

# **STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL**

**Aaron M. Frey, Attorney General**



**PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2020**

**March 3, 2021**

**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.

### **Program Trends**

The ombudsman activity involving question and complaint resolution has grown over the course of the program. A total of 464 contacts were received in 2020 from FOAA requesters and agencies seeking assistance. The number of inquiries and complaints is on par with the 2019 total of 467.

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

### **State Agency Annual FOAA Reporting**

The Ombudsman Report for 2020 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. 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.

At the date of publishing this report some agency data is still being calculated. The report will be updated upon receipt of further information. 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.

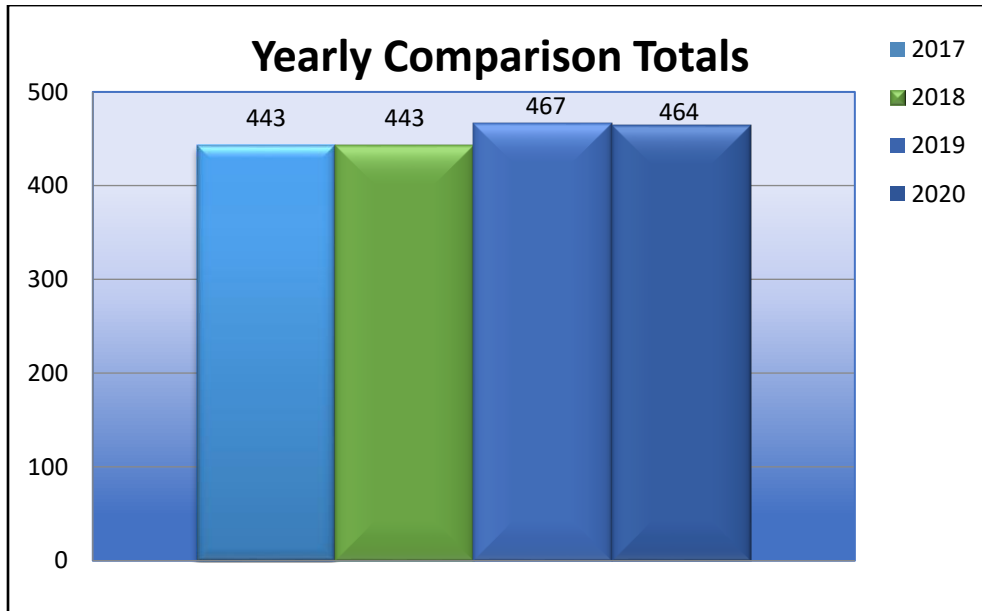
Brenda L. Kielty, Public Access Ombudsman

## 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).

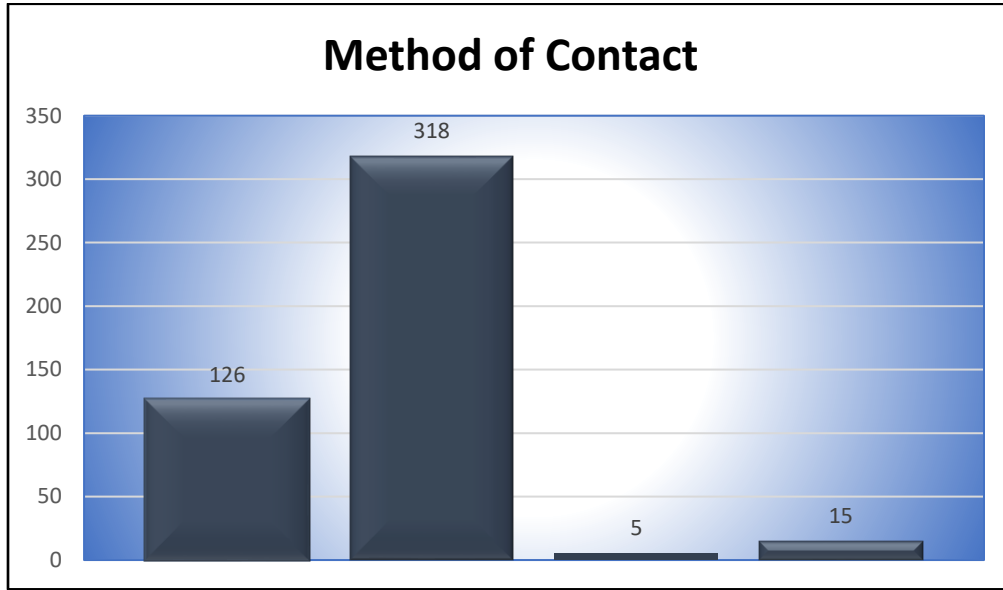
### 2020 Contacts with the Ombudsman

In 2020 I logged 464 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.



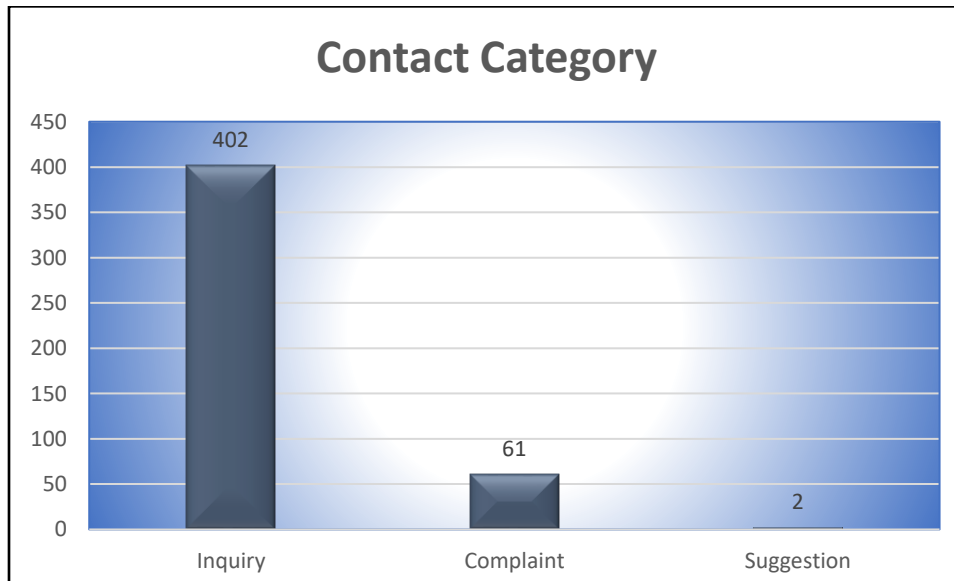
### Method of Contact

The bulk of initial contacts was by email (318) followed by telephone (126), U.S. Mail (15) and in-person (5). Direct telephone contact was limited and redirected mainly to email due to the remote working conditions instituted after the COVID-19 state of emergency declaration.



### Contacts Included Inquiries, Complaints and Suggestions

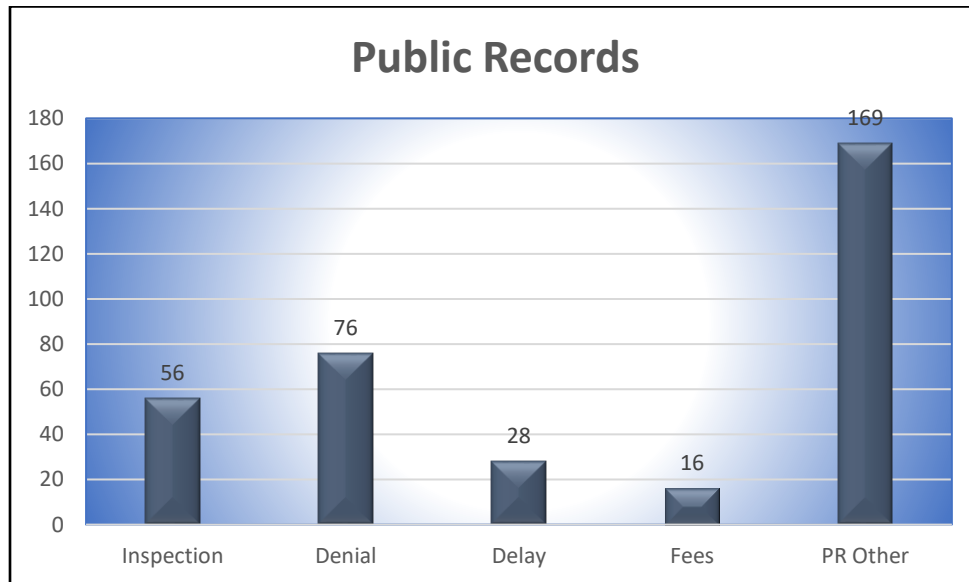
The 464 contacts included general inquiries (402), complaints (61) and suggestions (2). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



## Contacts Concerning Public Records

Of the contacts about public records (344), 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



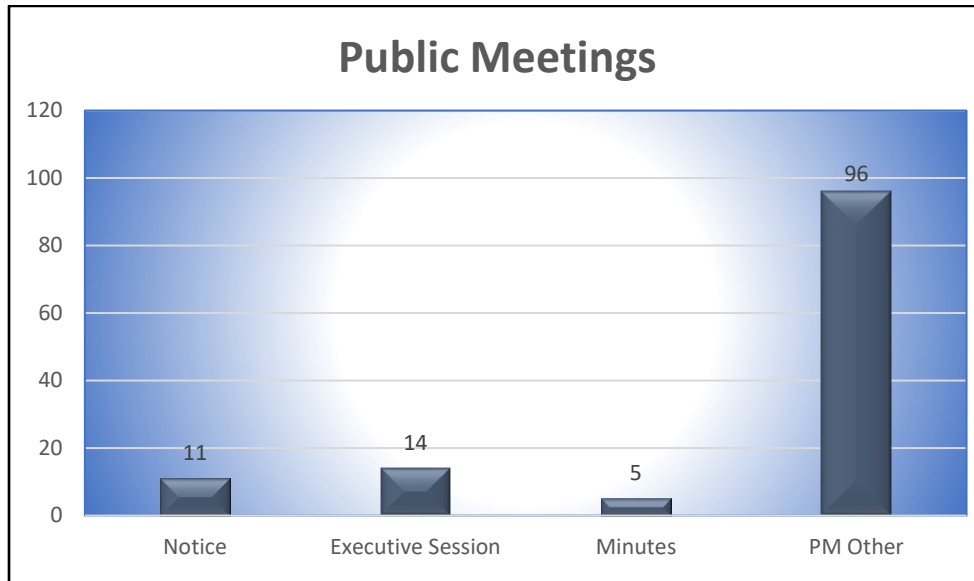
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 (122), most questions concerned:

- Use of executive session
- Remote participation notice and attendance
- What constitutes a meeting

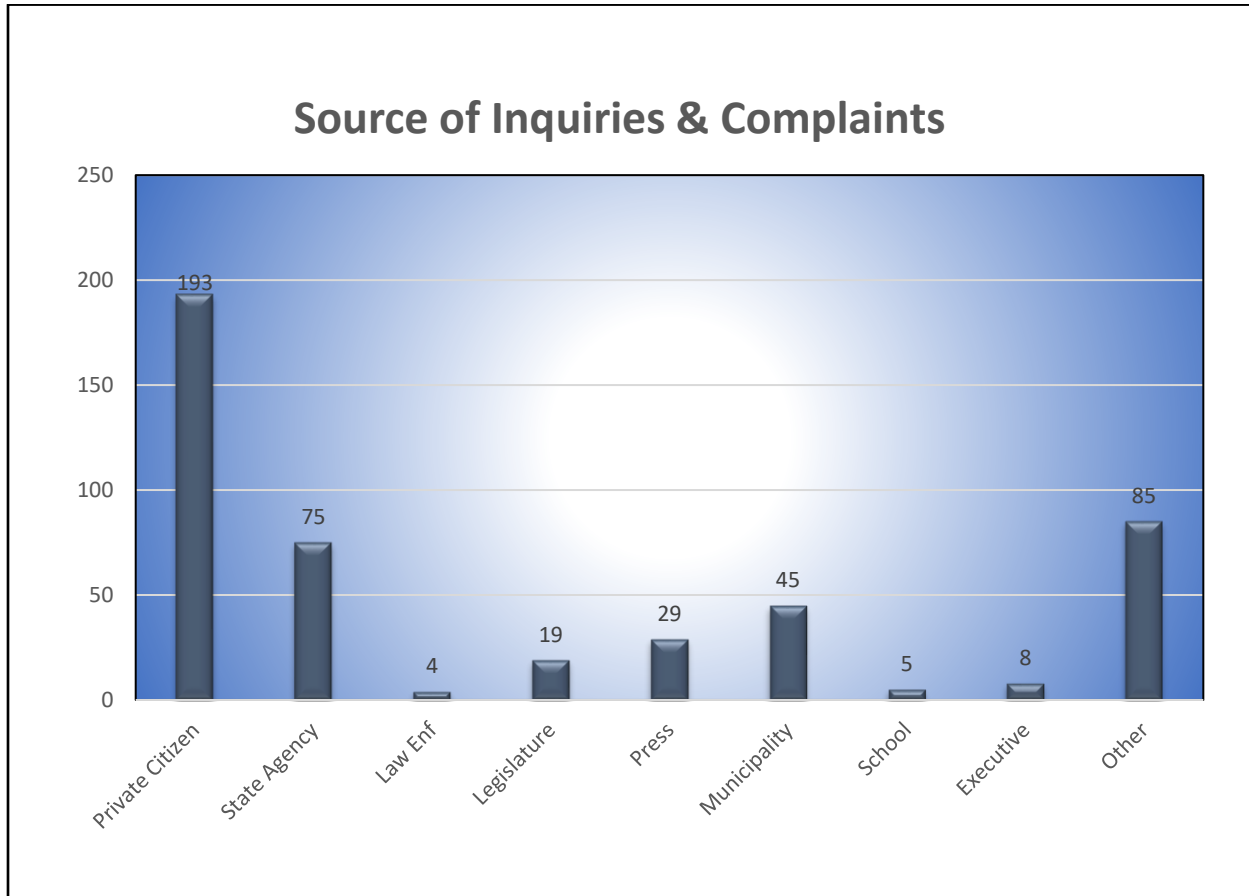


All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- Whether an agenda is required
- Public comment period during public meetings
- What entities are subject to FOAA

### Source of Inquiries, Complaints and Suggestions

Of the 464 inquiries, complaints and suggestions, 193 came from private citizens, 75 from state agencies, 4 from law enforcement agencies, 19 from the Legislature, 29 from members of the media, 45 from municipal officials, 5 from school districts, 8 from the executive branch and 85 from others including attorneys and commercial requesters.

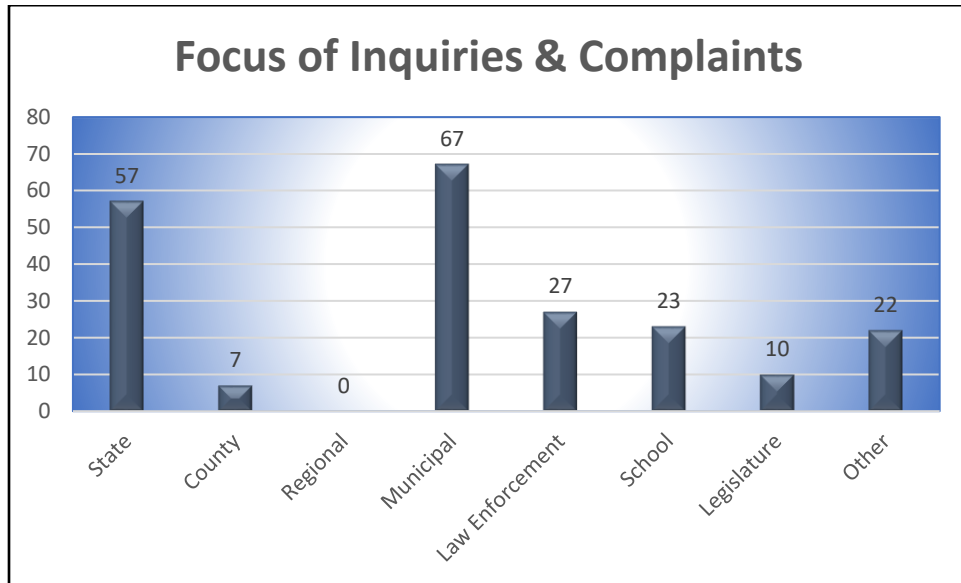




### Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (67) and state agencies (57). The remainder concerned law enforcement agencies (27), school administrative units (23), county agencies (7), and the Legislature (10). Others (22) 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 number of municipal entities in the state.



## Outcomes Reached as Result of Contact with Ombudsman

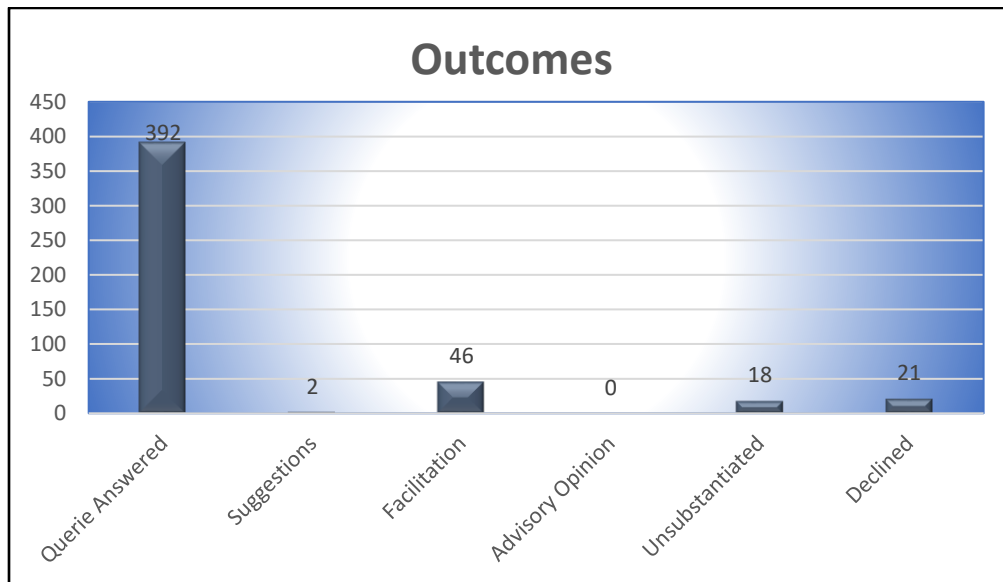
A contact may be logged as “resolved” for the following reasons:

- 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 2020 a total of 21 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 464 contacts included 392 answers to inquiries, 2 observations from citizens for improvements to the law and 46 facilitated resolutions.

There were no advisory opinions issued in 2020.



## **OUTREACH & TRAINING**

In addition to hosting an extern from the Maine Law School for the spring semester, I provided in-person and remote FOAA trainings and presentations to a variety of state and local entities, such as the Maine Rural Water Association and the Maine Legislature. There was more demand for one-on-one training resources this year and those are logged as inquiries in the data.

## STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2020 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. This does not include the large volume of requests for information that agencies handle in the normal course of business and that do not implicate the FOAA response 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 2020
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:**

The COVID-19 State of Emergency created unique conditions for agency FOAA responses in 2020. The notes following the chart on the next page include self-reported descriptions of factors that influenced the response times.

## STATE AGENCY 2020 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	FEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2018 REQUESTS
Administrative & Financial Services	160	43	41	16	13 0 2	n/a	n/a	0
Agriculture, Conservation & Forestry	120	100	20	0	0 1 1	\$ 1350	190	0
Corrections	75	60	13	1	0 0 0	n/a	1,300	1
Defense, Veterans & Emergency Management	9	2	3	1	0 0 0	n/a	9	3
Economic & Community Development	3	0	3	0	0 0 0	n/a	3	0
Education	124	34	72	12	7 0 0	\$ 585	176	5
Environmental Protection	145	65	57	14	5 0 0	\$ 4,755	317	4
Health & Human Services	332	79	75	23	81 74 0	n/a	n/a	0
Inland Fisheries & Wildlife	36	16	6	2	3 3 0	n/a	n/a	6
Labor	27	11	9	4	3 0 0	\$ 360	323	2
Marine Resources	26	3	4	14	4 1 0	\$ 840	63	0
Professional & Financial Regulation	47	21	13	5	0 0 0	n/a	n/a	3
Public Safety	1,516	822	118	67	90 27 0	\$ 9,892	124	0
Transportation	30	22	8	0	0 0 0	\$ 450	65	0
<b>TOTALS</b>	<b>2,652</b>	<b>1,278</b>	<b>442</b>	<b>159</b>	<b>206 106 3</b>	<b>\$ 18,232</b>	<b>2,570</b>	<b>24</b>

**Agency comments related to their 2020 FOAA response data:**

**DPS:** The Maine State Police Crime Laboratory has dedicated over 190 staff time hours to process a single FOAA request. The total hours reported vastly understates the number of hours DPS is devoting to processing record requests.

**DAFS:** It has been a pleasure to work with colleagues at the Department of Administrative and Financial Services and with members of the public, to facilitate our shared goals of transparency and accountability. DAFS has been on the frontlines of the response to COVID-19. Pandemic impacts to the agency workflow included:

- Shifting the vast majority of our more than 11,000 executive branch employees to remote work.
- Deploying resources to support employees' mental and physical health, including rolling out robust work rules founded in CDC best practices.
- Making air quality and other retrofits to State buildings.
- Devising additional administrative flexibility and augmented paid leave options for employees.
- Processing hundreds of thousands of taxes returns and refunds off-cycle amid revised filing deadlines at the Federal level.
- Creating and administering daily the State's employee response to COVID-19.
- Procuring more than \$31 million in Personal Protective Equipment (PPE) for State employees, the Maine CDC stockpile, and the statewide K-12 public education system.
- Making good on the will of the people by launching the new adult-use marijuana industry, while accounting for the impacts of the pandemic.
- Administering the State's budget curtailment and supplemental and biennial budget process amid a downturn in revenues as required by the State's balanced budget mandate.
- Staying in touch with more than 2,500 on-premise liquor licensees amid revised public health mandates.
- Managing the efficient and sound disbursement of more than \$1.25 billion in Federal Coronavirus Relief Funds (CRF), among other efforts.

“While reverberations have been felt across the Department and fitting our traditional duties into the accelerated pace has posed some challenges, mostly, we are humbled by the opportunity to make a difference in the fight against this deadly disease.”

As the home to the Maine Office of Information Technology and the Division of Procurement Services, certain FOAA requests that we receive can require months of data mining. This has not changed because of the pandemic but is worth noting in this annual report.

**DOC:** Our office makes every effort to respond as quickly as possible. Circumstances that can affect the response time include waiting for resources, time needed to gather the information, time for the review for confidentiality, other office workflow demands and employee scheduled leave, reallocation of staff due to COVID-19.

**DEP:** Typically, the number reported for cost is based on the amount of fees charged to various requesters. Since COVID impacted our ability to allow in-person reviews of records, fees associated with making records for those types of request electronically were generally waived. Instead, the cost figure is based on an estimate of agency cost using \$15 per hour of staff labor as the rate. It is likely an underestimate but closer to the actual cost to the agency.

**DVEM:** The three requests still pending from 2020 regard Maine Emergency Management Agency programs. They are outstanding due to the impact of COVID operations on MEMA. MEMA has implemented a full activation of their State Emergency Operations Center (SEOC) since March 16, 2020. MEMA has managed to clear 5 of the 8 assigned to them, but their folks have been working non-stop since the activation of the EOC. Their focus has been and must remain the State's response to the COVID emergency. Couple the COVID emergency with the onslaught of other State-wide events such as snow and wind driven massive power outages, drought, earth quakes, landslides, homeland defense emergencies (cyber and civil unrest), MEMA staff has not had the opportunity to address the 3 remaining FOAAs. The FOAAs are certainly on our to-do list and we'll accomplish them as circumstances and events allow. I did communicate these facts to the requestors using the following language:

**DOT:** The majority of our responses took less than an hour therefore there was no charge to the requester. The fees and costs only include the amounts that were charged on requests that took more than an hour.

**DHHS:** The Department's FOAA response rate was adversely affected by the current COVID-19 public health emergency. The Department received a vast number of COVID-19 related inquiries through Constituent Services inquiries, media inquiries, and FOAA requests. The great majority of the inquiries (2,301) were received informally through Constituent Services while a smaller but significant number (73) were received as formal FOAA requests. Responding individually to the public's request for information about COVID-19 was obviously challenging because public health staff necessarily had to prioritize their work to support the Department's direct response to the public health emergency rather than respond to individual inquiries for information. Nevertheless, the Department did strive to make as much information as reasonably possible available to the public about the COVID-19 public health emergency. In particular, it should be noted that the Maine CDC provided regular weekly press briefings as well as regularly posting updated information on its website.

## 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.

The recommendations from my last report remain the areas most in need of attention and I respectfully present these same themes again. All levels of government were thrust into the use of remote technology to conduct business and provide access to public proceedings during the COVID-19 State of Emergency. There is perhaps now a common sentiment and practical knowledge that will support a Freedom of Access Act amendment to allow for remote proceedings.

### **Remote Participation in Public Meetings**

I first addressed the need for guidance on remote participation in public meetings in my 2015 Annual Report. As I stated then, 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. 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. I fully support the Right to Know Advisory Committee’s current recommendation that the Legislature enact this essential amendment to the Freedom of Access Act.

### **Freedom of Access Act Training for Public Officials**

Recently enacted legislation amended 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.

This important step should be followed by an expansion of the list of municipal officials who must complete the training to include code enforcement officers, town managers and administrators, planning board members and deputies of municipal clerks, treasurers, managers or administrators, assessors and code enforcement officers. Currently 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.

Since the amendment to the statute eliminated the qualifier “elected” there may be some uncertainty who is an “official” of the school departments for the purposes of FOAA. The term “school official” should be clarified to include school superintendents, assistant superintendents and school board members.



### **State Agency FOAA Resources**

The interest in public information and requests for records continues to climb and responding thoroughly and promptly to these requests is a core function of government. Yet, the activities involved in responding to FOAA requests for records are generally performed by state employees whose primary job description does not include FOAA. In other words, the work of searching, compiling, reviewing and producing records is an “additional” task beyond the employee’s daily duties.

A dedicated full-time equivalent position in the Office of Information Technology should be created to provide technical FOAA expertise to agencies. Although there is currently some support provided by OIT to the agencies for FOAA responses, the complexity of requests, the magnitude and variety of electronic records warrant consideration of increasing this critical support.

This would be a solid first step in ensuring that state government can provide timely and complete access to public records as we move into an even more complex records environment in the future.

## 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 13<sup>1</sup>. 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 2019 Second Regular Session of the 129th Legislature.