

STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Aaron M. Frey, Attorney General



PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2018

February 7, 2019

Brenda L. Kielty, AAG, Ombudsman

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SUMMARY

Maine's Freedom of Access Act (FOAA) recognizes that government must be accountable to the people and provides a statutory right of access to public meetings and public records. While the principles of open government, transparent deliberations and access to public information are fundamental to FOAA, these interests must be balanced with the need for government to maintain the confidentiality of information to protect personal privacy, security and other legitimate interests.

In 2007 the Legislature created the public access ombudsman position within the Office of the Attorney General. The statute authorized the ombudsman to educate the public and government officials about the requirements of the State's freedom of access law, provide dispute resolution services, answer inquiries and make recommendations for improvements to the law. In 2012 the Legislature funded a full-time ombudsman position.

The ombudsman performs an unusual role in government. Although the ombudsman receives complaints from the public, the ombudsman's job is not to be either an advocate for the complainant or a defender of the government. An ombudsman is an impartial intermediary who provides information, who informally resolves disputes and encourages full compliance with the spirit and the letter of the law.

Six Year Program Trends

The ombudsman activity involving question and complaint resolution has grown over the six years of the program. A total of 443 contacts were received in 2018 from FOAA requesters and agencies seeking assistance. The number of inquiries and complaints remained stable from 2017 to 2018.

As was the case in previous years, the bulk of the contacts were telephone inquiries from private citizens regarding access to public records held by municipal government agencies.

State Agency Annual FOAA Reporting

The Ombudsman Report for 2018 includes data on the annual number of FOAA requests, average response time and the costs of processing FOAA requests for each of the executive branch State agencies. This is the fourth year that this information has been compiled. Although incomplete data was reported on some of the indicators, this snapshot of FOAA activity should help inform policy makers and the public on how each agency is generally responding to FOAA requests over the course of a year. This data also illuminates the volume of FOAA requests for these state agencies collectively.

I would like to thank the state agency public access officers for their time in compiling the data necessary for this report and their continued dedication to providing access to public records.

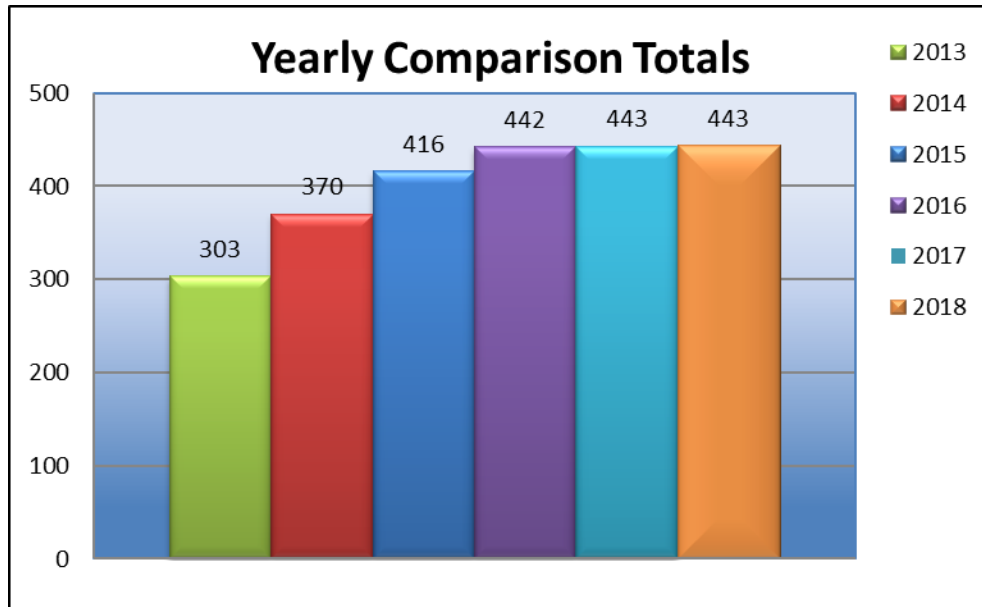
Brenda L. Kielty, Public Access Ombudsman

ANSWERING INQUIRIES & RESOLVING DISPUTES

“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S. § 200-I(2)(A) and (B).

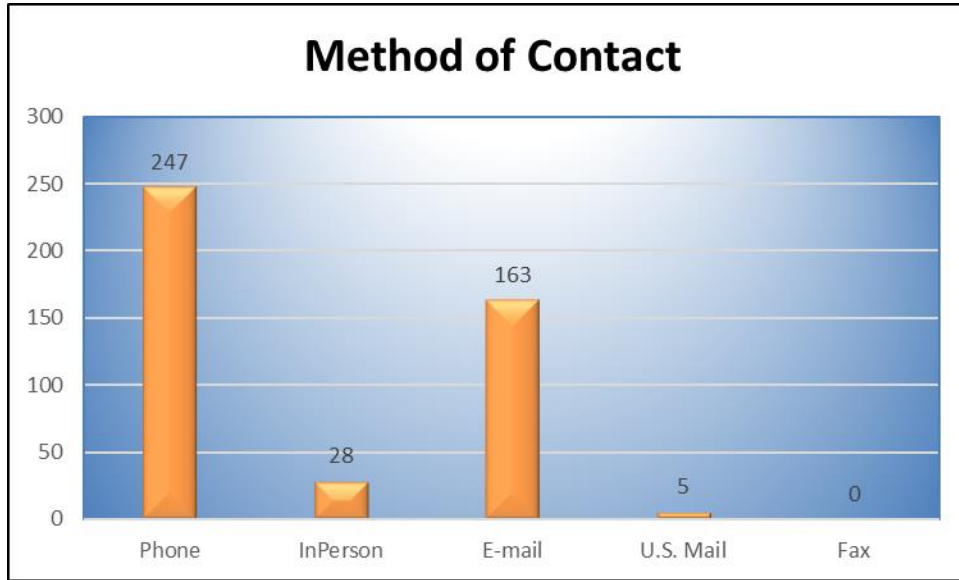
2018 Contacts with the Ombudsman

In 2018 I logged 443 inquiries and complaints. Requests for help ranged from questions about how to file a FOAA request to more complex inquiries regarding situations in which the FOAA issues were only part of a larger dispute or where some fact-finding was necessary before appropriate advice could be given.



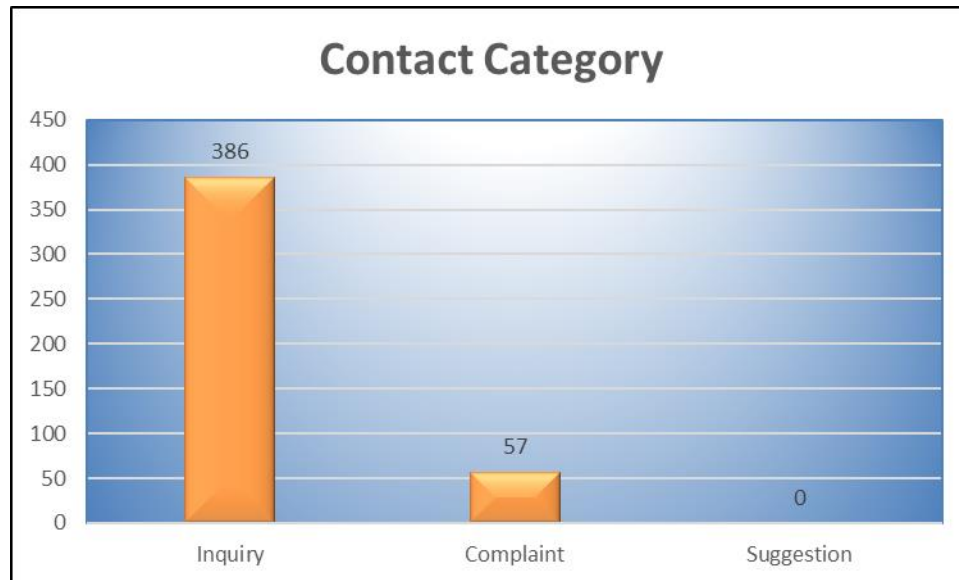
Method of Contact

The bulk of initial contacts was by telephone (247) followed by email (163), in- person (28) and U.S. Mail (5).



Contacts Included Inquiries, Complaints and Suggestions

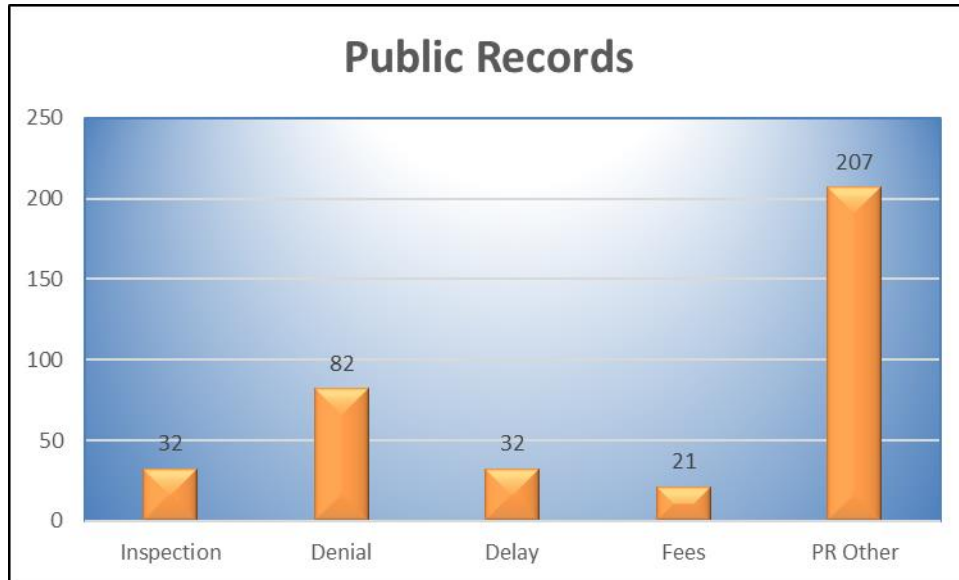
The 443 contacts included general inquiries (386), complaints (57) and suggestions (0). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



Contacts Concerning Public Records

Of the contacts about public records (368), the most common questions concerned:

- Basis for a denial
- Confidentiality exceptions
- Reasonable response times and delay
- Production or inspection of public records
- Fees and costs for public records



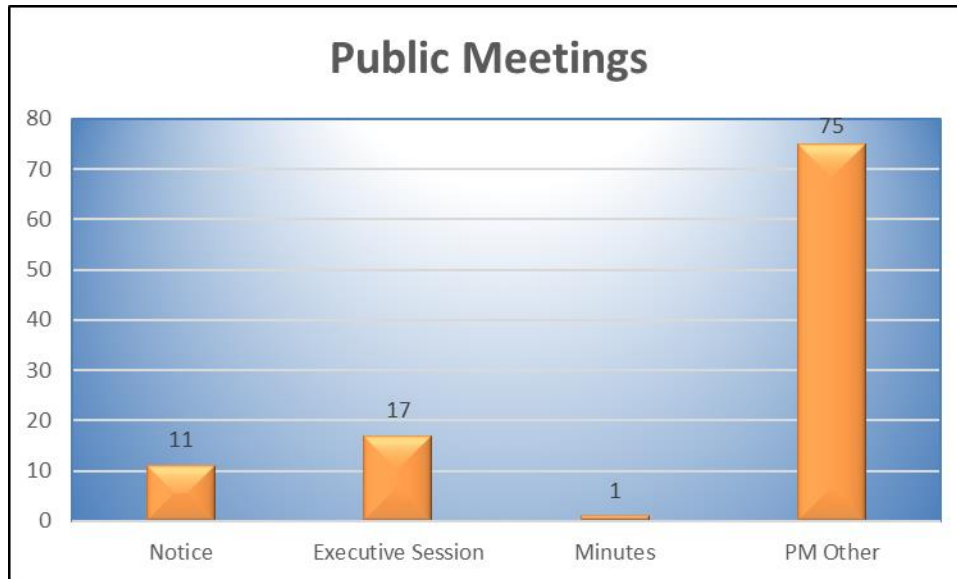
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- Retention and destruction of records
- Confidentiality of specific documents prior to a FOAA request being made
- Access to records normally part of discovery
- General information on making a FOAA request
- Mandatory FOAA training for officials
- Whether an entity is subject to FOAA
- Asking for a document rather than asking for the answer to a question
- Legislation and case law
- Asking an agency to compile data or create a document
- Burdensome FOAA requests
- Due diligence of an agency in searching for records

Contacts Concerning Public Meetings

Of the contacts concerning public meetings (101), most questions concerned:

- Use of executive session
- What constitutes a meeting

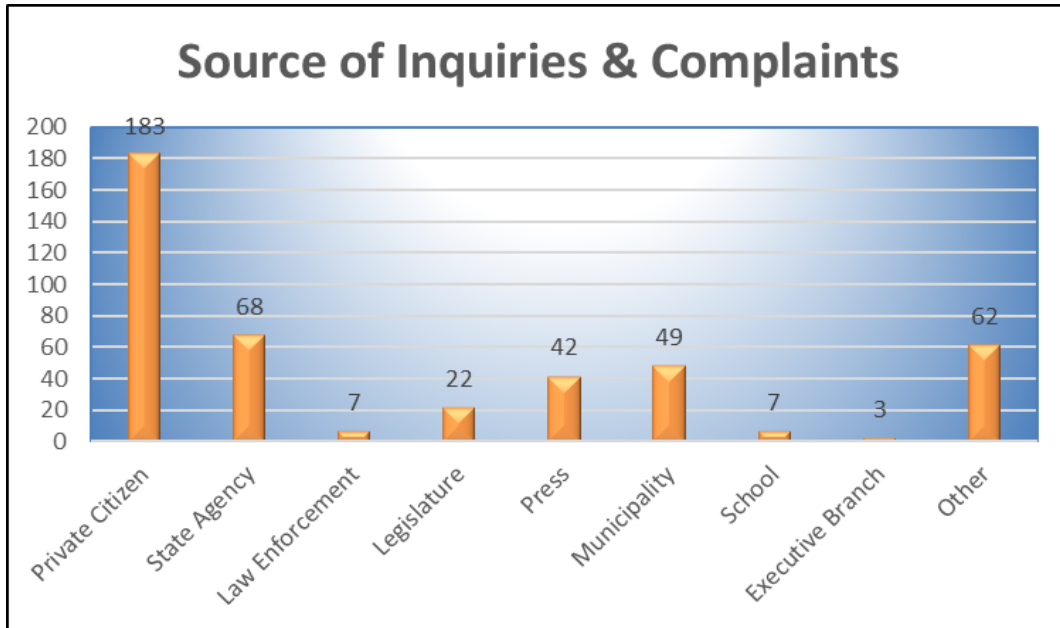


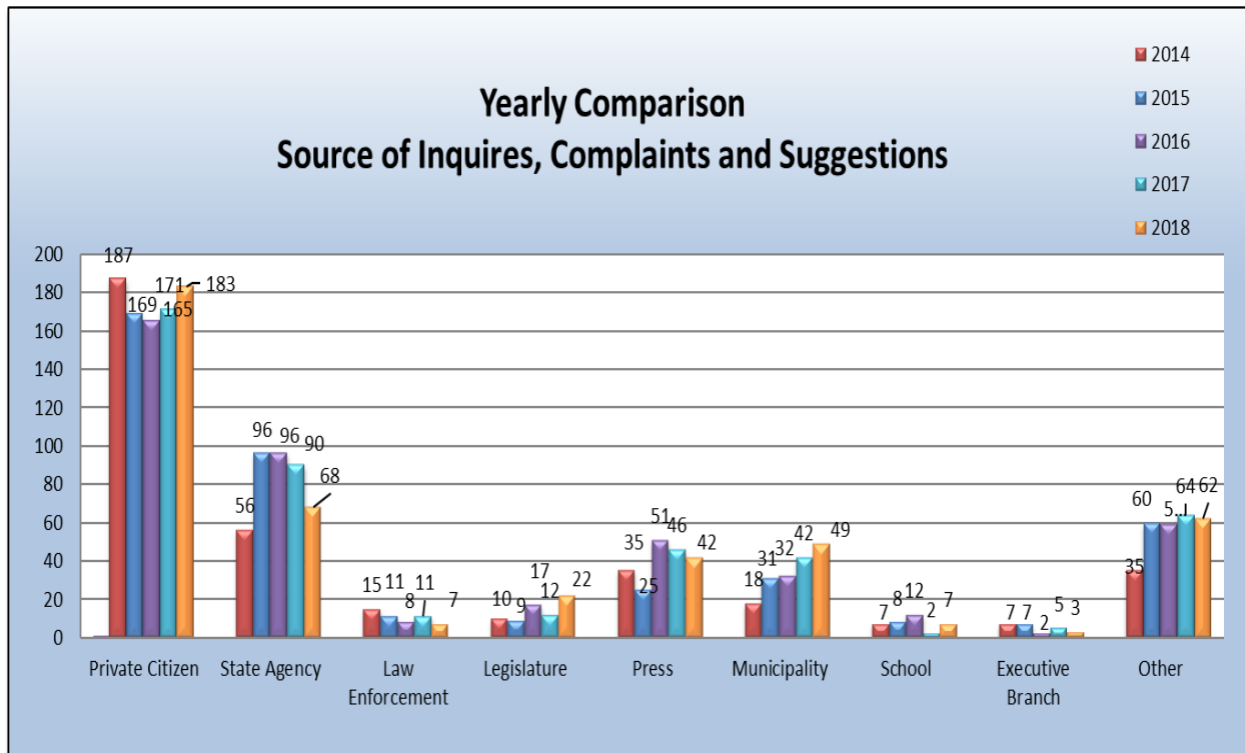
All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- Whether an agenda is required
- Public comment period during public meetings
- Remote participation by members of a public body
- What entities are subject to FOAA

Source of Inquiries, Complaints and Suggestions

Of the 443 inquiries, complaints and suggestions, 183 came from private citizens, 68 from state agencies, 7 from law enforcement agencies, 22 from the Legislature, 42 from members of the media, 49 from municipal officials, 7 from school districts, 3 from the executive branch and 62 from others including attorneys and commercial requesters.



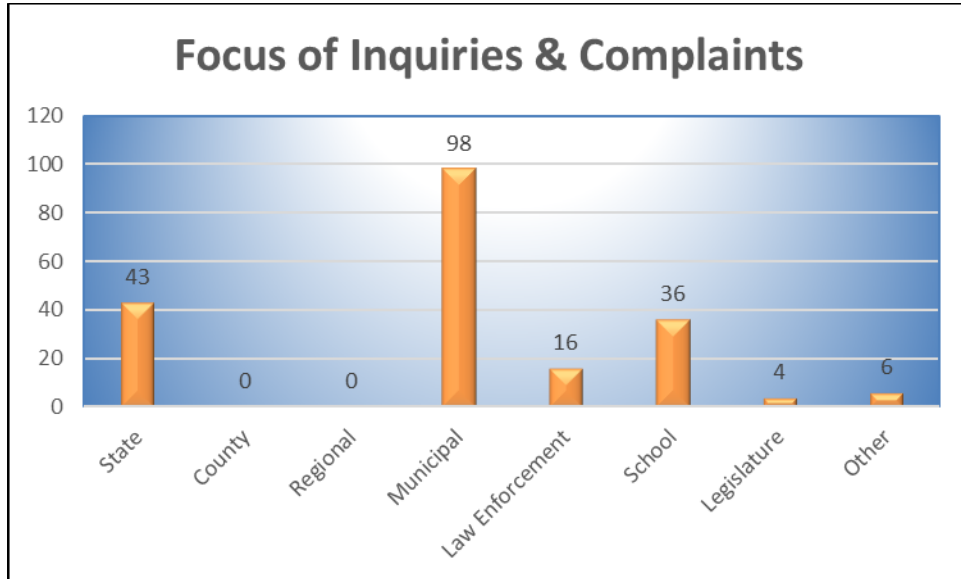


Although these metrics fluctuate each year, there were notable increases in contacts from private citizens (+18) and the Legislature (+10) and a decrease in contacts from state agencies (-22.)

Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (98) and state agencies (43). The remainder concerned law enforcement agencies (16), school administrative units (36), county agencies (0), and the Legislature (4). Others (6) concerned individual requesters, commercial requesters and various quasi-municipal and public entities.

The focus of the inquiries and complaints continues to be dominated by municipalities, as could be expected based on the sheer number of municipal entities in the state.



Outcomes Reached as Result of Contact with Ombudsman

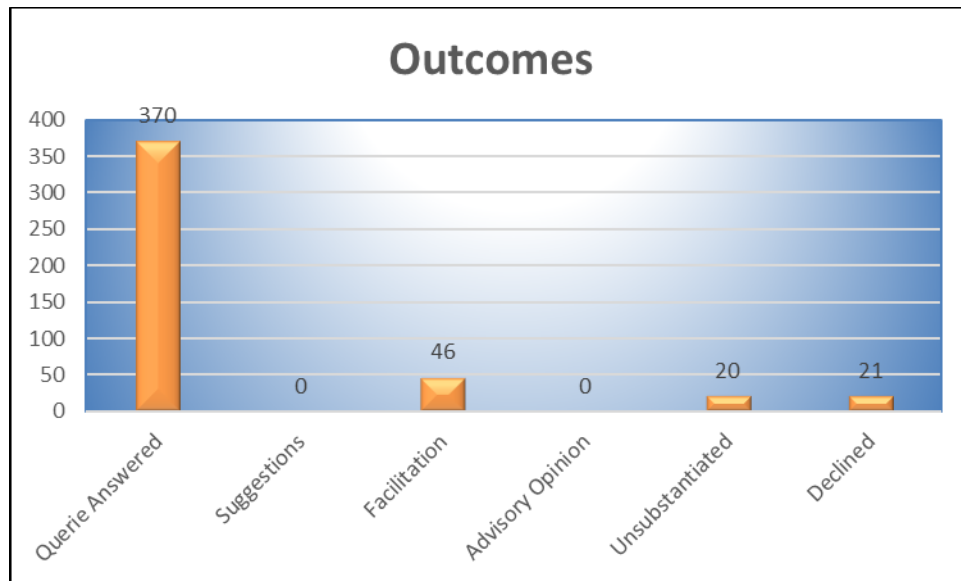
A contact may be logged as “resolved” for the following reasons:

- Complaint was deemed unsubstantiated
- Informal discussions or facilitation resulted in an agreement on how to proceed
- Agency offered an acceptable remedy
- Complaint was withdrawn
- Complainant failed to produce requested information
- Ombudsman determined there was other good cause not to proceed

A contact may be logged as “declined” if the subject of the dispute was outside the scope of authority of the ombudsman or related to a matter that was the subject of an administrative or judicial proceeding. In 2018 a total of 21 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 443 contacts included 370 answers to inquiries, 0 observations from citizens for improvements to the law and 46 facilitated resolutions.

There were no advisory opinions issued in 2018.



OUTREACH & TRAINING

I provided on-site FOAA trainings and presentations to a variety of state and local entities including the following:

- Maine Office of the Chief Medical Examiner
- Maine's 129th Legislature
- Office of the Attorney General
- Maine County Commissioner's Association

STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2018 includes data on the number of FOAA requests, average response time and the costs of processing FOAA requests for each of the executive branch State agencies.

Method

Each reporter was asked to submit data on key FOAA response indicators and include any other explanatory information relevant to their FOAA program. The absence of uniform FOAA tracking across agencies, variations in data collection and incomplete reporting limit the accuracy of the compiled data for some indicators.

Although the statute refers to “requests for information” which could include a set of data much broader than FOAA requests, reporting was limited to requests that were processed within an agency’s FOAA procedures.

The “average” response time was reported based on the set of timeframes listed below.

The “costs” of processing requests could include multiple criteria to assess the use of agency resources. As a baseline the data included the amount billed as fees for FOAA requests.

Agencies that could calculate the actual hours spent responding to FOAA requests included that data.

Key FOAA Response Indicators

1. Number of FOAA requests received in 2018
2. Response time 0 – 5 days
3. Response time 6 – 30 days
4. Response time 31 – 60 days
5. Response time greater than 60 days
6. Response time greater than 6 months
7. Response time greater than 1 year
8. Amount of fees and costs for FOAA requests
9. Amount of agency hours spent responding to FOAA requests

Findings

A total of 1,506 FOAA requests were logged by the fourteen executive branch state agencies in 2018. This reflects an increase of 268 requests from 2017. The total increase in requests over the last two years equals 439. There was a wide variation in totals between the agencies from four requests for the Department of Economic and Community Development to 581 for the Department of Public Safety.

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

year to complete were tracked for the first time in 2018. 68 (4.5%) requests were responded to in 6 – 12 months and 3 (0.2%) took more than a year.

There can be many reasons for the length of response times including the scope and complexity of the request, earlier pending requests and the availability of employees to shift from operational duties to FOAA. This relatively small data set does not provide enough information to determine why some requests took longer than others. However, it is a concern that the number of reported responses greater than 60 days has increased from 54 in 2016 to 73 in 2017 to 138 in 2018. **I will be addressing this issue with state agency public access officers to identify the barriers to prompt response times, especially focusing on the backlog cases.**

Agencies reported a total of \$9,377 of fees charged for responding to FOAA requests. This indicator does not include hourly fees and costs that could have been charged and were waived. Several agencies did not report on this metric and the actual total would certainly be greater with complete data.

Agency staff hours spent responding to FOAA requests totaled 1,511 hours with several agencies not reporting this indicator. The Department of Public Safety had the greatest number of requests (581) and the greatest number of hours spent on FOAA responses (422) while the Department of Economic & Community Development had the least number of requests (64) and the least number of hours spent on FOAA responses (6) among all the agencies.

STATE AGENCY 2018 FOAA REPORTING

AGENCY	FOAA REQUESTS RECEIVED	RESPONSE TIME 0-5 DAYS	RESPONSE TIME 6-30 DAYS	RESPONSE TIME 31-60 DAYS	RESPONSE TIME >60 DAYS > 6 Months > 1 Year	FEEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2017 REQUESTS
Administrative & Financial Services	79	46	14	7	3 3 0	\$ 237	136	7
Agriculture, Conservation & Forestry	65	36	24	4	1 0 0	\$ 546	93	0
Corrections	89	42	20	5	21 1 0	n/a	n/a	9
Defense, Veterans & Emergency Management	6	2	1	1	2 0 0	\$ 105	22	0
Economic & Community Development	4	3	1	0	0 0 1	\$ 0	6	2
Education	143	63	56	10	4 1 1	\$ 405	246	9
Environmental Protection	92	46	34	3	4 0 0	\$ 2,536	256	5
Health & Human Services	225	69	71	23	39 23 0	n/a	n/a	n/a
Inland Fisheries & Wildlife	41	15	14	5	6 0 0	n/a	41	0
Labor	17	4	6	1	2 2 0	\$ 143	26	2
Marine Resources	13	2	7	2	0 0 0	\$ 30	11	1
Professional & Financial Regulation	104	37	41	15	10 0 0	\$642	170	0
Public Safety	581	273	155	52	46 4 1	\$ 4,733	422	0

Transportation	47	19	23	5	0 0 0	\$ 405	82	0
TOTALS	1,506	657	467	133	138 68 3	\$ 9,377	1,511	35

Notes:

DAFS: These numbers do not include requests that were denied verbally to requesters who were clearly seeking records that were exempt from disclosure. Taxpayer confidentiality (Title 36) and confidentiality of employee records (Title 5) were the most common reasons for denials or redactions of information.

DOC: Department has gone from receiving approximately 10 FOAA requests to approximately 100 FOAA requests per year. The FOAA responsibilities have turned into a full-time position which the Department has not been allotted. DOC saw longer response times due to an immense increase in the length and depth of requests, the transitions of the agency AAG and administrative staff, changes in the agency FOAA process, sick, vacation times, and other unforeseen circumstances.

DOE: In 2018 the Department began tracking as FOAAs all requests rather than just some from media requesters. Since June 2018 the Department has been including data requests that come into the data team to keep better track on follow through. The “over 60 days” responses included the same request from three different requesters for data that had to be recollected and vetted after finding anomalies. The “greater than 6 months” response involved a time-consuming response plus the materials were sent to the requester with an invoice to pay for the materials. The requester promised for almost two months to pay and never did.

DEP: All four of the “greater than 60 days” requests were responded to in four months or less. The Department had no requests greater than six months. Typically requests requiring that length of time to respond are narrowed during the estimate phase of the request and end up somewhere in the three to six-month window.

DPFR: Factors that contributed to longer response times include voluminous requests, vacancy in staff position, awaiting required approval from Governor’s Office, change in the FOAA contact and difficulty locating records.

DPS: This data should be considered approximate only and does not include information relating to all record requests that were processed by DPS during 2018—for example, the Records Unit processed over 4,000 requests last year but only seven were formal FOAA requests.

RECOMMENDATIONS

The ombudsman is in a unique position to suggest improvements to the FOAA process and is mandated by statute to make recommendations concerning ways to improve public access to public records and proceedings.

Remote Participation in Public Meetings

I first addressed the need for guidance on remote participation in public meetings in my 2015 Annual Report. The widespread confusion regarding whether and under what circumstances members of a public body may participate in a public meeting through remote means has only increased since then. I again restate my position that “Local and state public bodies in Maine need guidance on how and when to permit remote electronic participation by their members.” Past proposals for legislation by the Right to Know Advisory Committee attempted to balance the need for transparency and public participation with the practical and geographical needs of Maine public bodies. Due to the failure of proposed legislation to move forward on this issue, I fully support the Right to Know Advisory Committee’s current recommendation that the Legislature create a legislative study commission on remote participation. Active involvement by a wider swath of legislators may alleviate any lingering concerns or unaddressed aspects of future remote participation legislation.

Freedom of Access Act Training for Public Officials

The Right to Know Advisory Committee Report for 2017 included recommended legislation to amend 1 M.R.S. § 412 to require municipal officials to complete the FOAA training when appointed to offices for which training is required if elected to those offices. This legislation simply provided equal training for persons in the same position, whether elected or appointed. The legislation to effect this change did not pass and the Right to Know Advisory Committee is again recommending the enactment of legislation to implement this requirement. I continue to support such legislation as a means of promoting FOAA understanding and compliance.

This important step should be followed by an expansion of the list of municipal officials who must complete the training to include, at the least, planning boards, appeals boards, appointed subcommittees and commissions. These officials are performing crucial local government functions with legal implications for their municipality without a state-wide requirement that they know about the public’s right to access the records they create or their deliberations or actions in meetings.

Although some municipalities provide training for all elected or appointed officials, this training is voluntary and does not ensure a consistent understanding of the basics of FOAA compliance across the state.

APPENDIX

5 M.R.S.A. § 200-I

§ 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 13¹. 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 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 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 January 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A.** The total number of inquiries and complaints received;
- 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. Repealed. Laws [2009, c. 240, § 7, eff. June 2, 2009.](#)

Credits

[2007, c. 603, § 1; 2009, c. 240, § 7, eff. June 2, 2009; 2013, c. 229, §§ 1, 2, eff. Oct. 9, 2013.](#)

Footnotes

[1 M.R.S.A. § 401 et seq.](#)

5 M. R. S. A. § 200-I, ME ST T. 5 § 200-I

Current with legislation through the 2017 Second Regular Session of the 128th Legislature.