

RIGHT TO KNOW ADVISORY COMMITTEE

PROPOSED AGENDA

September 17, 2014

9:00 a.m.

Room 438, State House, Augusta

Convene

1. Welcome and Introductions
2. Overview of types of technology/cloud computing data storage/ social media; how can technology, cloud computing and social media be used by government entities?
Representatives of Google and Microsoft (invited, but not confirmed)
Greg McNeal, Chief Technology Officer, Office of Information Technology
3. Legislation in other states addressing use of technology by government entities
RTKAC staff
4. Intersection of Freedom of Access Act with new and emerging technology
Brenda Kielty, Public Access Ombudsman
5. Resolve 2013, c. 112: Privacy of social media and email; cloud storage of school data
 - JUD bill, LD 1194, An Act to Protect Social Media Privacy in School and the Workplace;
 - EDU bill, LD 1780, An Act To Prohibit Providers of Cloud Computing Service to Elementary and Secondary Educational Institutions from Processing Student Data for Commercial Purposes
6. Update on activities re: LD 1818, An Act to Facilitate Public Records Requests to State Agencies
7. Agenda and schedule for 3rd meeting--- remote participation in public proceedings?
8. Other?

Adjourn

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TITLE 1 GENERAL PROVISIONS

CHAPTER 13 PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1 FREEDOM OF ACCESS

§400. Short title

This subchapter may be known and cited as "the Freedom of Access Act."

§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.

§402. Definitions

1. Conditional approval. Approval of an application or granting of a license, certificate or any other type of permit upon conditions not otherwise specifically required by the statute, ordinance or regulation pursuant to which the approval or granting is issued.

1-A. Legislative subcommittee. "Legislative subcommittee" means 3 or more Legislators from a legislative committee appointed for the purpose of conducting legislative business on behalf of the committee.

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:

A. The Legislature of Maine and its committees and subcommittees;

B. Any board or commission of any state agency or authority, the Board of Trustees of the University of Maine System and any of its committees and subcommittees, the Board of Trustees of the Maine Maritime Academy and any of its committees and subcommittees, the Board of Trustees of the Maine Technical College System and any of its committees and subcommittees;

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

D. The full membership meetings of any association, the membership of which is composed exclusively of counties, municipalities, school administrative units or other political or

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administrative subdivisions; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;

E. The board of directors of a nonprofit, nonstock private corporation that provides statewide noncommercial public broadcasting services and any of its committees and subcommittees;

F. Any advisory organization, including any authority, board, commission, committee, council, task force or similar organization of an advisory nature, established, authorized or organized by law or resolve or by Executive Order issued by the Governor and not otherwise covered by this subsection, unless the law, resolve or Executive Order establishing, authorizing or organizing the advisory organization specifically exempts the organization from the application of this subchapter; and

G. The committee meetings, subcommittee meetings and full membership meetings of any association that:

- (1) Promotes, organizes or regulates statewide interscholastic activities in public schools or in both public and private schools; and
- (2) Receives its funding from the public and private school members, either through membership dues or fees collected from those schools based on the number of participants of those schools in interscholastic activities.

This paragraph applies to only those meetings pertaining to interscholastic sports and does not apply to any meeting or any portion of any meeting the subject of which is limited to personnel issues, allegations of interscholastic athletic rule violations by member schools, administrators, coaches or student athletes or the eligibility of an individual student athlete or coach.

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

A. Records that have been designated confidential by statute;

B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding;

C. Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over;

C-1. Information contained in a communication between a constituent and an elected official if the information:

- (1) Is of a personal nature, consisting of:
 - (a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
 - (b) Credit or financial information;
 - (c) Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family;

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- (d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or
 - (e) An individual's social security number; or
 - (2) Would be confidential if it were in the possession of another public agency or official;
- D. Material prepared for and used specifically and exclusively in preparation for negotiations, including the development of bargaining proposals to be made and the analysis of proposals received, by a public employer in collective bargaining with its employees and their designated representatives;
- E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Technical College System and the University of Maine System. The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B;
- F. Records that would be confidential if they were in the possession or custody of an agency or public official of the State or any of its political or administrative subdivisions are confidential if those records are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;
- G. Materials related to the development of positions on legislation or materials that are related to insurance or insurance-like protection or services which are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;
- H. Medical records and reports of municipal ambulance and rescue units and other emergency medical service units, except that such records and reports must be available upon request to law enforcement officers investigating criminal conduct;
- I. Juvenile records and reports of municipal fire departments regarding the investigation and family background of a juvenile fire setter;
- J. Working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization. Working papers are public records if distributed by a member or in a public meeting of the advisory organization;
- K. Personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure. This paragraph does not apply to records governed by Title 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;
- L. Records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, but only to the extent that release of information contained in the record could reasonably be expected to jeopardize the physical safety of government personnel or the public. Information contained in records covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure. For purposes of this paragraph, "terrorism" means conduct that is designed to cause serious bodily injury or substantial risk of bodily injury to multiple persons,

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substantial damage to multiple structures whether occupied or unoccupied or substantial physical damage sufficient to disrupt the normal functioning of a critical infrastructure;

M. Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software. Records or information covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure;

N. Social security numbers;

O. Personal contact information concerning public employees, except when that information is public pursuant to other law. For the purposes of this paragraph:

(1) "Personal contact information" means home address, home telephone number, home facsimile number, home e-mail address and personal cellular telephone number and personal pager number; and

(2) "Public employee" means an employee as defined in Title 14, section 8102, subsection 1, except that "public employee" does not include elected officials;

P. Geographical information regarding recreational trails that are located on private land that are authorized voluntarily as such by the landowner with no public deed or guaranteed right of public access, unless the landowner authorizes the release of the information;

Q. Security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events that are prepared for or by or kept in the custody of the Department of Corrections or a county jail if there is a reasonable possibility that public release or inspection of the records would endanger the life or physical safety of any individual or disclose security plans and procedures not generally known by the public. Information contained in records covered by this paragraph may be disclosed to state and county officials if necessary to carry out the duties of the officials, the Department of Corrections or members of the State Board of Corrections under conditions that protect the information from further disclosure;

R. Social security numbers in the possession of the Secretary of State;

S. E-mail addresses obtained by a political subdivision of the State for the sole purpose of disseminating noninteractive notifications, updates and cancellations that are issued from the political subdivision or its elected officers to an individual or individuals that request or regularly accept these noninteractive communications; and

T. Records describing research for the development of processing techniques for fisheries, aquaculture and seafood processing or the design and operation of a depuration plant in the possession of the Department of Marine Resources.

3-A. Public records further defined. "Public records" also includes the following criminal justice agency records:

A. Records relating to prisoner furloughs to the extent they pertain to a prisoner's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of furlough and dates of furlough;

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B. Records relating to out-of-state adult probationer or parolee supervision to the extent they pertain to a probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of residence and dates of supervision; and

C. Records to the extent they pertain to a prisoner's, adult probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, and current address or location, unless the Commissioner of Corrections determines that it would be detrimental to the welfare of a client to disclose the information.

4. Public records of interscholastic athletic organizations. Any records or minutes of meetings under subsection 2, paragraph G are public records.

5. Public access officer. "Public access officer" means the person designated pursuant to section 413, subsection 1.

6. Reasonable office hours. "Reasonable office hours" includes all regular office hours of an agency or official.

§402-A. Public records defined (REPEALED)

§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.

2. Record of public proceedings. Unless otherwise provided by law, a record of each public proceeding for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and must be open to public inspection. At a minimum, the record must include:

- A. The date, time and place of the public proceeding;
- B. The members of the body holding the public proceeding recorded as either present or absent; and
- C. All motions and votes taken, by individual member, if there is a roll call.

3. Audio or video recording. An audio, video or other electronic recording of a public proceeding satisfies the requirements of subsection 2.

4. Maintenance of record. Record management requirements and retention schedules adopted under Title 5, chapter 6 apply to records required under this section.

5. Validity of action. The validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required by this section.

6. Advisory bodies exempt from record requirements. Subsection 2 does not apply to advisory bodies that make recommendations but have no decision-making authority.

§404. Recorded or live broadcasts authorized

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In order to facilitate the public policy so declared by the Legislature of opening the public's business to public scrutiny, all persons shall be entitled to attend public proceedings and to make written, taped or filmed records of the proceedings, or to live broadcast the same, provided the writing, taping, filming or broadcasting does not interfere with the orderly conduct of proceedings. The body or agency holding the public proceedings may make reasonable rules and regulations governing these activities, so long as these rules or regulations do not defeat the purpose of this subchapter.

§404-A. Decisions (REPEALED)

§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. These sessions 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 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 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 reputation or the individual's right to privacy would be violated;
- (2) Any person charged or investigated shall be permitted to be present at an executive session if he so desires;
- (3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against him 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.

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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) The student and legal counsel and, if the student be 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.

**§405-A. Recorded or live broadcasts authorized
(REPEALED)**

**§405-B. Appeals
(REPEALED)**

**§ 405-C. Appeals from actions
(REPEALED)**

§406. Public notice

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Public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons. This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding.

§407. Decisions

1. Conditional approval or denial. Every agency shall make a written record of every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit. The agency shall set forth in the record the reason or reasons for its decision and make finding of the fact, in writing, sufficient to apprise the applicant and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.

2. Dismissal or refusal to renew contract. Every agency shall make a written record of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee. The agency shall, except in case of probationary employees, set forth in the record the reason or reasons for its decision and make findings of fact, in writing, sufficient to apprise the individual concerned and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.

§408. Public records available for public inspection and copying (REPEALED)

§ 408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

1. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the agency or official may charge a fee as provided in subsection 8.

2. Copy. A person may copy a public record in the office of the agency or official having custody of the public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. The agency or official may charge a fee for copies as provided in subsection 8.

A. A request need not be made in person or in writing.

B. The agency or official shall mail the copy upon request.

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public

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record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time.

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public record requested. If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if an office exists.

6. No requirement to create new record. An agency or official is not required to create a record that does not exist.

7. Electronically stored public records. An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

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 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.

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.

9. Estimate. The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request

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and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than \$30, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

10. Payment in advance. The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the public record if:

- A. The estimated total cost exceeds \$100; or
- B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

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.

§409. Appeals

1. Records. Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to any Superior Court within the State as a trial de novo. The agency or official shall file an answer within 14 calendar days. If a court, after a trial de novo, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

§410. Violations

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For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 may be adjudged.

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

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

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and
- M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.

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B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making the information publicly available;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

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H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

§412 Public records and proceedings training for certain elected officials

1. Training required. A public access officer and an elected 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 elected official takes the oath of office to assume the person's duties as an elected official or the person is designated as a public access officer pursuant to section 413, subsection 1.

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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 this chapter;
- C. Penalties and other consequences for failure to comply with this chapter.

An elected 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 elected official or a 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 elected official shall keep the record or file it with the public entity to which the official was elected. 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 elected 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;
- D. Deleted. Laws 2007, c. 576, §2.
- E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;
- F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;
- G. Officials of school administrative units; and
- H. Officials of regional or other political subdivisions 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.

§ 413. Public access officer

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1. Designation; responsibility. Each agency, county, municipality, school administrative unit and regional or other political subdivision shall designate an existing employee as its public access officer to serve as the contact person for that agency, county, municipality, school administrative unit and regional or other political subdivision with regard to requests for public records under this subchapter. The public access officer is responsible for ensuring that each public record request is acknowledged within a reasonable period of time and that a good faith estimate of when the response to the request will be complete is provided according to section 408-A. The public access officer shall serve as a resource within the agency, county, municipality, school administrative unit and regional or other political subdivision concerning freedom of access questions and compliance.

2. Acknowledgment and response required. An agency, county, municipality, school administrative unit and regional or other political subdivision that receives a request to inspect or copy a public record shall acknowledge and respond to the request regardless of whether the request was delivered to or directed to the public access officer.

3. No delay based on unavailability. The unavailability of a public access officer may not delay a response to a request.

4. Training. A public access officer shall complete a course of training on the requirements of this chapter relating to public records and proceedings as described in section 412.

§ 414. Public records; information technology

An agency shall consider, in the purchase of and contracting for computer software and other information technology resources, the extent to which the software or technology will:

1. Maximize public access. Maximize public access to public records; and

2. Maximize exportability; protect confidential information. Maximize the exportability of public records while protecting confidential information that may be part of public records.

SUBCHAPTER 1-A

PUBLIC RECORDS EXCEPTIONS AND ACCESSIBILITY

§431. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Public records exception. "Public records exception" or "exception" means a provision in a statute or a proposed statute that declares a record or a category of records to be confidential or otherwise not a public record for purposes of subchapter 1.

2. Review committee. "Review committee" means the joint standing committee of the Legislature having jurisdiction over judiciary matters.

3. Advisory committee. "Advisory committee" means the Right To Know Advisory Committee established in Title 5, section 12004-J, subsection 14 and described in section 411.

§432. Exceptions to public records; review

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1. Recommendations. During the second regular session of each Legislature, the review committee may report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process and the accessibility of public records. Before reporting out legislation, the review committee shall notify the appropriate committees of jurisdiction concerning public hearings and work sessions and shall allow members of the appropriate committees of jurisdiction to participate in work sessions.

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

- A. Whether a record protected by the exception still needs to be collected and maintained;
- B. The value to the agency or official or to the public in maintaining a record protected by the exception;
- C. Whether federal law requires a record to be confidential;
- D. Whether the exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;
- E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;
- F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;
- G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;
- H. Whether the exception is as narrowly tailored as possible; and
- I. Any other criteria that assist the review committee in determining the value of the exception as compared to the public's interest in the record protected by the exception.

2-A. Accountability review of agency or official. In evaluating each public records exception, the advisory committee shall, in addition to applying the criteria of subsection 2, determine whether there is a publicly accountable entity that has authority to review the agency or official that collects, maintains or uses the record subject to the exception in order to ensure that information collection, maintenance and use are consistent with the purpose of the exception and that public access to public records is not hindered.

2-B. Recommendations to review committee. The advisory committee shall report its recommendations under this section to the review committee no later than the convening of the second regular session of each Legislature.

2-C. Accessibility of public records. The advisory committee may include in its evaluation of public records statutes the consideration of any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

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3. Assistance from committees of jurisdiction. The advisory committee may seek assistance in evaluating public records exceptions from the joint standing committees of the Legislature having jurisdiction over the subject matter related to the exceptions being reviewed. The advisory committee may hold public hearings after notice to the appropriate committees of jurisdiction.

§433. Schedule for review of exceptions to public records

1. Scheduling guidelines. (repealed)

2. Scheduling guidelines. The advisory committee shall use the following list as a guideline for scheduling reviews of public records exceptions.

A. Exceptions codified in the following Titles are scheduled for review in 2008:

- (1) Title 1;
- (2) Title 2;
- (3) Title 3;
- (4) Title 4;
- (5) Title 5;
- (6) Title 6;

- (7) Title 7;
- (8) Title 8;
- (9) Title 9-A; and
- (10) Title 9-B.

B. Exceptions codified in the following Titles are scheduled for review in 2010:

- (1) Title 10;
- (2) Title 11;
- (3) Title 12;
- (4) Title 13;
- (5) Title 13-B;
- (6) Title 13-C;
- (7) Title 14;
- (8) Title 15;
- (9) Title 16;
- (10) Title 17;
- (11) Title 17-A;
- (12) Title 18-A;
- (13) Title 18-B;
- (14) Title 19-A;
- (15) Title 20-A; and
- (16) Title 21-A.

C. Exceptions codified in the following Titles are scheduled for review in 2012:

- (1) Title 22;
- (2) Title 23;
- (3) Title 24;
- (4) Title 24-A; and
- (5) Title 25.

D. Exceptions codified in the following Titles are scheduled for review in 2014:

- (1) Title 26;
- (2) Title 27;
- (3) Title 28-A;

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- (4) Title 29-A;
- (5) Title 30;
- (6) Title 30-A;
- (7) Title 31;
- (8) Title 32;
- (9) Title 33;
- (10) Title 34-A;
- (11) Title 34-B;
- (12) Title 35-A;
- (13) Title 36;
- (14) Title 37-B;
- (15) Title 38; and
- (16) Title 39-A.

3. Scheduling changes. The advisory committee may make adjustments to the scheduling guidelines provided in subsection 2 as it determines appropriate and shall notify the review committee of such adjustments.

§434. Review of proposed exceptions to public records

1. Procedures before legislative committees. Whenever a legislative measure containing a new public records exception is proposed or a change that affects the accessibility of a public record 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 exception or proposed change that affects the accessibility of a public record may not be enacted into law unless review and evaluation pursuant to subsections 2 and 2-B have been completed.

2. Review and evaluation. Upon referral of a proposed public records exception 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 exception should be enacted:

- A. Whether a record protected by the proposed exception needs to be collected and maintained;
- B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;
- C. Whether federal law requires a record covered by the proposed exception to be confidential;
- D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;
- E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;
- F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

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

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

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

2-A. Accountability review of agency or official. In evaluating each proposed public records exception, the review committee shall, in addition to applying the criteria of subsection 2, determine whether there is a publicly accountable entity that has authority to review the agency or official that collects, maintains or uses the record subject to the exception in order to ensure that information collection, maintenance and use are consistent with the purpose of the exception and that public access to public records is not hindered.

2-B. Accessibility of public records. In reviewing and evaluating whether a proposal may affect the accessibility of a public record, the review committee may consider any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

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

TITLE 5

ADMINISTRATIVE PROCEDURES AND SERVICES

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.

2. Duties. The ombudsman shall:

A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;

B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;

C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;

D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with

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respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;

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

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

3. Assistance. The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential 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.

5. Report. The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A. The total number of inquiries and complaints received;
- B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;
- C. The number of complaints received concerning respectively public records and public meetings;
- D. The number of complaints received concerning respectively:
 - (1) State agencies;
 - (2) County agencies;
 - (3) Regional agencies;
 - (4) Municipal agencies;
 - (5) School administrative units; and
 - (6) Other public entities;
- E. The number of inquiries and complaints that were resolved;
- F. The total number of written advisory opinions issued and pending; and
- G. Recommendations concerning ways to improve public access to public records and proceedings.

6. Repeal. [PL 2009, c. 240, §7 (RP).]

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GENERAL QUESTIONS

What is the Freedom of Access Act?

The Freedom of Access Act (FOAA) is a state statute that is intended to open the government of Maine by guaranteeing access to the "public records" and "public proceedings" of state and local government bodies and agencies.

Are federal agencies covered by the Freedom of Access Act?

No. The FOAA does not apply to federal agencies operating in Maine or to federal government records. A similar but different federal statute called the Freedom of Information Act (FOIA) applies to the federal government. This federal statute does not apply to state or local government bodies, agencies or officials.

For more general information on the Freedom of Information Act go to:

[FOIA.gov](http://foia.gov) - Freedom of Information Act

Who enforces the Freedom of Access Act?

Any aggrieved person may appeal to any Superior Court in the state to seek relief for an alleged violation of the FOAA. 1 M.R.S. § 409(1)

Relief can be in the form of an order issued by the court that directs the government body, agency or official to comply with the law, such as by providing access to a public proceeding or by making public records available for inspection or copying.

In addition, the Office of the Attorney General or the District Attorneys may bring an enforcement action seeking penalties if the alleged violation is willful. 1 M.R.S. § 410

What are the penalties for failure to comply with the Freedom of Access Act?

A state government agency or local government entity whose officer or employee commits a willful violation of the FOAA commits a civil violation for which a forfeiture of not more than \$500 may be adjudged. 1 M.R.S. § 410 Under the current law, there are no criminal penalties for failure to comply with a request for public records. It is a Class D crime to intentionally remove, alter, or destroy documents belonging to a state office. 1 M.R.S. § 452

What is the Public Access Ombudsman?

The Legislature created a public access ombudsman position to review complaints about compliance with the FOAA and attempt to mediate their resolution, as well as answer calls from the public, media, public agencies and officials about the requirements of the law. The ombudsman is also responsible for providing educational materials about the law and preparing advisory opinions. The ombudsman works closely with the Right to Know Advisory Committee in monitoring new developments and considering improvements to the law.

How do I contact the Public Access Ombudsman?

Call the Office of the Attorney General at (207) 626-8577 or get more information online at:

Your Right to Know: Maine's Freedom of Access Act

Are elected officials required to take training on the Freedom of Access Act?

Yes. All elected officials subject to this section and public access officers must complete a course of training on the requirements of the FOAA. 1 M.R.S. § 412

Which elected officials are required to take Freedom of Access training?

Elected officials required to complete the training include:

- the Governor
- Attorney General, Secretary of State, Treasurer of State and State Auditor
- Legislators
- Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of any county
- Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments
- Officials of school administrative units

- Officials of regional or other political subdivisions, including officials of water districts, sanitary districts, hospital districts, transit districts or regional transportation districts
- Public access officers.

What is a public access officer?

A public access officer must be designated to serve as the contact person for an agency, county, municipality, school administrative unit and regional or other political subdivision for public records requests. An existing employee is designated public access officer and is responsible for ensuring that public record requests are acknowledged within a reasonable amount of time and that a good faith estimate of when the response to the request will be complete is provided.

What does the training include?

At a minimum, the training must be designed to be completed in less than 2 hours and include instruction in:

- the general legal requirements regarding public records and public proceedings
- the procedures and requirements regarding complying with a request for a public record
- the penalties and other consequences for failure to comply with the law

Elected officials and public access officers can meet the training requirement by conducting a thorough review of the material in this FAQ section of the State's Freedom of Access website or by completing another training course that includes all of this information but may include additional information.

Do training courses need to be certified by the Right to Know Advisory Committee?

No. Training courses do not need the approval of the Right to Know Advisory Committee, or any other State agency.

How do elected officials and public access officers certify they have completed the training?

After completing the training, elected officials and public access officers are required to make a written or electronic record attesting that the training has been completed. The record, which will be available to the public, must be kept by the elected official or filed with the public entity to which the official was elected. A public access officer must file the record with the agency or official that designated the public access

officer. A sample training completion form is available (PDF) (This file requires the free Adobe Reader).

PUBLIC RECORDS

What is a public record?

The FOAA defines "public record" as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business". A number of exceptions are specified. (See the discussion of exemptions below.) 1 M.R.S. § 402(3)

Do I have to be a citizen of this state to submit a Freedom of Access Act request for a public record?

No. The FOAA provides that "a person" has the right to inspect and copy public records. 1 M.R.S. § 408-A

How do I make a Freedom of Access Act request for a public record?

See the How to Make a Request page on this site.

Is there a form that must be used to make a Freedom of Access Act request?

No. There are no required forms.

Does my Freedom of Access Act request have to be in writing?

No. The FOAA does not require that requests for public records be in writing. However, most governmental bodies and agencies ask individuals to submit requests in writing in order to maintain a record of when the request was received and what records were specifically requested.

What should I say in my request?

In order for the governmental body, agency or official to promptly respond to your request, you should be as specific as possible when describing the records you are

seeking. If a particular document is required, it should be identified precisely—preferably by author, date and title. However, a request does not have to be that specific. If you cannot identify a specific record, you should clearly explain the type of records you are seeking, from what timeframe and what subject the records should contain. For example, assume you want to obtain a list of active landfills near your home. A request to the state Department of Environmental Protection asking for "all records on landfills" is very broad and would likely produce volumes of records. The fees for such a request would be very high; the agency would likely find your request too vague and ask that you make it more specific. On the other hand, a request for "all records identifying landfills within 20 miles of 147 Main Street in Augusta" is very specific and the request might fail to produce the information you desire because the agency has no record containing data organized in that exact fashion. You might instead consider requesting any record that identifies "all active landfills in Augusta" or "all active landfills in Kennebec County." It is more likely that a record exists which contains this information. You might also want to explain to the agency exactly what information you hope to learn from the record. In other words, if you are really trying to determine whether any active landfills near your home in Augusta accept only wood waste, this additional explanation may help the agency narrow its search and find a record that meets the exact request.

Does an agency have to acknowledge receipt of my request?

Yes. An agency or official must acknowledge receipt of a request within 5 working days of receipt of the request. 1 M.R.S. § 408-A(3) P.L. 2013, ch. 350

Can an agency ask me for clarification concerning my request?

Yes. An agency or official may request clarification concerning which public record or public records are being requested. 1 M.R.S. § 408-A(3)

Does an agency have to estimate how long it will take to respond to my request?

Yes. An agency or official must provide a good faith, nonbinding estimate of how long it will take to comply with the request within a reasonable time of receiving the request. The agency or official shall make a good faith effort to fully respond within the estimated time. 1 M.R.S. § 408-A(3) P.L. 2013, ch. 350

When does the agency or official have to make the records available?

The records must be made available "within a reasonable period of time" after the request was made. 1 M.R.S. § 408-A The agency or official can schedule the time for your inspection, conversion and copying of the records during the regular business

hours of the agency or official, and at a time that will not delay or inconvenience the regular activities of the agency or official. 1 M.R.S. § 408-A(5)

Can an agency or official delay responding if my request was not directed to the agency public access officer?

No. An agency that receives a request to inspect or copy a public record must acknowledge and respond regardless of whether the request was directed to the public access officer. The unavailability of a public access officer may not be reason for a delay. 1 M.R.S. § 413(3)

What if the agency or official does not have regular office hours?

If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if an office exists. 1 M.R.S. § 408-A(5)

Does an agency have to produce records within 5 days of my request?

No. The records that are responsive to a request must be made available "within a reasonable period of time" after the request was made. 1 M.R.S. § 408-A Agencies must acknowledge the request within 5 working days of receipt. A written denial within 5 working days of receipt is required if your request is denied in whole or in part. 1 M.R.S. § 408-A(4) P.L. 2013, ch. 350

Do I have to go to the agency to inspect the records or can I ask the agency or official to mail me the records?

A person may inspect or copy any public record in the office of the agency or official during reasonable office hours. The agency or official shall mail the copy upon request. The agency may charge a reasonable fee to cover the cost of making the copies for you, as well as actual mailing costs. 1 M.R.S. § 408-A(1), (2), (8)(E)

When may a governmental body refuse to release the records I request?

The FOAA provides that certain categories of documents are not public records. Included among these are records that have been designated confidential by statute, documents subject to a recognized legal privilege such as the attorney-client privilege or the work-product privilege, records describing security plans or procedures designed to prevent acts of terrorism, medical records, juvenile records, and the

personal contact information of public employees contained within records. 1 M.R.S. § 402(3)(A)-(O)

For a list of records or categories of records deemed by statute to be confidential or otherwise not a public record, see the Statutory Exceptions List. While this listing may not be totally complete, it contains the vast majority of exceptions to the FOAA.

What happens if a public record holds some information that is open to the public and some information that falls within an exception to the Freedom of Access Act?

Some public records contain a mixture of information that is public and information that is confidential or otherwise not subject to public inspection under the FOAA. If the record you requested contains any confidential or excepted information, the custodian will decide if the confidential or excepted information can be adequately redacted or blacked out so that public access can be provided or if public access to the document should be denied.

Must an agency have computer technology resources that allow for maximum accessibility to public records while protecting confidential information?

When purchasing and contracting for computer software and other information technology resources, an agency shall consider the extent to which it will maximize accessibility and exportability while protecting confidential information that may be contained in the public records. 1 M.R.S. §414

Does an agency have to explain why it denies access to a public record?

Yes. When an agency denies access to a public record, it must provide the reason for its denial in writing within 5 working days of the receipt of the request for inspection or copying. 1 M.R.S. § 408-A(4) P.L. 2013, ch. 350

What can I do if I believe an agency has unlawfully withheld a public record?

If you are not satisfied with an agency's decision to withhold access to certain records, you are entitled to appeal, within 30 calendar days of your receipt of the written notice of denial, to any Superior Court within the state. 1 M.R.S. § 409(1) P.L. 2013, ch. 350

What can I do if an agency fails to provide a written denial?

If an agency withholds access to a public record and does not provide a written denial within 5 working days of the receipt of the request, this is considered a failure to allow inspection or copying and is subject to appeal. 1 M.R.S. § 408-A(4) P.L. 2013, ch. 350

May a governmental body ask me why I want a certain record?

The FOAA does not specifically prohibit agencies or officials from asking why an individual is requesting a public record. However, if asked, the individual is not required to provide a reason for seeking a record, and the agency cannot deny an individual's request based solely on either the individual's refusal to provide a reason or the reason itself. An agency or official may request clarification concerning which public record or public records are being requested. 1 M.R.S. § 408-A(3)

Can I ask that public reports or other documents be created, summarized or put in a particular format for me?

No. A public officer or agency is not required to prepare reports, summaries, or compilations not in existence on the date of your request. 1 M.R.S. § 408-A(6)

If the public record is electronically stored, the agency or official subject to a request must provide the public record either as a printed document or in the medium in which the record is stored, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file. 1 M.R.S. § 408-A(7)

Must the agency or official provide me with access to a computer terminal to inspect electronically stored public records?

No. The agency or official is not required to provide access to a computer terminal. 1 M.R.S. § 408-A(7)(B)

I asked a public official a question about a record, but he/she didn't answer. Is he/she required to answer my question?

No. A public officer or agency is not required to explain or answer questions about public records. The FOAA only requires officials and agencies to make public records available for inspection and copying.

Are an agency's or official's e-mails public records?

Any record, regardless of the form in which it is maintained by an agency or official, can be a public record. As with any record, if the e-mail is "in the possession or custody of an agency or public official of this State or any of its political subdivisions,

or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business" and is not deemed confidential or excepted from the FOAA, it constitutes a "public record". 1 M.R.S. § 402(3)

An agency or official must provide access to electronically stored public records, including e-mails, as a printed document or in the medium it is stored at the discretion of the requestor. If an agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in an e-mail, the agency is not required to provide the records in an electronic format. 1 M.R.S. § 408-A(7)

Email messages are subject to the same retention schedules as other public records based on the content of the message. There are no retention schedules specific to email messages. The State of Maine E-mail and Digital Records Retention Guide contains more information on electronic records.

Is information contained in a communication between a constituent and an elected official a public record?

Information of a personal nature consisting of an individual's medical information, credit or financial information, character, misconduct or disciplinary action, social security number, or that would be confidential if it were in the possession of another public agency or official is not a public record. However, other parts of the communication are public. 1 M.R.S. § 402(3)(C-1)

Can an agency charge for public records?

There is no initial fee for submitting a FOAA request and agencies cannot charge an individual to inspect records unless the public record cannot be inspected without being compiled or converted. 1 M.R.S. § 408-A(8)(D) However, agencies can and normally do charge for copying records. Although the FOAA does not set standard copying rates, it permits agencies to charge "a reasonable fee to cover the cost of copying". 1 M.R.S. § 408-A(8)(A)

Agencies and officials may also charge fees for the time spent searching for, retrieving, compiling or redacting confidential information from the requested records. The FOAA authorizes agencies or officials to charge \$15 per hour after the first hour of staff time per request. 1 M.R.S. § 408-A(8)(B) Where conversion of a record is necessary, the agency or official may also charge a fee to cover the actual cost of conversion. 1 M.R.S. § 408-A(8)(C)

The agency or official must prepare an estimate of the time and cost required to complete a request within a reasonable amount of time of receipt of the request. If the estimate is greater than \$30, the agency or official must notify the requester before proceeding. The agency may request payment of the costs in advance if the estimated cost exceeds \$100 or if the requester has previously failed to pay a fee properly assessed under the FOAA. 1 M.R.S. § 408-A(9), (10) P.L. 2013, ch. 350

I cannot afford to pay the fees charged by the agency or official to research my request or copy the records. Can I get a waiver?

The agency or official may, but is not required to, waive part or all of the total fee if the requester is indigent, or if the agency or official considers release of the public record to be in the public interest because it 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. 1 M.R.S. § 408-A(11)

Is a public agency or official required under the Freedom of Access Act to honor a "standing request" for information, such as a request that certain reports be sent to me automatically each month?

No. A public agency or official is required to make available for inspection and copying, subject to any applicable exemptions, only those public records that exist on the date of the request. Persons seeking to inspect or obtain copies of public records on a continuing basis are required to make a new request for any additional records sought after the date of the original request.

PUBLIC PROCEEDINGS

What is a public proceeding?

The term "public proceeding" means "the transactions of any functions affecting any or all citizens of the State" by the Maine Legislature and its committees and subcommittees; any board or commission of a state agency or authority including the University of Maine and the Maine Community College System; any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision; the full membership meetings of any association, the membership of which is comprised exclusively of counties, municipalities, school districts, other political or administrative subdivisions, or their boards, commissions, agencies or authorities; and any advisory organization established, authorized or organized by law, resolve or executive order. 1 M.R.S. § 402 (2)

What does the law require with regard to public proceedings?

The FOAA requires all public proceedings to be open to the public and any person must be permitted to attend. 1 M.R.S. § 403

When does a meeting or gathering of members of a public body or agency require public notice?

Public notice is required of all public proceedings if the proceedings are a meeting of a body or agency consisting of 3 or more persons. 1 M.R.S. § 406

What kind of notice of public proceedings does the Freedom of Access Act require?

Public notice must be given in ample time to allow public attendance and must be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency. 1 M.R.S. § 406

Can a public body or agency hold an emergency meeting?

Yes. Public notice of an emergency meeting must be provided to local representatives of the media, whenever practicable. The notice must include the time and location of the meeting and be provided by the same or faster means used to notify the members of the public body or agency conducting the public proceeding. 1 M.R.S. § 406 The requirements that the meeting be open to the public, that any person be permitted to attend and that records or minutes of the meeting be made and open for public inspection still apply. 1 M.R.S. § 403

Can public bodies or agencies hold a closed-door discussion?

Yes. Public bodies or agencies are permitted, subject to certain procedural conditions, to hold closed "executive sessions" on specified subjects after a public recorded vote of 3/5 of the members present and voting. 1 M.R.S. § 405(1)-(5)

Can the body or agency conduct all of its business during an executive session?

Generally, no. The content of deliberations during executive sessions is restricted to the matters listed in the FOAA, such as the following: discussions regarding the suspension or expulsion of a student; certain employment actions; the acquisition, use or disposition of public property; consultations between a body and its attorney concerning its legal rights and responsibilities or pending litigation; and discussion of documents that are confidential by statute. In addition, any governmental body or agency subject to the FOAA is prohibited from giving final approval to any ordinances,

orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session. 1 M.R.S. § 405(2), (6)

What if I believe a public body or agency conducted improper business during an executive session?

Upon learning of any such action, any person may appeal to any Superior Court in the State. If the court determines the body or agency acted illegally, the action that was taken by the body or agency will be declared to be null and void and the officials responsible will be subject to the penalties provided in the Act. 1 M.R.S. § 409(2)

Can members of a body communicate with one another by e-mail outside of a public proceeding?

The law does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of the FOAA. 1 M.R.S. § 401

E-mail or other communication among a quorum of the members of a body that is used as a substitute for deliberations or decisions which should properly take place at a public meeting may likely be considered a "meeting" in violation of the statutory requirements for open meetings and public notice. "Public proceedings" are defined in part as "the transactions of any functions affecting any or all citizens of the State..." 1 M.R.S. § 402 The underlying purpose of the FOAA is that public proceedings be conducted openly and that deliberations and actions be taken openly; clandestine meetings should not be used to defeat the purpose of the law. 1 M.R.S. § 401 Public proceedings must be conducted in public and any person must be permitted to attend and observe the body's proceeding although executive sessions are permitted under certain circumstances. 1 M.R.S. § 403 In addition, public notice must be given for a public proceeding if the proceeding is a meeting of a body or agency consisting of 3 or more persons. 1 M.R.S. § 406

Members of a body should refrain from the use of e-mail as a substitute for deliberating or deciding substantive matters properly confined to public proceedings. E-mail is permissible to communicate with other members about non-substantive matters such as scheduling meetings, developing agendas and disseminating information and reports.

Even when sent or received using a member's personal computer or e-mail account, e-mail may be considered a public record if it contains information relating to the transaction of public or governmental business unless the information is designated as confidential or excepted from the definition of a public record. 1 M.R.S. § 402(3) As a result, members of a body should be aware that all e-mails and e-mail attachments

relating to the member's participation are likely public records subject to public inspection under the FOAA.

Can I record a public proceeding?

Yes. The FOAA allows individuals to make written, taped or filmed records of a public proceeding, or to broadcast the proceedings live, provided the action does not interfere with the orderly conduct of the proceedings. The body or agency holding the proceeding can make reasonable rules or regulations to govern these activities so long as the rules or regulations do not defeat the purpose of the FOAA. 1 M.R.S. § 404

Do members of the public have a right to speak at public meetings under the Freedom of Access Act?

The FOAA does not require that an opportunity for public participation be provided at open meetings, although many public bodies or agencies choose to permit public participation. In those instances, the public body or agency can adopt reasonable rules to ensure meetings are conducted in a fair and orderly manner. For example, the body or agency can set a rule that requires the same amount of time be afforded to each person that wants to speak.

Is a public body or agency required to make a record of a public proceeding?

Unless otherwise provided by law, a record of each public proceeding for which notice is required must be made within a reasonable period of time. At a minimum, the record must include the date, time and place of the meeting; the presence or absence of each member of the body holding the meeting; and all motions or votes taken, by individual member if there is a roll call.

The FOAA also requires that public bodies and agencies make a written record of every decision that involves the conditional approval or denial of an application, license, certificate or permit, and every decision that involves the dismissal or refusal to renew the contract of any public official, employee or appointee. 1 M.R.S. § 407(1), (2)

If the public proceeding is an "adjudicatory proceeding" as defined in the Maine Administrative Procedure Act, the agency is required to compile a record that complies with statutory specifications, including a recording in a form susceptible of transcription. 5 M.R.S. § 8002(1); 5 M.R.S. § 9059

Is the agency or body required to make the record or minutes of a public proceeding available to the public?

Yes. Any legally required record or minutes of a public proceeding must be made promptly and shall be open to public inspection. In addition, every agency is required to make a written record of any decision that involves conditional approval or denial of any application, license, certificate or other type of permit and to make those decisions publicly available, 1 M.R.S. § 403 , 407; 5 M.R.S. § 9059 (3)

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MEMORANDUM

TO: Members, Right to Know Advisory Committee

FROM: Peggy Reinsch, Colleen McCarthy Reid, Dan Tartakoff, Legislative Analysts

DATE: September 17, 2014

RE: Background to Communication Technology Platforms and Services

DOCUMENT-CENTRIC COLLABORATION PLATFORMS

- Google Docs, Office 365, Xaitporter, etc.
 - Each of these platforms offer, among other things, web-based word processing programs where multiple users can create, edit, and comment on documents online in real time.
 - Documents are private between the creating party and those users who the documents have been shared with.
 - Edits are automatically saved. Ability to track changes and revisions to a document varies by platform.

CLOUD STORAGE SERVICES

- Google Drive, iCloud, Dropbox, OneDrive, etc.
 - Each of these providers offer online data storage services. Users of the service upload files to the provider's servers ("the cloud") via an application or other interface. User can download or otherwise access files on the cloud through the same interface.
 - Files uploaded to a cloud storage server are private; however, files may be uploaded to shared folders or accounts and accessed by multiple users. Multiple users can edit the same shared document, although not simultaneously.

OTHER COMMONLY USED COMMUNICATION TECHNOLOGIES

- Email
 - Method of digital message exchange between multiple parties.
 - Emails are private between the sender and the receiver(s).
 - Multiple parties may collaborate on items via email, either in the body of the email or by attaching documents.

- Text Messaging
 - Method of electronic communication via brief messages between two or more phones, or fixed or portable devices over a phone network. Messages may be sent between multiple parties (group messaging).
 - Text messages are private between the sender and the receiver(s).
 - Multiple parties may collaborate on an item via group message. Documents may be exchanged via text message.
 - Text message retention policy varies from provider to provider, although most providers save message content for less than 1 month. Message content, if available, will generally not be disclosed by a provider absent a subpoena.

➤ Facebook

- Online social networking site where users create a personal profile and may post statuses, photos, links, etc. to share with their “friends.” Facebook also provides a messaging service for users to directly communicate with each other.
- Facebook’s privacy settings allow a user to significantly restrict what portions of their activity or profile are publicly available. Direct messages sent via Facebook are private.
- Multiple Facebook users can communicate and share documents via the messaging system. Documents shared cannot be amended directly via this interface.

➤ Twitter

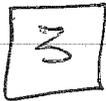
- Online social networking site that allows users to send and read short 140-character messages called “tweets.” A Twitter user may elect to “follow” another Twitter user and thereby receive notification of that user’s tweets.
- Tweets may be public, and thus viewed by both Twitter users and non-users, or can be “protected” so that only approved followers may view and comment on the tweet. Multiple users comment can comment on a tweet or share the tweet with others (called a “re-tweet”).
- Twitter users may also send private direct messages, although it is difficult to share documents on this interface or to engage in group messaging without the aid of outside applications.

➤ Snapchat

- Online photo messaging application where users can take photos, record videos, add text and drawings, and send them to a controlled list of recipients. These sent items are known as “snaps” and users set a time limit for how long recipients can view the snap (generally from 1 to 10 seconds), which are thereafter deleted.
- Although snaps are deleted within seconds of being viewed, users can create permanent screenshots of these snaps using their smartphone, a separate recording device, or a variety of applications designed for this purpose.

➤ Instagram

- Online mobile photo-sharing, video-sharing, and social networking service that enables users to take pictures and videos and share them on a variety of social networking platforms like Facebook, Twitter, etc.
- Photos may be shared publicly or privately on a user’s profile, or, utilizing Instagram Direct, may be sent to a specific user or group of users along with a short caption.



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HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH SESSION

H. F. No. 653

02/18/2013 Authored by Quam, Simon, Drazkowski, Winkler, Woodard and others
The bill was read for the first time and referred to the Committee on Government Operations
03/20/2013 Adoption of Report: Pass as Amended and Read Second Time
05/20/2013 Pursuant to Rule 4.20, re-referred to the Committee on Government Operations
03/27/2014 Adoption of Report: Amended and Placed on the General Register
Read Second Time
04/24/2014 Calendar for the Day
Read Third Time
By motion, re-referred to the Committee on Rules and Legislative Administration

1.1 A bill for an act
1.2 relating to open meeting law; providing that certain communications on
1.3 social media are not meetings under the law; proposing coding for new law
1.4 in Minnesota Statutes, chapter 13D.

1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.6 Section 1. [13D.065] USE OF SOCIAL MEDIA.

1.7 The use of social media by members of a public body does not violate this chapter so
1.8 long as the social media use is limited to exchanges with members of the general public.

1.9 For purposes of this section, e-mail is not considered a type of social media.

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HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH SESSION

H. F. No. 653

02/18/2013 Authored by Quam; Simon; Murphy, M.; Drazkowski; Winkler and others
The bill was read for the first time and referred to the Committee on Government Operations
03/20/2013 Adoption of Report: Pass as Amended and Read Second Time

- 1.1 A bill for an act
- 1.2 relating to open meeting law; providing that certain communications on social
- 1.3 media are not meetings under the law; amending Minnesota Statutes 2012,
- 1.4 section 13D.01, subdivision 2.
- 1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:
- 1.6 Section 1. Minnesota Statutes 2012, section 13D.01, subdivision 2, is amended to read:
- 1.7 Subd. 2. **Exceptions.** This chapter does not apply:
- 1.8 (1) to meetings of the commissioner of corrections;
- 1.9 (2) to a state agency, board, or commission when it is exercising quasi-judicial
- 1.10 functions involving disciplinary proceedings; ~~or~~
- 1.11 (3) to participation in social media forums by members of a public body otherwise
- 1.12 subject to this chapter, so long as:
- 1.13 (i) the social media forums are open to public participation;
- 1.14 (ii) the social media forums have been first identified by the public body at a public
- 1.15 meeting and a list of the identified social media forums is kept on file at the primary
- 1.16 offices of the public body;
- 1.17 (iii) participation is limited to discussion only and no decision or vote is made
- 1.18 or taken;
- 1.19 (iv) the use of social media forums is not the sole means of deliberation by the
- 1.20 public body; and
- 1.21 (v) participation does not take the place of any required public meeting or hearing.
- 1.22 "Social media" means forms of Web-based and mobile technologies for communication,
- 1.23 such as Web sites for social networking and microblogging, through which users participate
- 1.24 in online communities to share information, ideas, messages, and other content; or

2.1 (4) as otherwise expressly provided by statute.

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State of Minnesota
HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH SESSION

H. F. No. 653

02/18/2013 Authored by Quam; Simon; Murphy, M.; Draskowski and Winkler
The bill was read for the first time and referred to the Committee on Government Operations

- 1.1 A bill for an act
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- 1.9 (2) to a state agency, board, or commission when it is exercising quasi-judicial
- 1.10 functions involving disciplinary proceedings; ~~or~~
- 1.11 (3) to participation in social media forums by a member of a public body otherwise
- 1.12 subject to this chapter, whether or not a quorum of the public body is participating, when
- 1.13 participation is intended to augment traditional communication methods. The social
- 1.14 media forum must be generally open to public participation. Simultaneous or serial
- 1.15 participation by a quorum or more of members of a public body otherwise subject to this
- 1.16 chapter in a forum or section of a forum that the members know is not open to general
- 1.17 public participation is not exempt under this paragraph. Participation in a social media
- 1.18 forum shall not replace any required public meeting or hearing and no vote of any entity
- 1.19 otherwise subject to this section shall be taken by means of a social media forum. "Social
- 1.20 media" means forms of Web-based and mobile technologies for communication, such as
- 1.21 Web sites for social networking and microblogging, through which users participate in
- 1.22 online communities to share information, ideas, messages, and other content; or
- 1.23 (4) as otherwise expressly provided by statute.



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PUBLIC RECORDS OPINION NO. R-13-023

April 11, 2014

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-61-13(1)(b), Mississippi Code of 1972, as reflected upon its minutes of even date.

I. FACTS/PROCEDURAL HISTORY

1.1 On November 25, 2014, Robbie Ward ("Ward") of the Northeast Mississippi Daily Journal requested the City of Tupelo (the "city") provide "digital copies of all text messages Mayor Jason Shelton sent in his role as Mayor from [a cell phone number] between October 23, 2013 and October 26, 2013."

1.2 On December 9, 2013, the city attorney timely responded to Ward and denied the request. The city attorney explained that the mayor maintains a personal cell phone over which the city has no possession or control. The city also stated that the records of the city do not include the individual records of appointed or elected public officials. Finally, the city asserted that text messages containing governmental subject matter but stored on private hardware are not public records.

1.3 Ward filed this public records opinion request claiming that the mayor utilizes his personal cell phone to conduct official city business through text messaging. Additionally, Ward notes that the city has created a cell phone list of elected leaders and other officials. Ward asserts that the city has utilized this list since at least 2002, providing the city "a reasonable length of time to comply with laws related to public and electronic records including text messages."

1.4 In response to the public records opinion request, the city reiterates that the mayor's cell phone is a personal cell phone and that the city does not pay or reimburse the mayor for the cost of the cell phone. The city also recognizes this request presents a question of first impression in Mississippi and requests guidance from the Commission. The response also states the city maintains sixty (60) city-owned cell phones. The city asserts that "[o]f the remaining

400-plus employees [of the city], it can be inferred that most own their own private cell phones and conduct some manner of city business throughout the day. . . ." As it relates to the specific public records request at issue in this matter, the city does not deny that the mayor utilizes his cell phone to conduct city business.

1.5 The city also discusses the difficulty in differentiating between personal text messages and text messages concerning official city business. The city urges the Commission to differentiate text messages from more widely accepted methods of electronic communication such as email. The city points out that accessing text messages is more difficult than other forms of electronic communication. The city also explains that text messaging is widely used for "transitory communications" which are casual and routine messages that are not required to be maintained under guidelines applicable to email messaging. Ultimately, the city posits that treating texts messages as public records will "have a chilling and burdensome effect on the use of a now universally-utilized means of instant and efficient communication of transitory information."

II. ANALYSIS

2.1 At issue in this matter is whether text messages concerning city business but stored on a personal cell phone belonging to a mayor are subject to disclosure under the Mississippi Public Records Act of 1983 (the "Act"), codified at Section 25-61-1, et seq., Miss. Code of 1972. The Commission is asked to opine on this subject in the abstract because the city has not requested the mayor search his cell phone and provide any text messages responsive to the request.

2.2 The Act provides that public records shall be available for inspection by any person unless otherwise provided by law and places a duty upon public bodies to provide access to such records. Section 25-61-2 and Section 25-61-5, Miss. Code of 1972. The term "public records" is defined by the Act as follows:

"Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

See Section 25-61-3(b). A public body must provide access to public records upon request of any person, unless a statute or court decision "specifically declares" a public record to be confidential, privileged, or exempt. Section 25-61-11.

2.3 Text messages, similar to other electronic records, constitute documentary materials. The Act applies equally to paper and electronic records and provides that documentary materials are records "regardless of physical form or characteristics." The Legislature has instructed that "[a]s each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention." See Section 25-61-1 and 25-61-2.

2.4 Mr. Ward's public records request is inexact and broad in that it does not request a specific text message or even a category of text messages. Instead, the request broadly seeks all text messages sent by the mayor in his role as mayor for a specific time period. The City of Tupelo operates under the mayor-council form of government. The mayor serves as the chief executive officer of the city and is charged with supervising all departments of the municipality, as well as enforcing the charter and ordinances of the city. Notwithstanding the inexact and broad nature of the request, text messages concerning city business that are sent by the mayor in his role as chief executive officer of the city qualify as public records subject to the Act. The city should direct the mayor to forward any responsive documents to the city for review and production.

2.5 The fact that text messages reside on the mayor's personal cell phone is not determinative as to whether text messages must be produced.¹ Rather, it is the purpose or use of the text message that is determinative. Any text message used by a city official "in the conduct, transaction or performance of any business, transaction, work, duty or function of [the city], or required to be maintained by [the city]" is a public record subject to the Act, regardless of where the record is stored. However, purely personal text messages having absolutely no relation to city business are not subject to production under the Act. Documents described by the city as "transitory communications" should be reviewed for production on a case-by-case basis. Any doubt about whether records should be disclosed should be resolved in favor of disclosure. Harrison County Development Commission v. Kinney, 920 So.2d 497, 502 (Miss. App. 2006).

2.6 As the city notes in its response, the Mississippi Department of Archives and History (MDAH) has not developed records retention requirements specifically for text messages as it has for emails. However, MDAH's Local Government Records Office website states that "[e]lectronic [r]ecords are subject to the same retention guidelines as paper records and existing retention schedules apply to all records regardless of format unless noted otherwise in the approved retention period."² The city should instruct city officials that all public records, regardless of where they are created or stored, should eventually be stored on city equipment or in city files if those records are subject to an applicable retention schedule. All questions concerning retention requirements should be directed to MDAH.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel

¹ See Comments to Rule 3, Mississippi Model Public Records Rules, http://www.ethics.state.ms.us/ethics/ethics.nsf/webpage/A_records (March 5, 2010).

² See <http://mdah.state.ms.us/recman/electronic.php> (April 11, 2014). MDAH has developed records retention schedules applicable to municipalities, pursuant to Section 39-5-9. See <http://mdah.state.ms.us/recman/schedulemain.php> (April 24, 2012). Additionally, MDAH has also developed specific guidelines for retention of emails pursuant to Section 39-5-9 and the Mississippi Archives and Records Management Law (Sections 25-59-1 through 25-59-31). The email standards cite Section 29-59-3 for the proposition that work-related emails "must be managed the same way that other public records, whether paper or electronic, are managed." See http://mdah.state.ms.us/recman/email_guidelines.pdf (emphasis added). Section 29-59-3 defines "public records" as "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency or by any appointed or elected official." (emphasis added).



SOCIAL MEDIA: *THE RECORDS MANAGEMENT CHALLENGE*

Purpose

As society shifts from traditional methods of recordkeeping to electronic recordkeeping, the issues surrounding the management of electronic records have become more significant. The use of social media by governments is growing rapidly because it creates new avenues for and dramatically speeds up communication between public offices and their constituents. This guideline provides insight into what social media is and the records management challenges associated with social media use in the public sector.

Introduction to the Guidelines

Government agencies are increasing their use of social media to provide improved services, enable citizen interaction and increase overall transparency. Social media sites, such as Facebook and Twitter, provide governments the ability to explore new ways of working and shifting communication patterns. Because these sites are available to government offices and citizens with internet access, they add valuable audio, video and interactive capabilities without substantial costs.

These guidelines are intended to assist local government and state agencies in understanding the challenges related to social media implementation and how to mitigate risks associated with social media use. Before embracing these tools, agencies should reflect on their mission and vision and have a clear understanding of how social media can support those core functions.

Developing a Social Media Management Guideline should be considered as an important first step for government agencies that want to engage social media tools. Retention, management, and disposition of content of these sites, to the extent that it constitutes "records" of the agency, must be taken into consideration to ensure compliance with Ohio's public records law.

The Ohio Electronic Records Committee has developed these guidelines as a resource for governments to manage the creation, retention, disposition and preservation of social media records.

Social Media Definition

Social media are media for social interaction using highly accessible and scalable publishing techniques. Web 2.0 and social media are terms used to define the various activities integrating web technology, social interaction and content creation. These Internet based applications allow for the creation and exchange of user generated content. Through social media, individuals or collaborators create, organize, edit, comment and/or share content online. Social media is designed to support rapid interactive communications. Examples include, but are not limited to the following:



GUIDELINES FOR ELECTRONIC RECORDS MANAGEMENT OHIO ELECTRONIC RECORDS COMMITTEE

<http://www.ohioerc.org/>

1. **Web-Publishing** – Creating a Web site and placing on the Web server. A Web site is a collection of HTML pages accessed via the Internet.
 - a. **Blogs** – Web sites generally used to post online diaries or serve as a platform to express ones ideas and opinions, a particular topic or set of topics. These sites often allow for interactive commenting and feedback. The term “blog” derives from “web log.”
 - b. **Microblogging** – Microblogging services enable users to send/post content similar to traditional blogs, albeit much smaller in size that is typically character limited. Examples of microblogging include Twitter, Tumblr and Yammer. Other social media services include microblogging functionality such as Facebook, Google+ and LinkedIn.
 - c. **Wikis** – Web sites that allow multiple users to collaboratively create and edit its content. Levels of access and control over editing rights such as adding and removing material can be controlled.
 - d. **Mashups** – Web sites that combine data and functionality from multiple sources to create a new service or a “mashup”. Example: data from Google Maps can be utilized to add location maps in a real estate listings website.
2. **Social Networking** – Communicating informally with other members of a site by posting messages, status updates, photographs, videos, and other materials. Allows multiple users to share content and interact.
 - a. **Social** – A free online service for individuals or groups to connect and interact with other people or organizations. Examples include Facebook, MySpace and Google+.
 - b. **Business/Professional** – A Web site that enables companies and industry professionals to communicate with colleagues and build business relationships. Typically a base service is provided free of charge with enhanced capabilities for a fee. Examples include LinkedIn, Plaxo and Yammer.
 - c. **Virtual Worlds** – A type of online community that takes the form of a computer-based simulated environment through which users create an avatar to interact with one another and create objects. Enables the user to perform operations on a simulated system in such a way that it appears and feels like a real environment and often have their own economy. Virtual worlds are often used for massively multiplayer online games but can be used for research, educational and business purpose. An example of the latter is SecondLife.
3. **File Sharing and Storage** – A public or private sharing of computer data or space in an online network with various levels of access privilege. Users download or upload digital information such as music and movies in a network that allows a number of people to view, write to, copy or print.
 - a. **Photo Library** – An online service that allows users to post and view their photos and share them with specified individuals or freely with anyone. The service provider may also supply various ecommerce options for repurposing of the images. Examples of Photo libraries include Flickr, Picasa and Snapfish.
 - b. **Video Sharing** – An online service that users can upload, share and view videos. Examples include YouTube and Vimeo.
 - c. **Document Sharing** – An online service that allows users to store, share and potentially collaborate on documents. Examples range from Dropbox that is free and allows for storage and sharing to GoogleDocs, which is also free and allows storage sharing and



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rudimentary online collaboration to Microsoft SharePoint, which must be purchased by an organization, but can provide enterprise level online collaboration.

Social Media as Records

As defined in the Ohio Revised Code (O.R.C.) 149.011(G), the term 'records' includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Therefore, an agency must look beyond the electronic social medium and analyze the content to determine if information is a "record" that must be managed and kept in accordance with retention schedules.

If the content demonstrates that the information was both (1) created or received by and (2) documents the office's business activities, the posted information may well be a record. The analysis to determine record or non-record is necessarily fact-specific. More information on how to conduct this analysis can be found in the Ohio Sunshine Laws: An Open Government Resource Manual (www.OhioAttorneyGeneral.gov/Sunshine). If the agency evaluates the particular social media content and determines that it is a record, the agency must then decide whether that record is the agency's official record or a secondary copy. If the information or social media content is duplicated and kept elsewhere (i.e. Press Release, Meeting Minutes), then the social media version should be considered a secondary copy and therefore not need to be maintained in accordance with the records retention schedule. If it is determined that the information is the agency's official record, the information must be retained in accordance with agency records retention and disposition policy. Agencies must also consider whether each posting constitutes a unique record, or whether a record is composed of a collection of posts, such as an internal account used for a specific project.

When considering the use of a social media tools, agency records officers, legal counsel and information technology professionals should conduct an evaluation of the social media tool to determine what features or components should be included and how it will affect agency records management obligations.

Records Management Challenges

When considering the use of social media, it is important to understand the records and information management challenges that these tools may present users.

1. **Capture of Content** – Capturing records created by social media is important for a variety of reasons. An agency may need to retain a posted record due to the administrative, fiscal, legal or historical value of the information, to fulfill public records requests, as part of a litigation hold, or to ensure that the entity fulfills its responsibility for disposing of those records in accordance with its retention and disposition policy. Retaining social media records can be difficult, especially those that are frequently updated. Some social media platforms have developed tools



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to assist users with capturing content for retention purposes. It may be necessary to purchase third-party tools or develop in-house applications to electronically capture social media records. Capture strategies must be crafted for particular circumstances and tools. Once captured, agencies must also consider how they will access and search the captured information, which may accumulate quickly. For technical recommendations, consult Information Systems Security Agency (ISSA) or ARMA International.

2. **Ownership and Control of Data** – Most social media tools are managed by third-party companies and are generally free of charge. Yet, governmental agencies are responsible for the management of record information to the extent that it is available on the agency's accounts. One of the main concerns for many agencies is the possibility of termination of service and the loss of information that the agency is obligated to maintain. Generally, social media companies provide a generic "terms of service" agreement for all customers. Internal use policies should clarify who has the authority to enter into terms of service agreements with social media providers. Where possible, agencies, along with legal counsel and information technology professionals, should read and negotiate, where applicable, the "terms of service" agreement to incorporate language for the proper retention and disposition of records in accordance with state and federal laws.
3. **Implementation of Retention Policy** – Many times existing retention schedules can be applied to social media content and an agency should make every effort to map the information value of the content within the social media tools to existing records retention schedules or determine it to be a non-record. However, if the content is determined to have record value and cannot be mapped to an existing schedule, a new retention schedule or schedules will need to be created and approved. An inventory of data and records created across various social media will be helpful in assessing the strengths and weaknesses of one's current retention schedule in managing social media. Records that may be created through the use of social media include user agreements, user input forms, and user identification data. Retention of communication sent and received via social media should be managed in accordance with existing communication or e-mail policies. Retention policies should work in conjunction with policies governing employee use of social media.
4. **Duplication of Content** – Much like other formats, agencies must be careful to manage the duplication of information in social media. Similar content with different naming conventions, employee turnover, and lack of employee access and use controls are just a few of the issues that can lead to duplicate content. The effective management of duplicate content is critical to ensure records are not maintained longer than necessary. When the official record becomes eligible for disposal, duplicate content maintained on social media accounts should also be purged. It is important to keep track of where duplicate content is posted to ensure the efficient disposal of eligible record information.
5. **Management of Non-Record Content** – Agencies may determine that a considerable amount of information transmitted via social media is not a record under state and federal law. This content, however, still needs to be managed and properly disposed of. Otherwise, non-records can cause difficulty in retrieving information, wasted records storage resources, and additional discovery burden in the event of a lawsuit.
6. **Disposition of Content** – Once a government agency creates a presence on a social media site, any third party postings can be captured, forwarded, and used by others. Be cautious about what type of content is posted. Absent an existing records request or litigation hold, public



GUIDELINES FOR ELECTRONIC RECORDS MANAGEMENT

OHIO ELECTRONIC RECORDS COMMITTEE

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agencies are encouraged to delete social media in accordance with their retention schedule and use policies. The removal of obscene content should be treated as transparently and consistently as possible in accordance with internal policy. With that being said, it is also important to remember that information posted on social media should be considered available indefinitely, even if not through the government agency's site.

7. **Public Records Requests** – When evaluating social media, consideration should be given to features and components such as two-way communication. Be aware that public records requests could be made for social media content provided by both the public agency and the public. Agencies must determine whether comments and responses posted on the social media by the public meet the definition of 'record.' Also be aware that if two-way communication is enabled, it is possible to receive public records requests via social media. Consider who will monitor social media accounts for such requests and how the response will be provided and documented. Finally, while social media can be used both internally and externally, even social media tools that are not public facing, such as internal microblogging services (e.g. Yammer) or internal instant messaging, have the potential to be subject to public records inquiries.
8. **Legal Issues** – Agencies need to ensure that all federal, state and local laws and regulations are followed. Consider issues related to privacy, freedom of information, accessibility and applicable records management and public records laws; especially as it relates to how your agency handles requests for public records, the removal of inappropriate comments or posts, or use of copyrighted materials. It is important to consult your agency's legal representative to examine these issues, but a multidisciplinary approach is valuable. Professionals serving in other areas, such as human resources, accounting, or information technology, may have an intimate knowledge of the legal implications of social media within their areas of expertise.
9. **Preservation** – By law, records must be retained in an organized and accessible manner for the duration of their retention periods (O.R.C. 149.351, O.R.C. 149.43(B)(2)). The preservation of social media content can be challenging. Over time, you may not be able to rely on maintaining it in the third party provider's environment. Some social media sites provide tools to extract information in open formats, while other sites do not. Agencies must consider how frequently record information will need to be captured, the stability of the social media site, and the functionality of the tools used to extract the information. Depending on how your agency uses social media and how frequently, consideration must be given to how you will find captured information. This is particularly important when social media content is subject to a legal hold. Commercial tools may be available to assist agencies in archiving and searching social media content, but many times these tools are not "one-size fits all." It is also important to remember that the social media tools do not consist of just posts, but embedded files, links, photos, videos, etc., which need to be addressed in your agency's preservation strategy.
10. **Employee Use & Access** – Public sector workers must be trained to understand that the social media content they create as a public employee may be a record and subject to disclosure as a public record. Therefore, agencies must develop a policy identifying expected agency uses for social media, restrictions for personal use and consequences for violating the policy. Consider using a disclaimer that specifies that comments posted by employees are personal in nature and do not represent the views of the agency. Control which employees are allowed access to social media sites and limit the types of sites they can access. Request an official business justification in order to access and use pre-approved social media sites.

5

GOVERNOR'S
VETO
OVERRIDDEN

CHAPTER

112

MAY 1, 2014

RESOLVES

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND FOURTEEN

H.P. 838 - L.D. 1194

**Resolve, Directing a Study of Social Media Privacy in School and in the
Workplace**

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Legislature finds that the fast pace of technological development places increasing pressure on individuals' privacy, especially with regard to social media, e-mail and similar applications; and

Whereas, educational institutions often provide electronic devices, cloud computing services that process and store student data and access to technology to students to further the educational missions of the institutions; and

Whereas, educational institutions' responsibilities include protecting the privacy, safety and well-being of students and educational personnel, including stopping and preventing bullying; and

Whereas, employers often provide electronic devices and access to technology to their employees to further the employers' operations; and

Whereas, state and federal laws, rules, regulations and guidance require employers to monitor their employees' activities that may affect or be related to the employers' responsibilities; and

Whereas, the Legislature finds that an appropriate balance must be found between the needs of educational institutions and employers and the privacy interests of students and employees; and

Whereas, it is necessary that this legislation take effect immediately in order to allow sufficient time for the Joint Standing Committee on Judiciary to conduct its work; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as

1

immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1. Study. Resolved: That the Joint Standing Committee on Judiciary of the 126th Legislature, referred to in this resolve as "the committee," shall study the issues involved in social media and personal e-mail privacy with regard to education and employment. The committee shall study:

1. Concerns of employees and applicants for employment about privacy rights associated with social media and personal e-mail accounts;

2. Concerns of employers, both public and private, about social media and personal e-mail accounts of employees and applicants for employment with regard to workplace needs, protection of proprietary information, proposed heightened requirements associated with specific types of employment and compliance with state and federal laws concerning workplace safety and regulation of business-related representations;

3. Concerns of students and prospective students about privacy rights associated with social media, cloud computing services that process and store student data and personal e-mail accounts;

4. Concerns of educational institutions, including public and private schools and postsecondary institutions, about social media, cloud computing services that process and store student data and personal e-mail accounts of students and prospective students with regard to electronic communications devices provided by the institution, compliance with applicable laws and regulatory requirements, including policies and practices addressing bullying and harassment, and in loco parentis responsibilities;

5. Concerns of parents and educators about the processing and storing of student data by online service providers to kindergarten to 12th grade educational institutions in order to build information profiles on students and target online advertisements to students;

6. Laws and experiences in other states concerning social media, cloud computing services that process and store student data and personal e-mail privacy;

7. The application of federal law and regulations concerning social media, cloud computing services that process and store student data and personal e-mail privacy; and

8. How subpoena powers of governmental entities apply to social media, cloud computing services that process and store student data and personal e-mail accounts; and be it further

Sec. 2. Meetings. Resolved: That the committee may meet up to 4 times for the purposes of the study; and be it further

Sec. 3. Staff assistance. Resolved: That the Legislative Council shall provide necessary staffing services to the committee for the purposes of the study; and be it further

Sec. 4. Report. Resolved: That, no later than November 5, 2014, the committee shall submit a report that includes its findings and recommendations, including suggested legislation, for presentation to the First Regular Session of the 127th Legislature. The committee shall make recommendations concerning limitations on providing log-in information, requiring inclusion on contacts lists, changing privacy settings and otherwise accessing content of social media, cloud computing services that process and store student data and personal e-mail accounts of employees, applicants for employment, students and prospective students, as well as appropriate remedies for violations of restrictions; and be it further

Sec. 5. Funding. Resolved: That the committee shall seek funding contributions to fully fund the costs of the study. All funding is subject to approval by the Legislative Council in accordance with its policies. If sufficient contributions to fund the study have not been received within 30 days after the effective date of this resolve, no meetings are authorized and no expenses of any kind may be incurred or reimbursed; and be it further

Sec. 6. Appropriations and allocations. Resolved: That the following appropriations and allocations are made.

LEGISLATURE

Study Commissions - Funding 0444

Initiative: Provides an allocation to authorize the expenditure of contributions received to fund the costs of a study by the Joint Standing Committee on Judiciary.

OTHER SPECIAL REVENUE FUNDS	2013-14	2014-15
Personal Services	\$0	\$3,080
All Other	\$0	\$4,170
OTHER SPECIAL REVENUE FUNDS TOTAL	\$0	\$7,250

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.



126th MAINE LEGISLATURE

SECOND REGULAR SESSION-2014

Legislative Document

No. 1780

S.P. 707

In Senate, February 18, 2014

**An Act To Prohibit Providers of Cloud Computing Service to
Elementary and Secondary Educational Institutions from
Processing Student Data for Commercial Purposes**

(AFTER DEADLINE)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 205.

Reference to the Committee on Education and Cultural Affairs suggested and ordered printed.

A handwritten signature in dark ink, appearing to read 'Darek M. Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator KATZ of Kennebec.

Cosponsored by Representative BERRY of Bowdoinham and

Senator: THOMAS of Somerset, Representatives: BECK of Waterville, MacDONALD of Boothbay, NELSON of Falmouth, POULIOT of Augusta.

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

2 Sec. 1. 20-A MRS §6006 is enacted to read:

3 §6006. Student privacy and cloud computing

4 1. Definitions. As used in this section, unless the context otherwise indicates, the
5 following terms have the following meanings.

6 A. "Cloud computing service" means a service that enables convenient, on-demand
7 network access to a shared pool of configurable computing resources to provide a
8 student, teacher or staff member with account-based productivity applications such as
9 e-mail, document storage and document editing that can be rapidly accessed and
10 made available with minimal management effort or interaction by a cloud computing
11 service provider.

12 B. "Cloud computing service provider" means a person, other than an educational
13 institution, that operates a cloud computing service.

14 C. "Educational institution" means any public, private or charter school or school
15 administrative unit serving students in kindergarten to grade 12.

16 D. "Person" means an individual, partnership, corporation, association, company or
17 any other legal entity.

18 E. "Process" means to use, access, manipulate, scan, modify, transform, disclose,
19 store, transmit, transfer, retain, aggregate or dispose of student data.

20 F. "Student data" means any information or materials in any media or format created
21 or provided by:

22 (1) A student in the course of the student's use of a cloud computing service; or

23 (2) An employee or agent of an educational institution, if the information or
24 materials are related to a student.

25 "Student data" includes, but is not limited to, the name, e-mail address, postal
26 address, telephone number, unique identifier or metadata or any e-mail message or
27 word processing document of a student.

28 2. Prohibition on the use of student data. A cloud computing service provider
29 that, with knowledge that student data will be processed, provides a cloud computing
30 service to an educational institution may not use that cloud computing service to process
31 student data for any secondary use that benefits the cloud computing service provider or
32 any 3rd party, including, but not limited to:

33 A. Collecting information relating to a student's online activity;

34 B. Creating or correcting an individual or household profile primarily for the benefit
35 of the cloud computing service provider or any 3rd party;

36 C. Selling the student data for any commercial purpose; or

37 D. Providing for any other similar commercial for-profit activity, except that a cloud
38 computing service may process or monitor student data solely to provide the cloud

OFFICE OF POLICY AND LEGAL ANALYSIS

March 5, 2014

To: Members, Joint Standing Committee on Education and Cultural Affairs

From: Phillip D. McCarthy, Ed.D., Senior Legislative Analyst 

Subj: **LD 1780, An Act To Prohibit Providers of Cloud Computing Service to Elementary and Secondary Educational Institutions from Processing Student Data for Commercial Purposes (Sen. Katz)**

SUMMARY

This bill prohibits a cloud computing service provider that provides a cloud computing service to an educational institution from using that service to process student data for any secondary use that benefits the provider or any 3rd party.

TESTIMONY

Proponents	Opponents
<ul style="list-style-type: none"> ⊕ Sen. Katz, sponsor, bill provides a tool to protect privacy during the information technology age; and prohibits mining student data and using it for commercial purposes; some “cloud” service providers do not respect privacy and this is a concern for student information stored ; Fordham Law School survey found discouraging results related to protection of student privacy; proposed an amendment to the bill that includes provisions adopted by other states ⊕ Rep. Nelson, co-sponsor, many schools have contracts with cloud internet providers to store and share information within their own school; some share information from cloud to a third-party entities ⊕ Rep. Berry, cosponsor, Legislature needs to support our schools and our students by protecting the privacy of student information ⊕ Bob Hasson, MSBA and MSSA, support bill since security breaches are possible and information gathered from students by schools should only be used for their educational benefit ⊕ Ryan Harkins, Microsoft attorney, support bill as amended; strikes the proper balance between protecting privacy and permitting innovation; benefits of cloud computing should not come at the expense of the privacy of student data; FERPA and COPPA (Children’s Online Privacy Protection Act) only applies to children under 13 years old; 75% of parents disapprove of using student data for advertising or marketing data; 10 legislatures have adopted legislation to protect student privacy; Microsoft; laws can drive bad practices out of industries bill would close gaps in existing laws; prohibits scanning student data; we not only have to protect students’ physical safety, but their privacy 	<ul style="list-style-type: none"> ⊕ Ron Barnes, Google, bill is a solution looking for a problem and an opportunity for one of our competitors to go after us and our Google “apps for education”; apps for education does not include ads unless the school decides to turn them on (elementary versus colleges); if turned on, apps for education ads are contextual as compared to interest-based ads; consumer product versus education products; heard lots of conditional (hypothetical) statements, but no examples of how security of data is breached; would like to continue conversation and focus on problems and discuss bad actors; schools have two separate data centers, student data and administration (grades, demographic info, secondary use, etc.); bill uses a number of broad and undefined terms: individual or household profile, 3rd parties, etc.; bill expands beyond advertising and not just about student data and concerned is an operational concern as compared to a financial concern Neither For Nor Against ⊕ Jeff Mao, DOE, agree policies need to be developed to protect student data, however this is a complex set of policies and there must be a balance between data protection, using values of cloud computing to improve school services that benefit student learning and school performance ⊕ Andy Cashman, Preti Flaherty representing Connections Academy, no problem with underlying policy in the bill, but would like to have virtual charter school to be excluded from the bill

Proponents (cont'd)

- ⊕ Bradley Schear, attorney for SafeGov.org, schools need responsible privacy solutions for student data stored on cloud; Fordham study found that less than 25% of agreements specify the purposes for disclosure of student data, less than 7% of contracts restrict the sale or marketing of student information by vendors and many agreements allow vendors to change the terms of service without prior notice; 91% of parents are concerned about the privacy of their children's data and 89% of the parents support stronger standards for cloud computing storage
- ⊕ Lois Kilby-Chesley, MEA, supports the development of effective standards to protect privacy of student data
- ⊕ Suzanne Lafreniere, Roman Catholic Diocese of Portland, support bill as students should be free to learn and realize their full potential in an atmosphere free from commercial exploitation
- ⊕ Oami Amarasingham, American Civil Liberties Union of Maine, particularly concerned with the indiscriminate collection and use of students' personal information (e.g., student health and behavioral information and what student buys or eats at school); school contracts with cloud computing providers must include provisions to protect student data

POTENTIAL ISSUES OR TECHNICAL PROBLEMS:

- ⊕ Does bill address a serious public policy question or is it just a Microsoft versus Google bill?
- ⊕ Language in bill gets right to the core concern of protecting student information and data, but the provisions may need to clarify the definition of "processing student data for any secondary use"
- ⊕ There are three types of ads: placed ads, contextual ad (sports), and interest-based ads (connected to your personal interests)
- ⊕ 27% of cloud contracts with schools are "free", but there may be a cost to student data; bill would require a change in practices for a narrow sliver of providers
- ⊕ Blended learning and online learning; does bill need to be amended to support these learning approaches?
- ⊕ Other states are considering legislation to protect student privacy, including AZ, CA, ID, KY, MD, NY, VA
- ⊕ Should the legislation clarify the definition of "commercial"?
- ⊕ Need to clarify privacy versus "targeted" advertising concerns
- ⊕ DOE longitudinal data system protects individual data; do cloud service providers interfere with this data?
- ⊕ Seek balance between protecting student privacy and enabling service providers, to deal with their solutions
- ⊕ Implications for virtual charter schools, current policies or contracts that provide student privacy protection
- ⊕ Definition of cloud-based computing services is too narrow; more concerned with student performance data; definition of secondary use or secondary product data in the aggregate is too broad
- ⊕ Other issues that are not addressed in the bill, including data retention, conscription, etc.

COMMITTEE REQUESTS FOR ADDITIONAL INFORMATION:

- ⊕ Rep. Hubbell - For MSMA, how many SAUs use free-internet services versus paying for service providers; and what providers are schools using (e.g., Microsoft, Google, Yahoo, etc.)
- ⊕ Rep. Hubbell - For Microsoft, provide privacy policy and examples of good and poor privacy policies
- ⊕ Rep. Daughtry - For Google, provide privacy policy

- ⊕ Sen. Millett - For Google, review amendment language and provide a written statement on the amendment
- ⊕ Rep. Daughtry - For Google, provide legislation language proposed in other states
- ⊕ Rep. MacDonald - For DOE, which provider does DOE use to provide its cloud-based services
- ⊕ Rep. MacDonald - For DOE, review amendment language and provide perspectives on broad or narrow language
- ⊕ Sen. Johnson - For DOE, inventory of the kind of services in use by Maine schools and providers

PRELIMINARY FISCAL IMPACT STATEMENT:

- ⊕ Not yet determined by the Office of Fiscal & Program Review (OFPR)

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LINDA M. VALENTINO, District 5, Chair
 JOHN L. TUTTLE, JR., District 3
 DAVID C. BURNS, District 29



CHARLES R. PRIEST, Brunswick, Chair
 KIM MONAGHAN-DERRIG, Cape Elizabeth
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 WAYNE T. MITCHELL, Penobscot Nation

MARGARET J. REINSCH, Legislative Analyst
 SUSAN M. PINETTE, Committee Clerk

State of Maine
 ONE HUNDRED AND TWENTY-SIXTH LEGISLATURE
 COMMITTEE ON JUDICIARY

September 5, 2014

TO: Speaker Mark W. Eves, Chair
 President Justin L. Alford, Vice-Chair
 Legislative Council

FROM: Senator Linda M. Valentino, Senate Chair
 Representative Charles R. Priest, House Chair
 Joint Standing Committee on Judiciary

Re: Freedom of Access requests

During the Second Regular Session, the Judiciary Committee discussed specific recommendations by Public Access Ombudsman Brenda Kielty with the Governor's Senior Policy Advisor Jonathan Nass. Ms. Kielty's recommendations, pursuant to Public Law 2013, chapter 229, section 3, focused on actions that Maine government agencies can take to help members of the public more easily request public records via the Internet.

Mr. Nass committed to the administrative implementation of the recommendations that were included in LD 1818. We are attaching his letter to the Judiciary Committee and our response. Mr. Nass recommended that the Legislature take similar action on its webpages, specifically that the public access officer (required by 1 MRSA §413) for each agency that maintains a website place his or her contact information or a link to his or her contact information on the homepage of the agency's publically accessible webpage. The other actions that the Executive Branch will be taking are standardizing search terms to include Freedom of Access terminology, as well as working with the Ombudsman to develop a process to track public records requests.

We believe that these steps maybe be very useful for the Legislature to take to ensure as much transparency and public accessibility as possible. There may be great benefit in coordinating how the Legislature and the Executive Branch handle public records requests. We respectfully request that the Legislative Council adopt measures to increase the ability of the public to make public records requests online, and that the Council discuss the extent to which the coordination with State agencies is feasible or desirable.

Please feel free to contact us or the Right to Know Advisory Committee if you have any questions.

Thank you.

attachments

c: Suzanne Gresser, Acting Executive Director
 Nik Rende, Acting Director, Legislative Office of Information Technology
 Brenda Kielty, Public Access Ombudsman
 Members, Right to Know Advisory Committee



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

March 27, 2014

The Honorable Linda Valentino
The Honorable Charles R. Priest
Chairs, Joint Standing Committee on the Judiciary
C/O Legislative Information
100 State House Station
Augusta, ME, 04333

RE: LD 1818, *An Act to Facilitate Public Records Requests to State Agencies*

Dear Senator Valentino and Representative Priest:

Thank you for the opportunity to address the Judiciary Committee on LD 1818, *An Act to Facilitate Public Records Requests to State Agencies*. I am writing to memorialize that discussion.

Governor LePage is committed to a transparent government that allows the citizens of Maine to easily access information pertinent to their lives and well-being and that maintains confidence in state government and the democratic process. Therefore, the LePage Administration commits to administratively implement the provisions of LD 1818. These provisions include the actions that follow:

- The public access officer for each state agency that maintains a website will place his or her contact information or a link to his or her contact information on the home page of the agency's publically accessible website;
- The Department of Administrative and Financial Services will develop a standardized link to the Freedom of Access Act pages and develop a keyword match for "FOAA" in state agency website; and
- The Department of Administrative and Financial Services will work with the Public Access Ombudsman to develop and implement a system of consistent tracking and reporting of requests made pursuant to the Freedom of Access Act.

As we also discussed, I hope the Committee will make a similar request of the Legislative Council and the Legislature's own information technology office. If that office requires assistance in that effort, please have them contact my office, and I will facilitate assistance from the Office of Information Technology.

Thank you again for the opportunity to address the Judiciary Committee on this important topic.

Sincerely,

Jonathan T. Nass

Jonathan T. Nass, Esq.
Senior Policy Advisor
Governor Paul R. LePage



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 SUSAN M. PINETTE, Committee Clerk

State of Maine
 ONE HUNDRED AND TWENTY-SIXTH LEGISLATURE
 COMMITTEE ON JUDICIARY

April 2, 2014

Jonathan T. Nass, Esq.
 Senior Policy Advisory
 Governor Paul R. LePage
 1 State House Station
 Augusta, Maine 04333-0001

Re: LD 1818, An Act To Facilitate Public Records Requests to State Agencies

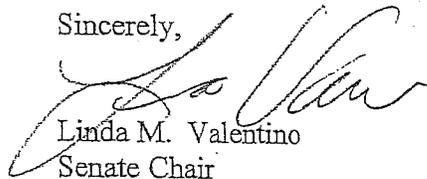
Dear Mr. Nass:

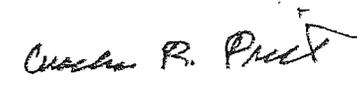
Thank you for engaging in the discussion about the Freedom of Access Act and some of the difficulties that often arise when governments are committed to transparency. We join the Governor in recognizing the importance in ensuring that citizens of Maine can easily access information pertinent to their lives and well-being. We agree that government transparency is essential in maintaining confidence in every level of government as well as the democratic process.

We accept your commitment to the administrative implementation of the recommendations for action in LD 1818 that we agree will help members of the public more easily access records, as well as increase their faith in the efficacy of government. We have confidence in Brenda Kielty's ability to work with OIT and others to develop and implement the tracking system that should help identify bottlenecks, as well as what the State is doing successfully in sharing information. We are very appreciative of your commitment to implement the tracking and reporting system using existing budgeted resources.

We look forward to continued cooperation in improving the transparency of Maine's state government. Thank you for coming forward and getting the process started.

Sincerely,


 Linda M. Valentino
 Senate Chair


 Charles R. Priest
 House Chair



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

September 16, 2014

The Honorable Linda Valentino
The Honorable Kimberly Monaghan-Derrig
Chairs, Right to Know Advisory Committee
C/O Office of Policy and Legal Analysis
13 State House Station
Augusta, ME 04333

RE: LD 1818, *An Act to Facilitate Public Records Requests to State Agencies*

Dear Senator Valentino and Representative Monaghan-Derrig:

I am writing to update you on the administrative implementation of the provisions of LD 1818, *An Act to Facilitate Public Records Requests to State Agencies*. This serves as a follow up to my March 27, 2014 letter to the Judiciary Committee on the same subject.

Since my original letter, the Department of Administrative and Financial Services (DAFS) has had a series of productive meetings resulting in significant progress toward implementation, including a meeting with the Attorney General's Public Access Ombudsman. Out of these meetings, both DAFS and the Public Access Ombudsman have identified the Footprints Incident Tracking System as the tool that will provide consistent tracking and reporting of requests for executive branch agencies. This system is currently used by the Department of Health and Human Services and can be easily adapted for use by other executive branch stakeholders.

The DAFS Communications Team and the Public Access Ombudsman will be meeting with executive branch public access officers and communications directors this fall to discuss the use and implementation of the Footprints system. Due to a significant upgrade of the Footprints software scheduled for later this year, both DAFS and the Public Access Ombudsman have agreed to an implementation date of January 1, 2015.

In addition to this important undertaking, the LePage Administration is committed to more immediate actions. The public access officer for each state agency that maintains a website will place his or her contact information, or a link to his or her contact information, on the home page of the agency's publically accessible website. A Freedom of Access Act (FOAA) graphic has been designed to serve as a standardized link to FOAA pages and will be posted on all executive branch department websites in a standard location. Finally, in an effort to improve the ability of the public to locate information on FOAA, the DAFS' Office of Information Technology has developed coding that will improve the search engine optimization for agency



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websites. This development improves the likelihood that users will locate the information they are seeking regardless of whether they are searching internally or externally of State of Maine websites.

Governor LePage is committed to a transparent government that allows the citizens of Maine to easily access information pertinent to their lives and well-being and maintains confidence in state government and the democratic process.

Thank you for the opportunity to provide you with this information. I hope that you will share it with the members of the Right to Know Advisory Committee.

Sincerely,

A handwritten signature in black ink that reads "Jonathan T. Nass". The signature is written in a cursive style and is enclosed within a hand-drawn oval shape.

Jonathan T. Nass, Esq.
Senior Policy Advisor
Governor Paul R. LePage

