Maine Freedom of Access Act

1 M.R.S. section 400, et seq.

Training for the Maine County Commissioners Association

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https://www.maine.gov/foaa/index.htm

Training Objectives

- Why are you here?
  - County officials are public record "creators" with duties to manage, retain and produce public records. Your public records are subject to disclosure under FOAA.
  - County Commissions, committees and subcommittees governed by FOAA public proceedings requirements.
- Purpose today?
  - Overview of the Freedom of Access Act
  - Satisfy FOAA training for elected and appointed county officials and public access officers as required by 1 M.R.S. section 412.
  - Sample training completion form can be found here.

Transparent and Open Government

Declaration of Intent

"... 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..."

Liberal Construction

"This subchapter shall be liberally construed and applied to promote its underlying purposes and policies..."

1 M.R.S.A. § 401

The Maine Supreme Judicial Court has elaborated the purpose of FOAA by reference to the intent of the federal FOIA *"to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."*

FOAA

Maine's Freedom of Access Act (a/k/a "Right-to-Know" law)

- First enacted in 1959, then replaced in 1976 with current structure
- Covers public records and proceedings
- Applies to executive and legislative officials and bodies

FOIA

U.S. Freedom of Information Act

- Became law in 1967, then amended in 1974 to protect citizens' rights to information about themselves
- Covers only records
- Applies only to federal executive agencies and not to Congress

What Does the Maine Law Cover?

Public Records

- Written, graphic or electronic
- In possession or custody of an agency or official of State or political subdivisions
- Received, prepared or containing information related to transaction of public business

Public Proceedings

- Transaction of any function affecting citizens
- By one of the covered bodies
- Applies to subcommittees and task forces

FOAA *in the context of government information*

- Government is a “storehouse” of information
- Individuals manage data and records in this storehouse
- “Curate and convey” is a core function of agency personnel in the ordinary course of governmental business
- FOAA requests for records are a small segment of the flow of information
- Agency response to a FOAA request must comply with statutory requirements

Public Records Definition

1. Any format or medium
2. In the possession or custody of an agency or official
3. Concerning the transaction of government business

What about public records exceptions?

Broad definition of public record AND...

Exemptions are construed narrowly due to public policy in favor of open government

Some Exceptions

- Records designated confidential by statute
- Medical and EMS records
- Attorney-client privileged communications
- Collective bargaining materials
- Security plans and procedures for purpose of preventing terrorism
- Information security/information technology infrastructure
- "Personal contact information" of public employees (but not elected officials)
- Social security numbers

1 M.R.S.A. § 402(3)

Process for Access to Public Records

What can the public expect when making a FOAA request?

1. **Acknowledgment** within five working days of receipt
2. **Denial** or preliminary denial within five working days of receipt
3. **Estimate** of time to complete and cost within a reasonable amount of time
4. **Access** to inspect or copy public records within a reasonable amount of time
5. **Appeal** a denial of records to Superior Court within 30 calendar days of receipt of written denial

Process for Access to Public Records

What responsibilities does a public official have for responding to a request for records?

- Determine what process applies: communication policy or FOAA policy?
- Centralized response (Department Head, Committee Chair or Public Access Officer?) or direct response from official?
- Receipt, tracking, acknowledge, clarify, deny, estimate, search, confidentiality review, time and expense, production

What about Repeated, Broad or Vexatious Public Record Requests?

Action for protection from overly burdensome FOAA requests can be sought by agency but...

- Requires extraordinary circumstances
- Creates remedy for limited situation where request is so extensive it is an undue burden
- Allows agency to seek protective order from court limiting the obligation to produce documents
- Showing of good cause and strict procedural steps

1 M.R.S.A. § 408-A(4-A)

Why Records Management Matters

- FOAA goal of open accountability not possible without records management and retention

- All Officials and staff encounter the lifecycle of records
  - Creation/Receipt
  - Use/Maintenance
  - Disposition

- The minimum time records must be kept before legal disposal is based on the content of record and the relative value of the record for legal, historical, administrative and fiscal purposes.

Records Management

- The disposition of local government records is governed by state law and record retention schedules as determined by the State Archivist 5 M.R.S. section95-B.
- Commission documents, drafts, agendas, minutes, notes, electronic communications and other related materials may be subject to preservation and retention requirements.
- County records management program should establish standards for capture, retention and disposition of Commission, committee, member and staff materials.

Meetings: Open to the Public

"...all public proceedings must be open to the public and any person must be permitted to attend a public proceeding."

- "Transactions of any functions" affecting any citizen
- Actions taken openly
- Deliberations conducted openly
- No clandestine meetings
- Does not prohibit communications outside the meeting unless used to defeat the purpose of the statute

Meetings: Rights of the Public

To attend any public proceeding and get minutes	• BUT not to speak unless the body permits it
To record or broadcast	• BUT not in a way that interferes with the meeting
To get advance notice of when and where	• EVEN emergency meetings, if practicable
To challenge in Superior Court the legality of final actions taken in executive session	• AND have the court declare the action null and void

Notice of Meeting

- Commission, committees and subcommittees must conduct business in public with limited exceptions, such as executive session topics
- Notice of meeting time and place
- In ample time to allow public attendance
- In a manner reasonably calculated to notify general public
- For “emergency” meeting, notice to local media “whenever practical” by same or faster means used to notify members

Record of Meeting

- Unless otherwise provided by law
- Record of proceeding made available to public within reasonable time
- Date, time, place
- Members recorded as present or absent
- All motions and votes by individual roll call
- Can be written, audio or video record
- Advisory bodies exempt

Remote Meetings

- Pursuant to adopted policy
- Meaningful opportunity for members of public to attend remotely when members of body are remote
- Members of public may record remotely using same platform if platform allows persons other than host to record, no additional costs to body and not interfere with orderly conduct of remote meeting

How Does County Government Implement FOAA Compliant Public Meetings?

- In some instances, FOAA sets minimum baseline
- Approved local policy and procedures govern administration
- More developed policies demonstrate:
  - consistency across different local bodies
  - standard operating procedures
  - responsiveness to various needs of the community
  - clarity and specificity

Common Meeting Questions Not Answered By FOAA

- How is a meeting scheduled?
- How much notice is "ample"?
- Is the agenda included in the notice?
- What information is in the agenda?
- When are supplemental meeting materials available to members and to the public?
- How is notice posted?
- What is an "emergency" meeting and how much notice is required?
- Is public comment permitted?
- What is the official record of the meeting—if written minutes, what is included?

Unlawful Secret Meeting?

- Substantive discussions held "off mike" before or after a remote public meeting
- Conversations in the parking lot after the conclusion of a public meeting
- Text or chat private messaging during a public meeting
- One member communicating separately with every other member about the same substantive topic
- Members of the same board or committee posting comments on social media and responding to each other's posts
- Circulating meeting minutes to members via email for approval

Executive Session

- Strictly limited grounds

- Subjects:
  - Confidential by statute
  - Certain employment related matters
  - Consideration of the sale or acquisition of real property or economic development, but only if premature disclosure would hurt the municipality's competitive or bargaining position
  - Labor contracts
  - Consultations with legal counsel concerning pending or anticipated litigation, settlements or other legal rights and responsibilities of the public body
  - Student suspension or expulsion

Executive Session

- Procedural Safeguards
  - Motion must state "precise nature of the business of the executive session"
  - Motion must cite statutory authority for the executive session
  - 3/5 vote of the members of the body, present and voting, in a public recorded vote
  - "An ordinance, order, rule, resolution, regulation, contract, appointment or other official action may not be finally approved" in executive session

Executive Session

- Cannot discuss the budget or a budget proposal in executive session
- Matters other than those in the motion may not be considered in that particular executive session
- Public records do not include documents prepared for use during or notes made in proper executive session
- Understand what MUST be kept confidential and what MAY be kept confidential
- Public disclosure of executive session privileged discussions could have a prejudicial effect on the County

Executive Session

- "Rules Governing the City Council" *1/09/2024 – 1/07/2025*
- Sec. 16. Confidentiality

(a) Confidential information includes but is not limited to statements made by individuals participating in executive session, documents prepared specifically for an executive session, and information in any form that is within one or more of the exceptions to the definition of public record, unless otherwise designated by the city Council in cases where the Council has the exclusive right to waive confidentiality.

(b) Officials shall not discuss the confidential information of the City or the City Council at home, at work, online, in public spaces, or in any other location. The place for such discussion is in executive session. Councilors shall not disclose or discuss confidential information or materials held or distributed in executive session with any person not otherwise authorized or privileged to receive that information.

Penalties

- A willful, intentional, or knowing violation of FOAA is subject to a civil penalty of not more than $500; up to $1,000 for a second violation within 4 years; up to $2,000 for any violation within 4 years of 2 or more violations by the same agency.
- It is a Class D crime to intentionally remove, alter or destroy public records
- It is a Class E crime to violate the record retention law

Attorneys' Fees

- Reasonable attorneys' fees can be awarded to a plaintiff who substantially prevails if a public agency or official acted in bad faith:
  - In denying access to public records, or
  - In taking final action in an executive session