed the actual cost of providing a record in a format other than a standard page
- Fee may be imposed for research and retrieval only if an agency has adopted a written policy establishing the fee, subject to certain requirements
- There may be no charge for the first hour of staff time
- After first hour, fee may not exceed \$30 per hour
- Provision in statute requires adjustment of fee based on changes in consumer price index beginning 7/1/19 and every 5 years thereafter

Florida:

- Unless fee established by another statute, fee may not exceed 15 cents per page for no more than an 8 ½ by 14 page and no more than an additional 5 cents per page for a 2-sided copy; other formats, fee may not exceed actual costs of duplication
- If the nature or volume of records is such to require "extensive clerical or supervisory assistance by personnel of the agency", the agency may charge a special service charge
- Special service charge must be reasonable and based on the costs incurred for information technology or labor costs of personnel responding to the request for records

Idaho:

- No fee may be charged for first 2 hours of labor or for copying first 100 pages of paper records
- After that, fee may be set for actual labor and copying costs
- Fees may not exceed reasonable labor costs and must reflect the personnel and quantity of time reasonable to respond to the request
- Fees for labor costs shall be charged at the per hour pay rate of the lowest paid person who is necessary and qualified to process the request
- If request requires redactions to be made by an attorney, then the rate may be no more than per hour pay rate of the lowest paid attorney or the usual and customary rate of the attorney retained if there are no attorneys on staff in the agency

Maryland:

- No fee may be charged for the first 2 hours of staff time to produce the record
- Staff and attorney review costs in calculating actual costs must be prorated for each individual's salary and actual time attributed to fulfilling the request for records

Excerpt: Public Access Ombudsman Annual Report for 2018

STATE AGENCY ANNUAL FOAA REPORTING

#4
②

Pursuant to 5 M.R.S. § 200-I(2)(F) the Ombudsman report for 2018 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 2018
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 1,506 FOAA requests were logged by the fourteen executive branch state agencies in 2018. This reflects an increase of 268 requests from 2017. The total increase in requests over the last two years equals 439. There was a wide variation in totals between the agencies from four requests for the Department of Economic and Community Development to 581 for the Department of Public Safety.

Of the 1,506 total requests, 657 (44%) were responded to within five days; 467 (31%) were responded to in 6-30 days; 133 (8.8%) were responded to in 31-60 days; and 138 (9.1%) were responded to in greater than 60 days. Requests that took more than 6 months and more than one

STATE AGENCY 2018 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 2017 REQUESTS
Administrative & Financial Services	79	46	14	7	3 3 0	\$ 237	136	7
Agriculture, Conservation & Forestry	65	36	24	4	1 0 0	\$ 546	93	0
Corrections	89	42	20	5	21 1 0	n/a	n/a	9
Defense, Veterans & Emergency Management	6	2	1	1	2 0 0	\$ 105	22	0
Economic & Community Development	4	3	1	0	0 0 1	\$ 0	6	2
Education	143	63	56	10	4 1 1	\$ 405	246	9
Environmental Protection	92	46	34	3	4 0 0	\$ 2,536	256	5
Health & Human Services	225	69	71	23	39 23 0	n/a	n/a	n/a
Inland Fisheries & Wildlife	41	15	14	5	6 0 0	n/a	41	0
Labor	17	4	6	1	2 2 0	\$ 143	26	2
Marine Resources	13	2	7	2	0 0 0	\$ 30	11	1
Professional & Financial Regulation	104	37	41	15	10 0 0	\$642	170	0
Public Safety	581	273	155	52	46 4 1	\$ 4,733	422	0

22 **PROPOSAL 4: LEGISLATION**

23

24 **Be it enacted by the People of the State of Maine as follows:**

25

26 **Sec. 1. 1 M.R.S.A. § 403-B, is enacted to read:**

27

28 **§ 403-B. Use of electronic devices during public proceedings prohibited.**

29

30 A member of a body or agency subject to this chapter may not use an electronic
31 device to communicate with any person during a public proceeding, including, but
32 not limited to, to communicate with any other member of that body or agency who
33 also is attending or monitoring the proceeding, or with a member of the public who
34 is attending or monitoring the proceeding. For the purposes of this section,
35 “electronic device” means a device such as, as examples only, a cellular phone, a
36 desktop computer, or a laptop computer, that may be used to send or receive
37 electronic mail or text messages.

296 **PROPOSAL 8: LEGISLATION**

297

298 **Be it enacted by the People of the State of Maine as follows:**

299

300 **Sec. 1. 1 M.R.S.A. § 432, sub-§ 2, ¶ H**, as enacted by PL 2003, c. 709, §3, is amended
301 to read:

302

303 **2. Process of evaluation.** According to the schedule in section 433, the advisory
304 committee shall evaluate each public records exception that is scheduled for review that
305 biennium. This section does not prohibit the evaluation of a public record exception by
306 either the advisory committee or the review committee at a time other than that listed in
307 section 433. The following criteria apply in determining whether each exception scheduled
308 for review should be repealed, modified or remain unchanged:

309

310 A. Whether a record protected by the exception still needs to be collected and
311 maintained;

312 B. The value to the agency or official or to the public in maintaining a record protected
313 by the exception;

314 C. Whether federal law requires a record to be confidential;

315 D. Whether the exception protects an individual's privacy interest and, if so, whether
316 that interest substantially outweighs the public interest in the disclosure of records;

317 E. Whether public disclosure puts a business at a competitive disadvantage and, if so,
318 whether that business's interest substantially outweighs the public interest in the
319 disclosure of records;

320 F. Whether public disclosure compromises the position of a public body in negotiations
321 and, if so, whether that public body's interest substantially outweighs the public
322 interest in the disclosure of records;

323 G. Whether public disclosure jeopardizes the safety of a member of the public or the
324 public in general and, if so, whether that safety interest substantially outweighs the
325 public interest in the disclosure of records;

326 H. Whether the exception is as narrowly tailored as possible; and

327 I. Any other criteria that assist the review committee in determining the value of the
328 exception as compared to the public's interest in the record protected by the exception.

329

330 **Sec. 2. 1 M.R.S.A. § 432, sub-§ 2, ¶ H-1** is enacted to read:

331

332 H-1. Whether public access to the record ensures or would ensure that members
333 of the public are able to make informed health and safety decisions; and

334 PROPOSAL 9: LEGISLATION

335

336 Be it enacted by the People of the State of Maine as follows:

337

338 Sec. 1. 5 M.R.S.A. § 200-I, sub-§ 2, ¶¶ D and E, as amended by PL 2013, c. 229,
339 §1, are further amended to read:

340

341 [2. Duties. The ombudsman shall:]

342

343 D. Furnish, upon request, advisory opinions regarding the interpretation of and
344 compliance with the State's freedom of access laws to any person or public
345 agency or official in an expeditious manner. The ombudsman may not issue an
346 advisory opinion concerning a specific matter with respect to which a lawsuit
347 has been filed under Title 1, chapter 13. Advisory opinions must be publicly
348 available after distribution to the requestor and the parties involved; and

349 E. Make recommendations concerning ways to improve public access to public
350 records and proceedings; and,

351

352 Sec. 2. 5 M.R.S.A. § 200-I, sub-§ 2, ¶¶ F, as enacted by PL 2013, c. 229, §2, is
353 repealed.

354

355 [~~F. Coordinate with the state agency public access officers the compilation of~~
356 ~~data through the development of a uniform log to facilitate record keeping and~~
357 ~~annual reporting of the number of requests for information, the average~~
358 ~~response time and the costs of processing requests.]~~

359



Maine Municipal Association

60 COMMUNITY DRIVE
AUGUSTA, MAINE 04330-9486
(207) 623-8428
www.memun.org

To: Right to Know Advisory Committee
From: Kate Dufour, Director State and Federal Relations Department
Date: Tuesday, December 3, 2019
Re: Municipal Experience with Freedom of Access Requests

On November 21, the Maine Municipal Association (MMA) was asked for data regarding the municipal experience regarding requests for information under the Freedom of Access Act (FOAA). In order to generate the requested data, the Association sent a survey to each community's key municipal official (e.g., manager, administrator or first selectboard member, etc.), asking that a completed form be returned to MMA by December 2.

Participation Rate. Due to the quick response deadline only 49 communities were able to participate in the survey. However, the results nonetheless provide a representative snapshot of municipal experiences with requests for public information. As shown in *Table 1*, communities of varying populations participated in the study, ranging from 36,425 in Lewiston to 46 in Beddington. Municipalities from 14 out of 16 counties are represented in the results.

Table 1 – Survey Participation Rate

Population Group	# of Municipalities in Group	# of Municipalities in FOA Survey	Response Rate
Over 30,000	3	1	33%
10,000 - 30,000	16	5	31%
5,000 - 9,999	45	5	11%
3,500 - 4,999	35	6	17%
2,000 - 3,499	69	11	16%
1,000 - 1,999	116	11	9%
Under 1,000	204	10	5%
<i>Totals</i>	<i>488</i>	<i>49</i>	<i>10%</i>

Requests, Time to Complete, Costs. The data presented in *Table 2* shows that in 2018 the communities participating in the survey responded to 542 requests, 99% (534) of which were completed within 30 days. Municipal officials from the 49 responding communities on average spent \$26 per hour responding to each request, for total cost of roughly \$14,200. Based on the responses provided, we project that in 2018 municipalities statewide spent \$119,200 responding to 4,940 requests for information, 4,900 of which were completed within 30 days.

Table 2 – Request, Time to Complete, Costs

Population Group	2018 Total Number of Requests	Response Less Than 30 Days	% Completed Less Than 30 Days	Average Hourly Rate
Over 30,000	20	18	90%	\$46.00
10,000 - 30,000	193	191	99%	\$44.13
5,000 - 9,999	74	74	100%	\$22.00
3,500 - 4,999	14	14	100%	\$24.50
2,000 - 3,499	70	66	94%	\$24.31
1,000 - 1,999	42	42	100%	\$22.81
Under 1,000	129	129	100%	\$19.70
<i>Totals</i>	<i>542</i>	<i>534</i>	<i>99%</i>	<i>\$26.12</i>

General Feedback and Comments. The survey also included two opened ended questions, which are provided as *Appendix A and B*. The first asked for feedback on the factors present when communities needed 30 or more days to complete the request. The second question asked participants for general feedback on the current law and process.

As you will read, the number of records, time necessary to locate, copy and redact documents, request involving input from multiple departments, as well as legal review, were the reason 30 or more days were needed to generate the data. A review of the general comments shows a growing level of frustration with “data mining” requests where information provided by the community at taxpayer expense is sold for a profit.

Survey. Included as *Appendix C* is a copy of the survey. Please note that the question regarding total fees and costs is not reflected in the results. It was phrased in a way that resulted in responses that, for the most part, did not provide reportable data.

Unfortunately, I am unable to attend your December 4 meeting, please do not hesitate to direct questions about the survey and the report to either Paul Nicklas or me. I can be reached at either kdufour@memun.org or 1-800-452-8786.

Thank you.

Appendix A

Reasons for Longer Response Times

- This fall, I had a request that involved obtaining information from Cary Medial Center (a department of the city). CMC had their lawyer, the request came from a lawyer, and the city's lawyer was also involved. Everything about this request went slowly.
- Volume of records; the time to redact confidential information; and simply figuring out how to download the information from Trio.
- Number of records, amount of redacting, requests involving multiple departments, document review time.
- We have not had any requests that required 30 or more days to complete. If we had, the process would not be difference except that we would notify the requester periodically of the status of fulfilling the request.
- If a request took more than 30 days, it is most likely related to the sheer volume or collecting relevant documents from board members. If you have a committee of seen and handwritten notes are requested, it is difficult to get the membership to get those note to us in a short window.
- We typically are able to prevent request that take more than 30 days by suggesting the party requesting the information narrow the scope of the request.
- Finding previously filed documents upstairs, researching, copying tax information and land records, and vendor request for addresses to sell to others.
- Common factors are wildly broad requests that take several meetings with the requestor to narrow down to a reasonable request, overly broad search terms that return numerous and often unrelated results, and requests that relate to legal matters requiring extra review.
- The number of years they request and the number of records that are part of the request.
- Photocopying, researching, and faxing the information.
- Number of records, multiple sources of records, records outside of municipal control, redacting and legal review.
- Staff availability.

- Number of records, review of records, confirming release of records with the attorney, working with IT staff to determine search criteria for requests regarding emails.
- Number of records, depending on other departments, redacting, and reviewing the information provided as to whether it is public.
- It depends on the amount of research.

General Comments

- We probably don't charge for all our time.
- We should be looking at requests by citizens differently than commercial entities. Dozens of commercial entities request information that may take less than an hour but the request accumulate over the year.
- In order to provide specific average fees and more detail would require more research though all the files. We had 18 requests in 2018 and in 2019 we have received 23. There has been a recent uptick in requests and we have experienced more time consuming and larger requests. Some of this is due to issues or project specifics to the city. There also appears to be more and more businesses using the FOAA process to obtain data and information from municipalities. Typically the business requests are around purchasing, contracts for printers and postal machines, uncashed check information, etc.
- I agree that the statutory limit of \$15 per hour is unreasonable. Our total cost for the 2019 request was \$623 before subtracting the statutory first hour.
- The major concern is that should FOAA requests become more frequent or time consuming, it could cause the municipality to lose money. Costs to be considered must include wages as well as benefits. Currently, an employee's benefits total nearly \$10 per hour, in addition to an hourly wage.
- Companies seeking to mine data from municipalities are increasingly using FOAA as a tactic to get this information. Most of the time they are asking municipalities to generate special reports, which fall outside of the scope of FOAA. However, smaller municipalities or those with less experience can end up wasting a lot of time on these types of requests. These companies are becoming savvier in understanding what they can and cannot access through a FOAA request and that has the potential to cost municipalities a lot of money in staff time. FOAA laws were not designed to protect public entities from companies looking to mine data. The cost of preparing a FOAA response should be borne by the applicant and not the taxpayers. The \$15/hour charge does not come close to covering the cost of preparing a response.
- Most requests are fine and we are glad to look for items like old land records we might have or plumbing permit information, to help out our residents. But the repeated requests for all of our vendor information and addresses for others to sell for money, or vindictive requests others have to go through or we have in the past takes away from the intention of the law. Plus small offices don't have the staff to keep doing these. The workforce pool is getting smaller and harder to find help is another complication for towns to keep up with this.

- Many requests are reasonable but most use the process punitively or for private commercial gain. We are subjected to a LOT of data mining requests. The first hour should not be free. There are very few individual services provided to residents (and often non-residents) at no cost, even if there is a public good component.
- In 2019, the town elected a new board of selectpersons. Never had there been a FOAA request in the history of the town, however, this year, because we are a board of all women, the selectmen from previous years have been relentless in FOAA requests, some of which they had no right to know...they just want to make our position as difficult as possible, but we are handling it.
- Some of the individuals we've dealt with use FOAA as a vindictive tool that wastes staff time and consumes resources. I don't mind assisting someone who is looking for information about the town - we'll even help them narrow down their search to save everyone time and money. I do have a problem with folks that have a beef, real or imagined, and choose to take it out on town staff.
- We are a small town and try to have things available for requestors as easily as possible because our hours are limited and our residents need to come first.
- I dislike that SmartProcure uses our data to sell to vendors.
- I've had requests that have generated hundreds of emails but when I tell someone how much it's going to cost they never follow through with the request so my response time is generally pretty quick because most requests fulfilled are small.
- Now that more information is being stored digitally it is making it easier to locate the information but we have to print off a copy if someone just wants to review it but can't charge because it's only a "view" for the copy of the report we just had to print.
- FOAA is rarely used by citizens. It is primarily used by businesses wanting to resell the data they get, sell a product to the city, or a potential/actual litigator fishing for information to sue the city.
- Prior to last year I responded to three such requests but was able to do so within hours. Once it is established that the records are discoverable, I try to respond as soon as possible. On two occasions I have done so while the person waited at my office. I find the more courteous and prompt you are the less aggravation you have to endure.
- I would rather see the fee increased to actual rate of pay for staff processing the request and give the requester an extra free hour.

- Generally agreeable if the requester follows protocols and has realistic expectations.
- Most of the requests are fairly simple to fulfill.
- Glad to do it...just requests can arrive during busy times and we have a difficult time with just two people in the office.
- Some entities will request vast amounts of information that would severely impact our ability to operate as well as operate at a loss financially. Increasing pay would help but will not help us with the staffing issues that some requests can cause. We also have increased risk of confidentiality releases due to the size of some of the past requests.
- FOIAs for commercial entities who use the data to solicit business should not be allowed for "free". FOIAs for emails are troublesome, but I'm not sure what the answer is...limit how far back searches can go? Each request be limited to one key word? Or one to/from exchange?
- We have only gotten official FOAA requests for purchasing data which is provided with a report from the financial software that takes minutes to do. The cost is minimal.
- Code enforcement officer spent time gathering information that the requester never picked up.



Maine Municipal
Association

60 COMMUNITY DRIVE
AUGUSTA, MAINE 04330-9486
(207) 623-8428
www.memun.org

To: Key Municipal Officials

From: Kate Dufour, Maine Municipal Association

Date: Friday, November 22, 2019

Re: Freedom of Access Requests Survey – *Time Sensitive*

The Right To Know Advisory Committee, which is in large part charged with overseeing the state's Freedom of Access Act, is discussing possible revisions to the fees charged for responding to public record requests. Concerns have been raised by some members of the committee that the current \$15/hour assessment (after the first hour) may not cover the expenses associated with identifying, retrieving, reviewing and redacting requested records.

Although the committee has data on requests made to state agencies, very little information about the specifics of the requests made to municipal officials are available.

In order to provide the committee with the information they need to decide whether changes are warranted, municipal officials are urged to complete the survey linked below.

Because the committee will discuss the adequateness of the current fee and the nature of the more complicated data requests at its December 4 meeting, your response to this information request by *noon on Monday, December 2* would be greatly appreciated. Also, please do not hesitate to share this survey with another municipal official in your community who may have the information necessary to respond to these questions.

You can access the survey [here](#).

If you would prefer a paper copy of the survey, please do not hesitate to contact Laura Ellis at lellis@memun.org or 1-800-452-8786. If you have questions about the survey, please contact Kate Dufour at kdufour@memun.org.

Thank you.

Freedom of Access Cost & Time Survey
November 2019

Please email or fax the completed survey to Laura Ellis at lellis@memun.org or 624-0129 by ***noon on Monday, December 2.*** If you have questions about the survey, please contact Kate Dufour at kdufour@memun.org or 1-800-452-8786. Thank you.

In 2018 how many freedom of access requests did you receive?

Of the total number of requests, how many were completed within 30 days?

On average, how many hours do you spend responding to requests that are completed within 30 days?

On average, how many hours do you spend responding to information requests that take 30 or more days to complete?

What factors are in place for requests that take 30 or more days to complete (e.g., number of records, amount of redacting necessary, etc.). Please provide as many details and examples as possible.

What is the average hourly rate paid to the person or persons in your community who normally respond to these requests?

What are the average total fees and costs, including hourly rate paid, to respond to these requests?

Please share any general comments you have regarding your experiences administering information requests.

TO: Right to Know Advisory Committee
Peggy Reinsch, OPLA

FROM: Julie Finn, Legislative Analyst, Judicial Branch

RE: Questions from PL 2019, ch. 489

DATE: December 2, 2019

The Right to Know Advisory Committee has asked the Judicial Branch to provide information and data regarding “the application for and issuance of search warrants authorizing the installation and monitoring of tracking devices and seeking content and location information under Maine Revised Statutes Title 16, chapter 3, subchapters 9-A, 10 and 11 and ... aggregate information about warrants, including warrants in which the application for the warrant included a request for an order to waive notice of the issuance of the warrant.”

1. Initiation of process: CR-077. A Law Enforcement Officer (LEO) fills out a search warrant form (attached) in accordance with M.R.U. Crim. P. 41 and/or 41B. A judge or justice or a justice of the peace must review the materials for compliance with the laws and constitution before signing the warrant. Not all search warrants are requested using the same form.
2. In addition to the installation and monitoring of tracking devices, warrants may be requested to search a person, location, vehicle, or for other purposes. In 2017, three checkboxes on page 2 of the warrant form were added to indicate (a) NOTIFICATION REQUIRED in acquisition of location or content information from an electronic device; (b) NOTIFICATION NOT REQUIRED in acquisition of location or content information from an electronic device; and/or (c) PRECLUSION of notice to owner or user subject to warrant for content or location information.
3. Recording and tracking of search warrants by the courts. All search warrants are recorded on a spreadsheet maintained separately in each court location. This spreadsheet contains the search warrant number, the name of the judge who signed, the date of filing, and the date returned with the inventory filed, if that is provided to the court. When an inventory is provided to the court, it may be multiple pages long. The spreadsheet does not contain specific information regarding what items were returned; which boxes were checked on the CR-077; or whether waiver of notice was allowed. The search warrant form, CR-077, and inventory form, CR-078, are filed in the case file created after a criminal complaint is filed.

Statewide, it is estimated that more than 2000 search warrants of all types are issued each year. After polling the court clerks throughout the state, it has been determined that in 2017, there were 2131 search warrants issued; in 2018, there were 2037 search warrants issued; and thus far in 2019, there have been 1722.

It is not uncommon that a search warrant and affidavit are sealed, preventing disclosure of pertinent information until ordered by the court.

The court's current case management system, known as MEJIS, does not track specific information regarding search warrants. A few courts record in MEJIS the existence of the search warrant and inventory but there is no uniform policy regarding this extra step.

4. Future tracking of search warrants: Odyssey. The Maine courts have used only a primarily paper-driven system of case management to date. However, the Judicial Branch is in the process of migrating to an electronic system and has contracted with Tyler Technologies to implement the new, modern case management system, known as Odyssey. This system will track warrants electronically and have the capacity to provide more detailed data.
5. Conclusion. In order to provide the information requested in PL 2019, ch. 489, Sec. 18, the courts would have to pull every file in which a search warrant was issued in a given period of time. The warrant would need to be reviewed by court staff knowledgeable in the law to determine whether (a) tracking devices had been placed; (b) whether content and location information had been sought; and (c) whether notice had been waived. Given that over 2000 search warrants are issued each year, it would be very time consuming and difficult to complete the report as requested. A determination of the number of work hours needed to pull the files, analyze the files and retrieve the information requested could be completed upon request.

Attachments: CR-077, CR-078

STATE OF MAINE

- UNIFIED CRIMINAL DOCKET
- SUPERIOR COURT
- DISTRICT COURT

County: _____

Location: _____

Docket No: _____

SEARCH WARRANT
(M.R.U. Crim. P. 41)

TO: Any officer authorized by law to execute this search warrant. On the basis of the

- Affidavit(s) by:
 - _____ dated, _____;
 - _____ dated, _____;
 - _____ dated, _____;

which affidavit(s) is/are attached to the original hereof and made a part thereof to be filed in the Unified Criminal Court at _____.

- Evidence given under oath/affirmation by:
 - _____ dated, _____;
 - _____ dated, _____;

which evidence was recorded on tape number(s) _____
to be filed in the Unified Criminal Court at _____.

I am satisfied that there is probable cause to believe that there are grounds for the issuance of a search warrant. You are therefore commanded to search the place(s), person(s) and/or electronic device(s) described below for the property, persons(s) and/or location or content information described below and, if the person, property, property and/or location or content information is/are found, to seize such property, persons(s) and/or location or content information and prepare a written inventory of the property seized.

Place(s), electronic device or person(s) to be searched:

Property, article(s) or location or content information to be searched for:

Name of owner or occupant of premises, if known:

SERVICE ON DOMESTIC OR FOREIGN ENTITIES. This warrant authorizes service of criminal process on domestic and/or foreign providers of electronic communication service or providers of remote computing services in accordance with 15 M.R.S. § 56 (2017).

DAYTIME WARRANT ONLY. This warrant shall be executed between the hours of 7:00 a.m. and 9:00 p.m. and shall be returned, together with a written inventory, within 14 days of the issuance hereof, to the _____ located at _____
Unified Criminal Court of Maine.

EITHER NIGHTTIME OR DAYTIME WARRANT. For reasonable cause shown in the affidavit(s)/evidence, this warrant may be executed in the daytime or in the nighttime (9:00 p.m. to 7:00 a.m.) and shall be returned, together with a written inventory, within 14 days of the issuance hereof, to the _____ located at _____
Unified Criminal Court of Maine.

UNANNOUNCED EXECUTION OF SEARCH WARRANT. For reasonable cause shown, this warrant may be executed by an officer without providing notice of the officer's purpose and office.

NOTIFICATION REQUIRED IN ACQUISITION OF LOCATION OR CONTENT INFORMATION FROM AN ELECTRONIC DEVICE. Notice shall be provided to the owner or user that content and/or location information was obtained from that owner's or user's electronic device within 3 days of obtaining the content and/or location information. The notice must be made by service or delivered by registered or first-class mail, e-mail or

NOTIFICATION NOT REQUIRED IN ACQUISITION OF LOCATION OR CONTENT INFORMATION FROM AN ELECTRONIC DEVICE. For reasonable belief shown that notification will have an adverse result, I order the notification required under 16 M.R.S. § 643 waived. I order the provider of electronic communication service or location information service to which the warrant is directed not to notify any other person, including but not limited to, customers, owners, or users of the account(s), of the existence of the warrant.

PRECLUSION OF NOTICE TO OWNER OR USER SUBJECT TO WARRANT FOR CONTENT OR LOCATION INFORMATION. For reasonable belief shown that notification will have an adverse result, I order the provider of electronic communication service or location information service to which the warrant is directed not to notify any other person, including but not limited to, customers, owners, or users of the account(s), of the existence of the warrant.

Issued at _____ in the County of _____
on _____.

Judge/Justice
Justice of the Peace

STATE OF MAINE

- UNIFIED CRIMINAL DOCKET
- SUPERIOR COURT
- DISTRICT COURT

County: _____
 Location: _____
 Docket No: _____

STATE OF MAINE

v.

INVENTORY
 M.R.U. Crim. P. 41(g)

On _____, I seized the following material(s) pursuant to the search warrant issued by _____ and dated _____.

- Attached are _____ additional sheet(s) of paper listing material(s) seized. They are incorporated as part of the inventory.
- This inventory made in the presence of the person from whose possession or premises the property was taken, to wit: _____
- This inventory made in the presence of the following credible person(s): _____

 Officer Taking Property

VERIFICATION

On the above date I seized the property set forth in this Inventory pursuant to the above-described search warrant.

Date: _____

 Officer Taking Property

Personally appeared the above-named _____ and made oath to the truth of the foregoing inventory.

Date: _____

 Clerk / Notary Public

