

RIGHT TO KNOW ADVISORY COMMITTEE
Improve FOAA Subcommittee

Wednesday, December 18, 2019
9:30 a.m.
State House Room 436

Meeting Agenda

1. Welcome and introductions
2. Review final language of recommendations
 - A. Warrants recommendation
 - B. Cap on copying fees
 - C. Changes to FOAA training statute
 - D. Request to Public Access Ombudsman for training recommendations
 - E. Remote participation – preamble
 - F. Emerging technologies study committee commendations
 - G. Additional criterion for public records exceptions reviews
3. Tiered fee schedule
Review draft
4. Unresolved issues
 - A. Fee waiver
 - B. FOAA request reporting requirements
 - C. Add to RTKAC membership: having legal or professional expertise in the field of data or personal privacy, appointed by the Governor
5. Other issues?
6. Adjourn

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

**PROPOSED DRAFT RECOMMENDATION CONCERNING INFORMATION
ABOUT SPECIFIC SEARCH WARRANTS
*REFLECTS DECISIONS MADE AT DEC. 4th 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 believes there is a benefit to having the information in some form, and 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.

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

**PROPOSED DRAFT LEGISLATION TO CAP COPYING COSTS
REFLECTS DECISIONS MADE AT DEC. 4th MEETING**

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 records provided electronically.

Summary

This draft caps the fee to cover the cost of copying at no more than 10¢ per page for a standard 8½" x 11" black and white copy of a record and clarifies that a per page copy fee may not be charged for records provided electronically.

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**PROPOSED DRAFT LEGISLATION TO AMEND FOAA TRAINING LAW
REFLECTS DECISIONS MADE AT DEC. 4th MEETING**

Sec. 1. 1 MRS §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 414, 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;

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D.

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, managers or administrators, assessors, code enforcement officers, planning board members and budget committee members of municipal governments;

G. ~~Officials~~ Superintendents, assistant superintendents and school board members of school administrative units; and

H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

SUMMARY

This draft makes the following changes to the requirements for training.

1. It clarifies that an official must complete training within 120 days of assuming the duties of the position.
2. It expands the municipal officials required to completed training to include code enforcement officers, town managers and administrators and planning board members.
3. It clarifies that school superintendents, assistant superintendents and school board members are required to complete training.

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**PROPOSED RECOMMENDATION TO IMPROVE TRAINING LAW
*REFLECTS DECISIONS MADE AT DEC. 4th MEETING***

Recommendation: 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

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**PROPOSED DRAFT LEGISLATION TO ADDRESS REMOTE
PARTICIPATION (NEW PREAMBLE)
*REFLECTS DECISIONS MADE AT DEC. 4th 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 are 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, the Freedom of Access Act was enacted years before technology supporting effective remote participation was created, and that technology has improved the ability for expansive access, and continues to advance;

Whereas, many in the private sector have embraced remote participation technology to improve participation in meetings and discussions that would not otherwise be as effective because of geographic diversity and other reasons for which the ability to be physically present is limited, as well as to improve efficiency and reduce costs;

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 proceeding to the public;

Whereas, enactment of the legislation provides clear guidance, and will ensure that if municipal, county and State public bodies engage in remote participation, these reasonable limitations will apply to ensure public access to the whole of each public proceeding;

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

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PARTICIPATION (NEW PREAMBLE)
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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:

PART A

Sec. A-1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

It is the intent of the Legislature that actions of public bodies subject to this subchapter be taken openly and their deliberations be conducted openly. This section governs participation in a public proceeding of such a public body by a member of that public body when the member is not physically present. Remote participation, which means participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401. The Legislature may not allow its members to participate remotely in public proceedings of the Legislature.

1. Remote participation; requirements. Except as provided in subsection 5, a public body subject to this subchapter may not allow a member of the public body to participate remotely in any of its public proceedings unless the participation is in accordance with this subchapter and:

A. After notice and public hearing, the public body has adopted a written policy or rule that authorizes a member of the public body who is not physically present to participate in a public proceeding of that public body 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 notice required by section 406 to hear all members of

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the public body. The policy may not allow remote participation in executive sessions. The policy must prohibit a member who is participating remotely from voting on an issue that was discussed in an executive session if the executive session immediately precedes the proceeding in which the vote is taken;

B. For public bodies consisting of 3 or fewer members, at least one member is physically present at the location identified in the notice required by section 406; and, for public bodies of more than 3 members, a quorum is physically present at the location identified in the notice required by section 406, unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time in which action must be taken. The determination that a quorum is not required under this paragraph must be made by the presiding officer of the public body and the facts supporting that determination must be included in the record of the meeting. A public body of 3 or more members may not consider 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.

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PARTICIPATION (NEW PREAMBLE)
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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;

B. The Commission on Governmental Ethics and Election Practices, as provided in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as provided in Title 22, section 2054, subsection 4;

D. The Maine State Housing Authority, as provided in Title 30-A, section 4723, subsection 2, paragraph B;

E. The Maine Municipal Bond Bank, as provided in Title 30-A, section 5951, subsection 4;

F. The Emergency Medical Services' Board, as provided in Title 32, section 88, subsection 1, paragraph D; and

G. The Workers' Compensation Board, as provided in Title 39-A, section 151, subsection 5.

PART B

Sec. B-1. 1 MRSA §431, sub-§4 is enacted to read:

4. Remote participation. "Remote participation" means participation in a public proceeding by a member of the body that is holding or conducting the public proceeding

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while the member is not physically present at the location of the public proceeding identified in the notice required by section 406.

Sec. B-2. 1 MRS §435 is enacted to read:

§435. Review of proposed remote participation authorization

1. Procedures before legislative committees. Whenever a legislative measure containing a new remote participation authorization or a change that affects the accessibility of a public proceeding is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to 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.

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PARTICIPATION (NEW PREAMBLE)
*REFLECTS DECISIONS MADE AT DEC. 4th MEETING***

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.

It prohibits remote participation in executive session. It also prohibits a member who is participating remotely in a proceeding from voting on an issue that was discussed in executive session that immediately preceded the vote in the public proceeding.

It requires a quorum of the body to be physically present at the location identified in the meeting notice unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time requiring action, or, for public bodies that consist of 3 or fewer members, at least one member of the public body must be physically present at the location identified in the meeting notice.

It requires that each member of a public body subject to the Freedom of Access Act be physically present in at least one public proceeding each year.

It requires that each member participating remotely identify all persons present at the remote location, that all votes be taken by roll call and that members participating remotely receive documents or other materials presented or discussed at the public proceeding in advance or when made available at the meeting, if the technology is available. The bill prohibits members who are not physically present at the meeting location from participating and voting in adjudicatory proceedings.

It requires that a state public body adopt its remote participation policy as a major substantive rule under the Maine Administrative Procedure Act.

It authorizes municipalities and counties to impose stricter requirements than are provided in this bill and allows municipalities and counties to prohibit the use of remote participation by any public body under their jurisdictions. The stricter requirements or the prohibition must be imposed through the adoption of an ordinance by the municipality or the county.

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It provides that an elected public body may adopt a remote participation policy only after the constituency of the elected public body has voted to authorize the body to adopt the policy.

It prohibits the Legislature from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication, but allows the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority, the Maine Municipal Bond Bank, the Emergency Medical Services' Board and the Workers' Compensation Board to continue allowing remote participation at their public proceedings as currently authorized in law.

Part B of the bill amends law to require the joint standing committee of the Legislature having jurisdiction over judiciary matters to conduct a review of any proposed statutory authorization of remote participation or change in accessibility with respect to public proceedings.

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**Right to Know Advisory Committee
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**PROPOSED DRAFT RECOMMENDATION TO STUDY EMERGING
TECHNOLOGIES
*REFLECTS DECISIONS MADE AT DEC. 4th MEETING***

Recommendation: That the Legislature establish a study committee of appropriate stakeholders to examine the specific challenges emerging technologies create for governmental entities and the public under the Freedom of Access Act. The study committee shall focus on the responsibility of governmental entities to ensure public access to public records in the face of new and emerging technologies and shall develop recommendations that are designed to preserve communications that can be accessed by the public. The study committee shall also examine the use of technologies that allow communication by members of public bodies during public proceedings to consider whether such communications should be authorized. 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;
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; and
4. Best practices and guiding principles on the use of communication technologies by members of public bodies during public proceedings.

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**PROPOSED DRAFT LEGISLATION TO AMEND PUBLIC RECORD
EXCEPTIONS REVIEW CRITERIA
*REFLECTS DECISIONS MADE AT DEC. 4th MEETING***

Sec. 1. 1 MRSA §432, sub-§2, ¶G-1 is enacted to read:

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

Sec. 2. 1 MRSA §434, sub-§2, ¶G-1 is enacted to read:

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

SUMMARY

This draft adds to the list of criteria considered by the Right to Know Advisory Committee when reviewing existing public records exceptions and by the Judiciary Committee when evaluating proposed public records exceptions. The new criterion is whether the providing access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions.

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**Right to Know Advisory Committee
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**PROPOSED DRAFT TO AMEND FOAA PAYMENT OF COSTS PROVISION
REFLECTS DECISIONS MADE AT DEC. 4TH MEETING**

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

8. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees for public records as follows.

A. The agency or official may charge a reasonable fee to cover the cost of copying.

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record ~~as follows, of not more than \$15 per hour after the first hour of staff time per request.~~ Compiling the public record includes reviewing and redacting confidential information.

~~(1) The agency or official may not charge a fee for the first 3 hours of staff time per request.~~

~~(2). After the first 3 hours of staff time and between 4 and 6 hours of staff time per request, the agency or official may charge a fee of not more than \$25 per hour.~~

~~OPTION A: (3) After six hours of staff time per request, the agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record as long as the actual cost does not exceed a reasonable hourly rate for the staff time per hour necessarily incurred in searching for, retrieving and compiling the requested public record.~~

~~OPTION B: (3) After six hours of staff time per request, the agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record as long as the actual cost does not exceed a reasonable hourly rate for the staff time per hour necessarily incurred in searching for, retrieving and compiling the requested public record and, prior to the date of receiving the request, an agency or official has posted on the agency or official's publicly accessible website or otherwise documented a written policy that specifies the applicable conditions concerning the searching for, retrieving and compiling the requested public record, including the maximum hourly rate.~~

~~OPTION C: (3) After six hours of staff time per request, the agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record as long as the actual cost does not exceed the lowest hourly rate for the staff time per hour for a person who has the necessary skill and training incurred in searching for, retrieving and compiling the requested public record.~~

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- C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.
- D. An agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.
- E. The agency or official may charge for the actual mailing costs to mail a copy of a record.
- F. An agency or official may require payment of all costs before the public record is provided to the requester.

SUMMARY

This draft makes the following changes.

1. It extends the time period for which an agency or official may not charge a fee for searching for, retrieving and compiling a requested public record from the first hour of staff time per request to the first 3 hours of staff time per request.
2. It limits the fee charged to no more than \$25 per hour of staff time for the staff time after 3 hours and between 4 and 6 hours.
3. After 6 hours of staff time, it authorizes an agency or official to charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record. The draft also sets forth the parameters for determining "actual cost."

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PROPOSED DRAFT TO AMEND FOAA WAIVER PROVISION
Not approved; suggested language based on discussion at Dec. 4th meeting

Sec. 1. 1 MRSA §408-A, sub-§11 is amended to read:

11. Waivers. The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or

B. The agency or official considers release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. If an agency or official denies a request for a waiver of part or all of the total fee charged based on a determination that the release of the public record does not meet the standard set forth in this paragraph, the agency or official shall provide written notice of the denial and state the reason for the denial of the waiver prior to proceeding with the request.

SUMMARY

This draft amends the provision authorizing an agency or official having custody or control of a public record subject to a request to waive part or all of the total fee. The draft requires that, if an agency or official denies a request for a waiver, the agency or official must provide written notice of the denial and state the reason for the denial of the waiver

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CURRENT LAW

Title 5: ADMINISTRATIVE PROCEDURES AND SERVICES

Part 1: STATE DEPARTMENTS

Chapter 9: ATTORNEY GENERAL

§200-I. Public Access Division; Public Access Ombudsman

1. Public Access Division; Public Access Ombudsman. There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.

[PL 2007, c. 603, §1 (NEW).]

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; [PL 2007, c. 603, §1 (NEW).]

B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws; [PL 2007, c. 603, §1 (NEW).]

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; [PL 2007, c. 603, §1 (NEW).]

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; [PL 2013, c. 229, §1 (AMD).]

E. Make recommendations concerning ways to improve public access to public records and proceedings; and [PL 2013, c. 229, §1 (AMD).]

→ 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. [PL 2013, c. 229, §2 (NEW).]

[PL 2013, c. 229, §§1, 2 (AMD).]

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.

[PL 2007, c. 603, §1 (NEW).]

4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the

records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

[PL 2007, c. 603, §1 (NEW).]

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; [PL 2007, c. 603, §1 (NEW).]
- B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials; [PL 2007, c. 603, §1 (NEW).]
- C. The number of complaints received concerning respectively public records and public meetings; [PL 2007, c. 603, §1 (NEW).]
- 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; [PL 2007, c. 603, §1 (NEW).]
- E. The number of inquiries and complaints that were resolved; [PL 2007, c. 603, §1 (NEW).]
- F. The total number of written advisory opinions issued and pending; and [PL 2007, c. 603, §1 (NEW).]
- G. Recommendations concerning ways to improve public access to public records and proceedings. [PL 2007, c. 603, §1 (NEW).]

[PL 2015, c. 250, Pt. B, §1 (AMD).]

6. Repeal.

[PL 2009, c. 240, §7 (RP).]

SECTION HISTORY

PL 2007, c. 603, §1 (NEW). PL 2009, c. 240, §7 (AMD). PL 2013, c. 229, §§1, 2 (AMD). PL 2015, c. 250, Pt. B, §1 (AMD).

The Revisor's Office cannot provide legal advice or interpretation of Maine law to the public.
If you need legal advice, please consult a qualified attorney.

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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

231 PROPOSAL 6: LEGISLATION

232

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

234

235 Sec. 1. 1 M.R.S.A. § 411, sub-§ 2, ¶ M, as amended by PL 2015, c. 250, Pt. A, §1, is
236 further amended to read:

237

238 [2. Membership. The advisory committee consists of the following members:]

239

240 M. The Attorney General or the Attorney General's designee; ~~and~~

241

242 Sec. 2. 1 M.R.S.A. § 411, sub-§ 2, ¶ N, as enacted by PL 2015, c. 250, Pt. A, §2, is
243 amended to read:

244

245 N. One member with broad experience in and understanding of issues and costs
246 in multiple areas of information technology, including practical applications
247 concerning creation, storage, retrieval and accessibility of electronic records;
248 use of communication technologies to support meetings, including
249 teleconferencing and Internet-based conferencing; databases for records
250 management and reporting; and information technology system development
251 and support, appointed by the Governor; and

252

253 Sec. 3. 1 M.R.S.A. § 411, sub-§ 2, ¶ O is enacted to read:

254

255 O. One representative having legal or professional expertise in the field of data
256 or personal privacy, appointed by the Governor.

Right to Know Advisory Committee
c/o Joint Standing Committee on the Judiciary
Room 438 State Office Building
Augusta, ME 04330

Dear Right To Know Advisory Committee Members,

The Maine Freedom of Information Coalition (MFOIC) is aware of the Right to Know Advisory Committee's (RTKAC) discussions regarding a potential recommendation to the Judiciary Committee to "Enact legislation to adjust the fees that may be charged for searching for, retrieving and compiling public records in response to requests."

We at the MFOIC believe, as we believe the RTKAC members do as well, that "freedom of access is not real unless it is affordable." A public record is not in fact "public" if the cost to obtain it is unaffordable. The value of transparency in a democratic society cannot be reduced to dollars and cents; an informed public is the very fabric of our society.

We strongly believe that transparency should not be based on substantial "user fees" or a "pay to play" system, with wealthy people able to buy access while others cannot. We all as a society benefit from open access to government information, whether the request is by a concerned citizen, a journalist, or a researcher.

The Board of MFOIC encourages the RTKAC to consider the following points when deciding whether to make a recommendation on this topic at this time.

- We wholeheartedly concur, as we believe the Committee does, with the Declaration of Public Policy in the FOAA: "The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly."
- We take this to mean that access to records generated by government are a routine function of government in the same way that providing for health services, commerce support, roadways, education, etc. are government responsibilities, all of which are paid for mainly through taxation.
- Section 8 of the FOAA establishes some fees to help offset some of the costs of responding to FOAA requests. We understand that a request for information from state agencies by the Ombudsman, and a somewhat similar polling of members by the Maine Municipal Association, indicate that the vast majority of FOAA requests are fulfilled within a week, and require requesters to pay affordable and reasonable costs as currently defined in the statute.
- We understand that there is a RTKAC concern based on a number of anecdotal examples that some FOAA requests require a good deal of staff time to provide a

response. Some of these requests are made by commercial entities which then go on to use that information for profit generating activities. These requests can require a large amount of staff time and sometimes constitute a burden upon the proper operation of an agency or municipality. We also understand that some municipalities feel they are burdened by requests made by disgruntled persons that have no apparent legitimate purpose but are simply meant to tie up staff time and be a burden on the operation of the municipality.

- The potential recommendations under consideration by the RTKAC are, we understand, meant to address these outlier types of burdensome requests by making those who make these requests assume most of the actual costs of fulfilling those requests.
- As we understand it, the rationale for this approach is twofold: either to ensure that those who are intending to generate profit from the FOAA response pay as close to the cost of responding to that request as possible in order to minimize costs to taxpayers; or to ensure that those who make what some have referred to as “spite requests” similarly shoulder as much of the cost of responding to those requests as possible.
- While we understand the burden that these types of requests can put on an agency or municipality, we are **very concerned** about the potential for unintended consequences for the press, academic and other researchers, and for the public in general. We are especially concerned that this recommendation may be based on somewhat random anecdotes rather than on researched quantitative data. The simple surveys responded to by self-selected Maine Municipal Association members, and by state agencies who self-selected to respond to the Ombudsman’s questions suggest that this is a solution meant to address a small very percentage of FOAA request outliers.
- We are also concerned about the potential for abuse where agencies can use substantial fees to block or deter requests for records, and thereby keep public records secret merely by quoting large user fees. As the law stands now, there is no real check on excessive fees and we are aware of instances where public agencies have quoted enormous fees only to back away from them later under public pressure. The sort of amendment under consideration could encourage such gamesmanship by agencies. See <https://www.sunjournal.com/2010/08/16/state-wants-36000-public-records-wind-energy/>, and <https://www.preti.com/news/preti-flaherty-prevails-in-foaa-case-superior-court-rules-in-favor-of-macimage-of-maine>.

We at the MFOIC urge the RTKAC not to support the draft recommendation referenced above at this time. We urge instead a careful reading and review of the tools already built into the statute that:

- deal with requests that are “unduly burdensome or oppressive”
- allow a demand for payment in advance for those who have not fully paid the fees from past FOAA requests

- allow a demand for payment in advance for fees that will exceed \$100.

All of these stipulations have been put forward by prior RTKACs to address the types of problems mentioned above. If these provisions are not sufficient to deal with most of these anecdotal outlier problems, we urge the RTKAC to gather solidly researched information to identify and suggest precise remedies for what problems exist without placing additional cost burdens on the great majority of FOAA requests and requesters, and to avoid the potential for abuse if a cost structure is put in place that makes public records requests unaffordable.

Thank you for your consideration of these points. We would be happy to answer any questions or develop these points more fully if the Committee would find that helpful.

Sincerely,
Board of Directors of the Maine Freedom of Information Coalition