

STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Janet T. Mills, Attorney General



PUBLIC ACCESS OMBUDSMAN REPORT Brenda L. Kielty, Esq., Ombudsman

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MESSAGE FROM ATTORNEY GENERAL JANET T. MILLS

“Government ought to be all outside and no inside. . . . Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.”

- Woodrow Wilson

Thirty years ago, if you said you wanted to “FOA” somebody, you might have been arrested for threatening to commit a crime. Today, the word “FOA”—as a noun, as a verb—has become an integral part of our vocabulary, particularly for people who work in government and in the news media. For some the term represents a threat; for others, a nuisance, the basis for a news story, the start of a lawsuit, a glimpse into a decision or into the purpose of a meeting.

Since 1967 citizens have enjoyed the right to acquire information from the federal government by statute. Other countries, even non-democratic regimes, have followed suit. Since 1975 Maine has provided a statutory right of access to governmental information and governmental meetings. We have become accustomed to participation. We resent stalling. We expect full access.

After all, what would our government be like if it operated in secret—without access, without public participation or public knowledge? Many believe that nothing is more fundamental to our democracy than transparency in government, in its documents, its actions and its deliberations.

This right is not absolute, of course. Our statutes still shield matters of personal privacy, trade secrets, investigative information, personnel records, and the like. When you file a form with the government containing personal information, do you expect that others outside that agency will see the information, even if you had no choice about filing that form with the government, that your name might be listed in the newspaper or on a social network as holding a particular license from the government?

The balancing of public access with legitimate privacy interests is what our laws strive to achieve. It is the reason we have a “Right to Know Advisory Committee,” made up of news people, lawmakers and regular citizens. It is the reason we require the Legislature’s Judiciary Committee to review the myriad confidentiality statutes on the books each year to see if they still make sense. It is the reason we now have a fulltime “Public Access Ombudsman” in the Office of the Attorney General.

This first report of the Ombudsman covers a period of her first four months on the job. We hope this report sheds light not only on the volume and type of work performed already but also on the challenges of achieving that important balance between competing interests of personal privacy and transparency, each of equal importance to the citizens of this state. While government may never be “all outside, no inside,” we are determined to make our government more “outside” than ever before, while protecting the legitimate “inside” for which citizens have every right to expect protection.

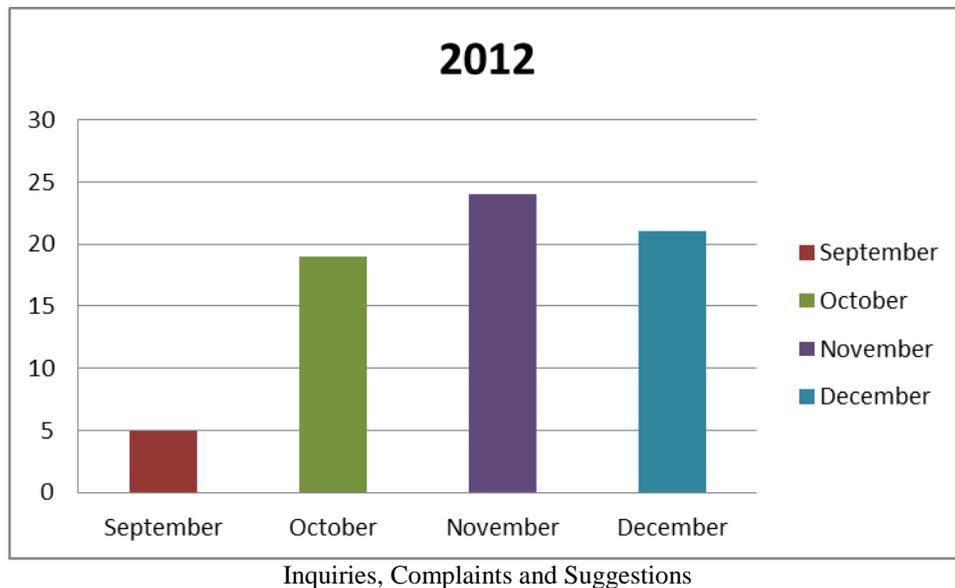
EXECUTIVE SUMMARY

The mission of the public access ombudsman is simple – to serve as a resource concerning the FOAA process and to solve disputes between requesters and public agencies. The ombudsman serves both FOAA requesters and agencies. The ombudsman advocates for adherence to the law. Located in the Office of the Attorney General, the position is independent of the executive branch.

Beginning in the last quarter of 2012, requesters and agencies asked for assistance with everything from filing requests to dealing with difficult requesters to resolving disputes. From September 11, 2012 to December 31, 2012 there were 50 inquiries, 17 complaints and two suggestions. Most of the persons seeking assistance were private citizens and most of the questions or complaints related to municipal government.

During the first few months, the ombudsman conducted outreach and training, updated the website, designed a case management system, and responded to inquiries and complaints. Much remains to be done. One focus for 2013 will be working with the public access officers who are appointed as the contact person for their agency to develop training, support and best practice resources.

Brenda L. Kielty, Public Access Ombudsman



ESTABLISHING THE OMBUDSMAN PROGRAM

The State FOAA website, [Your Right to Know: Maine's Freedom of Access Act](#), provides contact information for the ombudsman and links to a variety of resources including a Frequently Asked Questions page that serves as a self-administered training for public officials. The ombudsman has assumed responsibility for updating and maintaining the website to reflect changes in the law.

In the first three months, the ombudsman:

- Created a database to meet the dual purposes of tracking contacts and measuring results. The case management system will require enhancements as the volume of contacts continues to grow.
- Created an intake and review process for determining the needs of a requester or agency and the appropriate action or referral to address that need.
- Publicized the new program through interviews with local and regional media outlets. Speaking at the annual fall conferences for the Maine Press Association, the Maine School Board Association and the Association of Conservation Districts provided visibility, an opportunity to get input from interested parties, and a forum to share the mission of the program.
- Attended the Right to Know Advisory Committee meetings, met with citizen activists and counsel for State and municipal agencies, and researched what ombudsman offices in other states are doing. Connecting with both requester and agency communities provided valuable information and will help gauge priorities and goals for the program.
- In December, the ombudsman presented the FOAA training to the incoming 126th Legislature required by 1 M.R.S. § 412.

ANSWERING INQUIRIES & RESOLVING DISPUTES

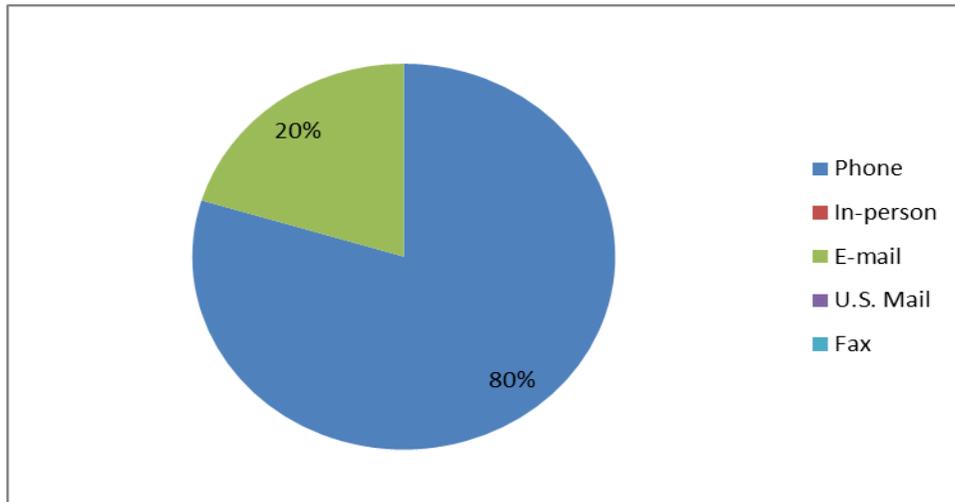
“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S.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

The ombudsman may request assistance, services and information from any public agency or official to effectively carry out the functions of the office. The ombudsman can access confidential records in order to make a recommendation concerning the release of records to the public and will give confidential information received from an agency the same degree of protection as provided by the agency. Any recommendations issued by the ombudsman are non-binding. 5 M.R.S. § 200-I(4).

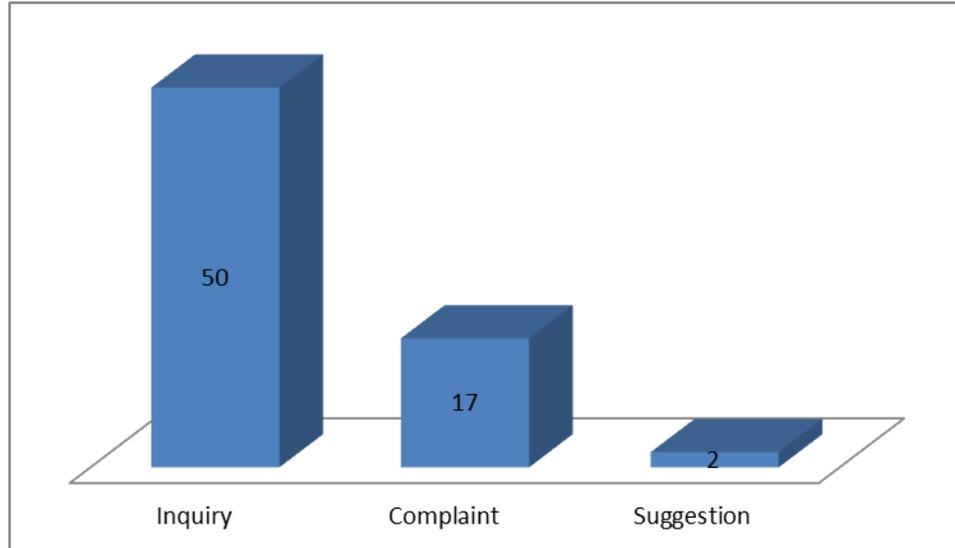
The ombudsman did not issue any advisory opinions in 2012 or the first three months of 2013.

From early September until the end of 2012, there were 69 inquiries, complaints and suggestions. Requests for help ranged from questions about how to file a FOAA request to more difficult inquiries regarding situations in which the FOAA issues were only part of a larger dispute.

The bulk of initial contact was by telephone (55) and the remainder by email (14).



The 69 contacts included general inquiries (50), complaints (17) and suggestions (2).



Of the contacts concerning public records (52), the most common questions concerned:

- Reasonable response times and delay
- Fees
- Confidentiality exceptions
- Basis for a denial
- Requesting an electronic document in digital format

Of the contacts concerning public meetings (17), most questions concerned:

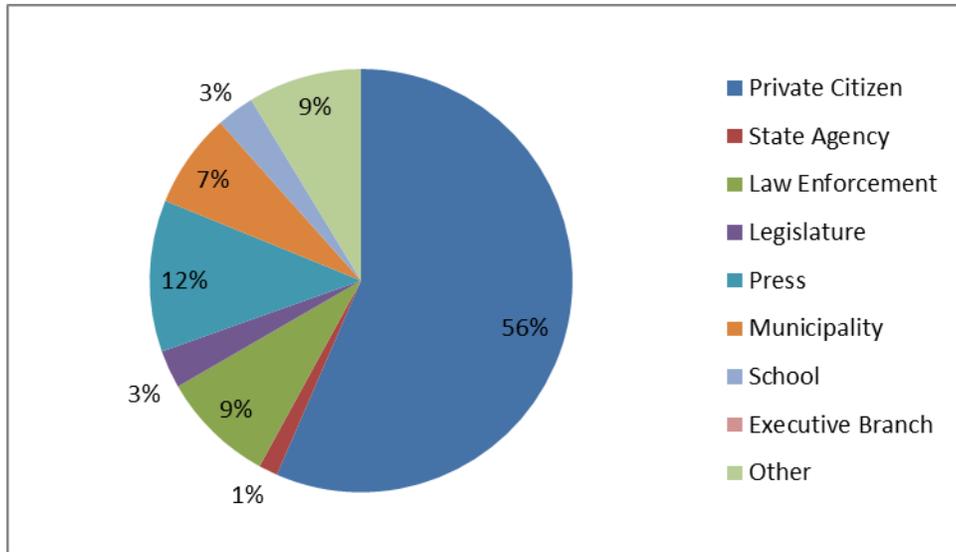
- Notice
- Use of executive session

A citizen complaint about a local board's meeting notice or use of executive session is often part of a complex situation involving other issues such as municipal governance and long-standing disputes for which there may be an inadequate remedy. Resolution of the FOAA complaint may not garner the accountability and change that the citizen could only obtain through the political process. Local officials may see the use of the FOAA as harassing.

The estimated fee and time needed for a response to a FOAA request is frequently challenged as excessive. The requester may suspect that government officials are dragging their feet and should be able to provide the records easily with modern technology. Especially for a broad request involving both paper and electronic documents from multiple departments, the official may have difficulty scheduling the search for responsive records and redaction of confidential information without impacting regular work duties.

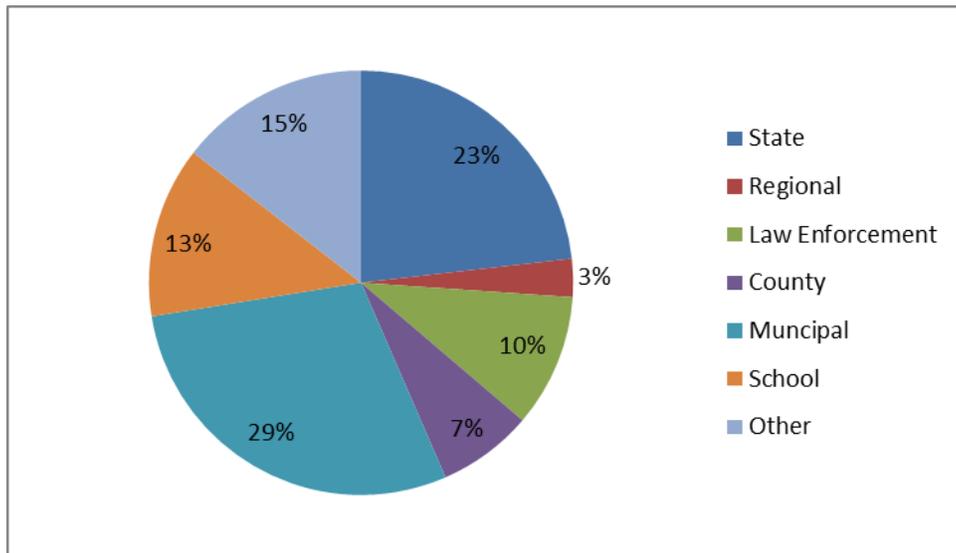
The actual conversion costs of providing an electronic record in the format in which it is stored can exceed what requesters expect. The staff who are responding to the request rely on available technological resources and their current skill level. From a part-time town office to a State agency, the discrepancy between what the requester expects and the response time and cost causes disputes.

Of the 69 inquiries, complaints and suggestions, 39 came from private citizens, 1 from a state agency, 6 from law enforcement agencies, 2 from legislators, 8 from members of the media, 5 from municipal officials, 2 from school officials, and 6 from others including attorneys and commercial requesters.



Source of Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (20) and State agencies (16). The remainder concerned school administrative units (9), County agencies (5), regional agencies (2), and law enforcement agencies (7). Others (10) concerned court, medical, bank or unspecified records.



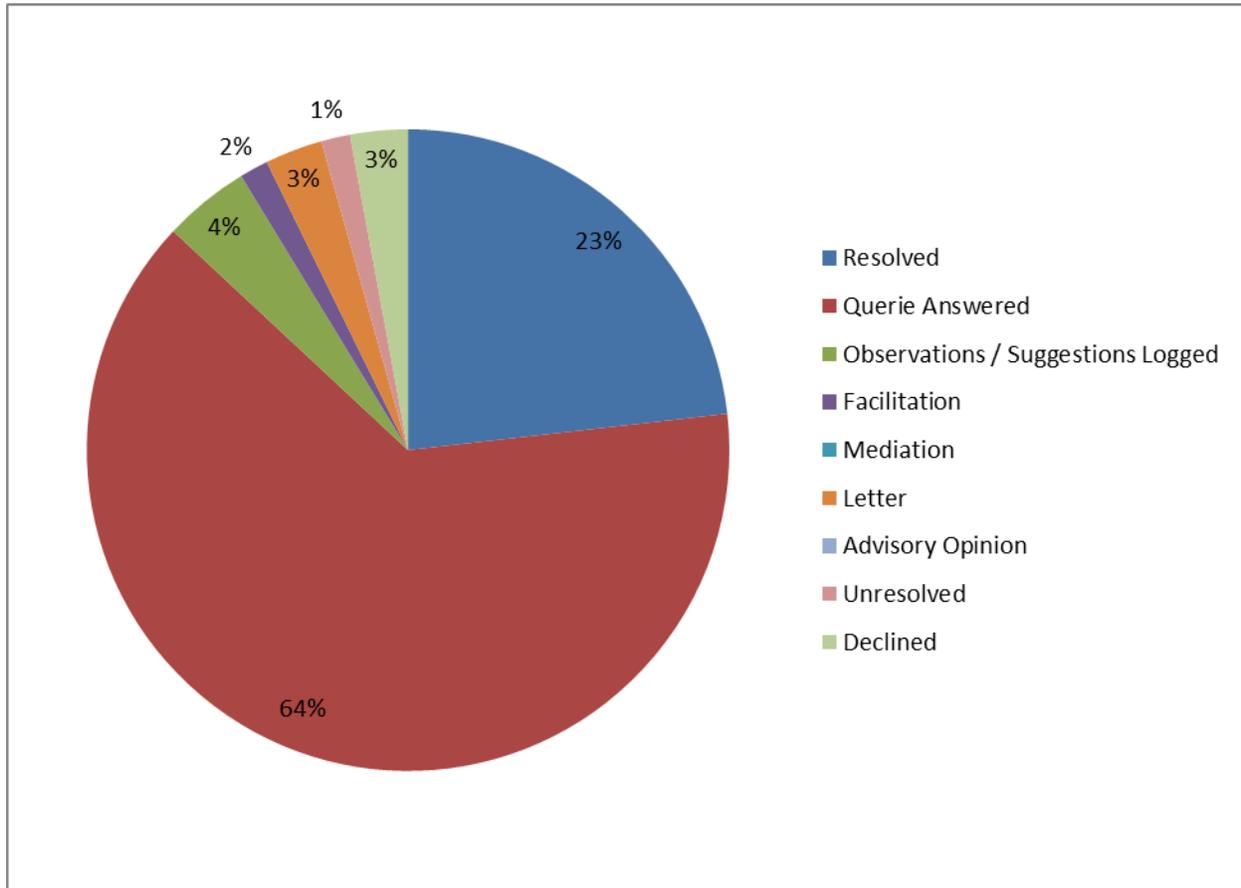
Agencies

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 is 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.

Many of the inquiries (44) were answered either immediately or within a matter of days. Sixteen of the contacts were logged as resolved, three suggestions were taken, one case involved a successful facilitation, two letters were written, one case was unresolved as of the date of this report and two cases were declined.



Outcomes

RECOMMENDATION

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. This report encompasses only the last quarter of 2012 during which time the focus was to identify and build on what was already in place. The following recommendation highlights an area in the law that could be more effectively utilized to promote public access:

The Public Access Officers

The FOAA was amended in 2012 to require each State agency, county, municipality, school administrative unit and regional or other political subdivision to designate an employee to serve as the contact person and resource for freedom of access questions and compliance. The public access officers must participate in the same Freedom of Access training as elected officials. 1 M.R.S. § 412(1). This provision has the potential to create a state-wide network of informed FOAA officials who can share their knowledge within their distinct organizations.

These public access officers could develop more comprehensive data collection to track FOAA requests and responses by agency without imposing costs on local units.

Standardized reporting by agencies would generate the consistent, high-quality data needed to conduct state-wide assessments. Current, reliable and comparable information regarding how the FOAA is being administered would be useful in assessing Maine's progress with open government objectives. One way to ensure that the challenges faced by agencies in processing FOAA requests can be addressed is to expand the duties of the public access officers to include the collection and reporting of this type of data.

Appendix

enable the ombudsman to effectively carry out the responsibilities of this section.

[2007, c. 603, §1 (NEW) .]

4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

[2007, c. 603, §1 (NEW) .]

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; [2007, c. 603, §1 (NEW) .]

B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials; [2007, c. 603, §1 (NEW) .]

C. The number of complaints received concerning respectively public records and public meetings; [2007, c. 603, §1 (NEW) .]

D. The number of complaints received concerning respectively:

(1) State agencies;

(2) County agencies;

(3) Regional agencies;

(4) Municipal agencies;

(5) School administrative units; and

(6) Other public entities; [2007, c. 603, §1 (NEW) .]

E. The number of inquiries and complaints that were resolved; [2007, c. 603, §1 (NEW) .]

F. The total number of written advisory opinions issued and pending; and [2007, c. 603, §1 (NEW) .]

G. Recommendations concerning ways to improve public access to public records and proceedings. [2007, c. 603, §1 (NEW) .]

[2007, c. 603, §1 (NEW) .]

6. Repeal.

[2009, c. 240, §7 (RP) .]

SECTION HISTORY

2007, c. 603, §1 (NEW). 2009, c. 240, §7 (AMD).

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