

FOAA Requests for Public Records
How to Comply with the Freedom of Access Act

AGENDA

Agency Responsibilities in Freedom of Access Compliance and the Role of the Public Access Ombudsman

The Freedom of Access Act and Public Records

The Many Exceptions to Public Records

The Creation, Maintenance and Retention of Records and Why this Matters to FOAA

The FOAA Process from Request to Response

FOAA and Public Meetings
The Idea of Transparent & Open Government

Public Policy for Open Deliberations and Actions

Entities Subject to Open Meeting Requirements

Mechanics of Conducting Lawful Meetings

Executive Session

RESOURCES

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RESPONDING TO A FREEDOM OF ACCESS ACT (FOAA) REQUEST

Receipt

1. Is it a FOAA request, a request for information, or a request to answer questions?
 - *Agency dissemination of information as usual course of business, not all is FOAA*
 - *Distinguish request for records from questions*
 - *For hybrid requests that include questions and possibly a records request, clarify with requester, if possible, and summarize the history of these communications in the response.*
2. What is the date of receipt?

Date of receipt is date a “sufficient description” of the record is received by the agency or official at the office responsible for maintaining the record.

 - *Five day deadline; never let it sit on your desk*

FOAA database entry

How is the agency tracking and retaining FOAA requests?

Communication

1. Do agency management, the public access officer, or the press contact need to be consulted?
2. Who has custody of responsive records?

Acknowledgment

1. Acknowledge receipt of request within 5 working days of receipt of the request. [§ 408-A(3)]¹
2. Forward a request made to a department or office within an agency to the office or official who maintains the record “without willful delay.”
3. Notify the requester that the request was forwarded within the agency
4. A forwarded request must be acknowledged by the office to which it was forwarded within 5 working days of receipt of the request.

Clarify

1. Restate the language of the request in the acknowledgment to confirm scope and content.
2. Communicate with requester to narrow a broad request.

Estimate

1. Provide an estimate of time within which the agency will comply with request within a reasonable amount of time of receiving the request. [§ 408-A(3)]
FOAA requires a reasonable time frame for providing records. [§ 408-A]
Provide estimate of fees within a reasonable amount of time of receiving the request. [§ 408-A(3)]
 - Seek confirmation from requester before proceeding with response for estimate greater than \$30.

¹ All citations are to M.R.S. Title 1.

Current with legislation through the 2018 Second Regular Session of the 128th Legislature.

2. Review any fee waiver request.

Notice of denial

1. Provide written notice to requester within 5 working days of receipt of the request if denying access to any public records. State the legal basis for the denial. [§ 408-A(4)]
2. If the identification of confidential records requires more time, provide an initial written notice within 5 working days of receipt of the request explaining that access to some public records may be denied after the review is complete. This notice may be combined with acknowledgement of receipt.
3. A supplemental denial or further explanation of the grounds for the denial may be provided depending on the circumstances.

Search

- *Due diligence: Can you demonstrate that you conducted a search reasonably calculated to uncover all relevant documents?*
1. Key custodians: Public access officer and/or assigned staff identify who may have responsive records.
 2. Repositories: Identify repositories associated with these custodians.
 - Email regardless of source or location
 - Personal network (home directories)
 - Local repositories ("My Documents" and other local collections)
 - Shared (non-custodian-based) repositories
 - Hardcopy documents
 3. Scope of the search: Develop a set of relevant filter criteria such as a keyword list, date range and file types.
 - In some circumstances, it may be necessary to agree with requester on the culling criteria.

Confidentiality review

Determine if any public records requested are confidential, privileged or otherwise protected from disclosure. [§ 402(3), 408-A]

1. Redact confidential or privileged material where reasonably possible rather than withholding entire public record.
2. If access is denied in whole or in part, provide written notice of denial and state reason for denial. [§ 408-A(4)]
3. Depending on the circumstances, including the types and numbers of records requested, written notice may take the form of a letter summarizing the reasons for denial of access or of a more formal log.

Provide access

Schedule time to inspect records; provide paper copies; or provide access to an electronically stored record as either a printed document or in the medium it is stored at the discretion of the requester. [§ 408-A(5) &(7)]

Time and expense

1. Track staff time, actual costs and copying fees.

2. The invoice will account for the recorded costs and any fee waiver that has been granted.
3. Fees:
 - Reasonable copying fee [§ 408-A(8)(A)]
 - Actual cost of searching, retrieving & compiling (compiling includes reviewing & redacting confidential information) of \$15/hour after the first hour of staff time. [§ 408-A(8)(B)]
 - Determine actual cost to convert into form susceptible of visual or aural comprehension or into usable format. [§ 408-A(7)(A) & (8)(C)]
 - Actual mailing costs. [§ 408-A(8)(E)]
4. No charge for inspection unless public record cannot be inspected without being compiled or converted. [§ 408-A(1) & (8)(D)]
5. Fee notification if cost is greater than \$30.
 - If estimated total cost is greater than \$30, you must inform requester (preferably in writing) before proceeding. [§ 408-A(9)]
6. Fee notification if cost is greater than \$100.
 - If estimated total cost is greater than \$100, requester may be required to pay all or portion of estimated costs before search, retrieval, compiling, conversion & copying.
 - Payment in advance of search, retrieval, compiling, conversion & copying may be required if requester has previously failed to pay properly assessed fee in timely manner. [§ 408-A(9) & (10)]
7. Part or all of the fee may be waived if:
 - Requester is indigent, or
 - The agency determines release of public record requested to be in public interest because doing so is likely to contribute significantly to public understanding of operations or activities of government and is not primarily in commercial interest of requester.

Close the FOAA request

HOW TO CONDUCT A FOAA SEARCH FOR EMAIL

The Freedom of Access Act (FOAA) defines searching, retrieving, compiling, reviewing, redacting and converting as actions an agency or official may charge a requester in responding to a FOAA request. Of all of these activities, the search for records can be the most challenging. Especially with broad or vague FOAA requests for email, figuring out how to proceed with a search that will be complete but not pose an undue burden on the normal operations of staff or officials can be troublesome. A systematic approach that is reasonably calculated to uncover all relevant emails will save time and avoid haphazard results.

The FOAA search is one step in a five-part process that begins with the proper preservation of public records and ends with the timely delivery of a responsive but not confidential subset of documents. To be useful in practice, any protocol for responding to a request for emails should include instructions for the retention, search, assembly, review and production of the records.

Retain: Preserve the entire pool of emails subject to public records law

Email communications in the possession or custody of staff or appointed officials that concern the transaction of government business are public records and must be retained according to state retention schedules. Preservation of public records in a recordkeeping system sanctioned and maintained by the agency ensures control of the public email of both current and former employees and officials. Access to email is obviously hindered by the use of personal email accounts for public business.

Search: Collect raw subset of relevant emails

Clarifying the request with the requester to narrow the time frame, content area and possible staff or officials who may have communications will help make relevant emails easier to find.

Custodians are individuals who are likely to be in possession or custody of emails responsive to the FOAA request. Identification of custodians is crucial to targeting the location of potentially responsive records within the larger pool of emails that have been retained.

After the custodians have been named, their **repositories** containing potentially responsive records are identified. This includes all sources and formats of email and any attachments that may be stored on the local network mail server, in a remote mail server, in a web-based account such as Yahoo or Gmail, or in locally-saved Personal Storage (PST) or individual files.

Once the repositories have been identified, **filter criteria** such as the date range of the request and relevant keywords can be used to winnow out a subset of records that are responsive. The subset of records produced from this initial electronic search will include "hits" that are responsive but also some emails that are outside the request parameters. These raw search results are collected in a working file for the next step in the process.

Assemble: Process the selected emails to create a subset for review

A secondary search is conducted by the custodian to remove nonresponsive emails and duplicates. The review set of responsive emails can then be exported from the custodian to the person designated as the reviewer.

Review: Identify and redact confidential or privileged information

The review set of documents is checked for confidentiality and redactions or denials are marked as appropriate. The subset of responsive, non-confidential emails is prepared for production.

Access: Production of responsive, non-confidential subset of records

The production set of public records is exported or sent to the requester. If the scope of the first production set is too narrow, the criteria for an expanded search can be determined for a subsequent response.

An agency should retain separate files with the production set of public records as well as the confidential records with and without redactions.

FOAA and Public Meetings *Key Concepts*

Open Deliberations and Actions

1 M.R.S.A. § 401

§ 401. Declaration of public policy; rules of construction

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*.

It is further the intent of the Legislature 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 this subchapter.

This subchapter *does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes* of this subchapter.

This subchapter shall be *liberally construed* and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

1975, c. 758; 2011, c. 320, § B-1.

Public Proceeding

1 M.R.S.A. § 402

§ 402. Definitions

2. Public proceedings. The term “public proceedings” as used in this subchapter means the *transactions of any functions affecting any or all citizens* of the State by any of the following:

C. Any board, commission, agency or authority of any *county*, municipality, school district or any regional or other political or administrative subdivision;

1 M.R.S.A. § 403

§ 403. Meetings to be open to public; record of meetings

1. Proceedings open to public. Except as otherwise provided by statute or by section 405, all *public proceedings must be open to the public and any person must be permitted to attend* a public proceeding.

Credits

1975, c. 758; 2009, c. 240, § 1, eff. June 2, 2009; 2011, c. 320, § C-1.

Executive Session

1 M.R.S.A. § 405

§ 405. Executive sessions

Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions.

1. Not to defeat purposes of subchapter. An executive session *may not be used to defeat the purposes* of this subchapter as stated in section 401.

2. Final approval of certain items prohibited. An ordinance, order, rule, resolution, regulation, contract, appointment or other official action *may not be finally approved* at an executive session.

3. Procedure for calling of executive session. An executive session may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies.

4. Motion contents. A motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.

5. Matters not contained in motion prohibited. Matters other than those identified in the motion to go into executive session may not be considered in that particular executive session.

6. Permitted deliberation. Deliberations on only the following matters may be conducted during an executive session:

A. Discussion or consideration of the employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an individual or group of public officials, appointees or employees of the body or agency or the investigation or hearing of charges or complaints against a person or persons subject to the following conditions:

(1) An executive session may be held only if public discussion could be reasonably expected to cause damage to the individual's reputation or the individual's right to privacy would be violated;

(2) Any person charged or investigated must be permitted to be present at an executive session if that person so desires;

(3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against that person be conducted in open session. A request, if made to the agency, must be honored; and

(4) Any person bringing charges, complaints or allegations of misconduct against the individual under discussion must be permitted to be present.

This paragraph does not apply to discussion of a budget or budget proposal;

B. Discussion or consideration by a school board of suspension or expulsion of a public school student or a student at a private school, the cost of whose education is paid from public funds, as long as:

(1)¹The student and legal counsel and, if the student is a minor, the student's parents or legal guardians are permitted to be present at an executive session if the student, parents or guardians so desire;

C. Discussion or consideration of the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency;

D. Discussion of labor contracts and proposals and meetings between a public agency and its negotiators. The parties must be named before the body or agency may go into executive session. Negotiations between the representatives of a public employer and public employees may be open to the public if both parties agree to conduct negotiations in open sessions;

E. Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's or agency's counsel to the attorney's client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage;

F. Discussions of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute;

G. Discussion or approval of the content of examinations administered by a body or agency for licensing, permitting or employment purposes; consultation between a body or agency and any entity that provides examination services to that body or agency regarding the content of an examination; and review of examinations with the person examined; and

H. Consultations between municipal officers and a code enforcement officer representing the municipality pursuant to Title 30-A, section 4452, subsection 1, paragraph C in the prosecution of an enforcement matter pending in District Court when the consultation relates to that pending enforcement matter.

Credits

1975, c. 758; 1979, c. 541, § A, 3, eff. June 22, 1979; 1987, c. 477, §§ 2, 3; 1987 c. 769, § A, 1, eff. April 26, 1988; 1999, c. 40, §§ 1, 2; 1999, c. 144, § 1; 1999, c. 180, §§ 1 to 3; 2003, c. 709, § 1; 2009, c. 240, § 2, eff. June 2, 2009.

**CERTIFICATION OF COMPLETION OF FREEDOM OF ACCESS
TRAINING
REQUIRED BY 1 M.R.S.A. § 412**

I, _____, hereby certify

that I have met the training requirements

set forth in 1 M.R.S.A. § 412

by completing the following training:

“How to Comply with the Freedom of Access Act: Public Records and Public Meetings”

Presented by Brenda L. Kielty, Maine Public Access Ombudsman

Maine County Commissioner Orientation & Training
December 14, 2018

Signature

Printed Name

Elected Office Note: Training must be completed within 120 days after an elected official takes the oath of office.