

STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Aaron M. Frey, Attorney General



PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT FOR 2022

January 31, 2023

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 610 contacts were received in 2022 from FOAA requesters and agencies seeking assistance. The number of inquiries and complaints is an increase from the 2021 total of 584.

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 2022 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.

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.

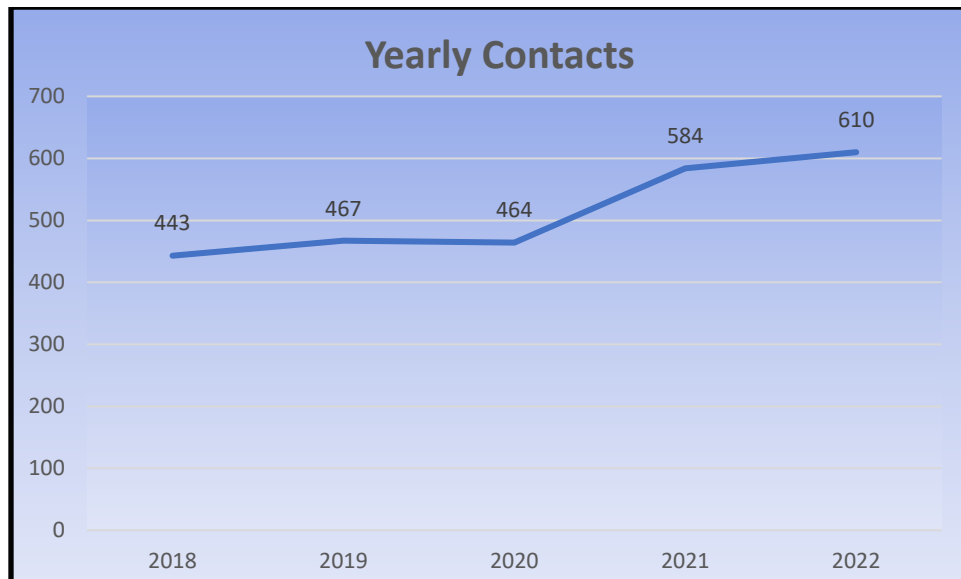
Brenda L. Kielty, Public Access Ombudsman

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).

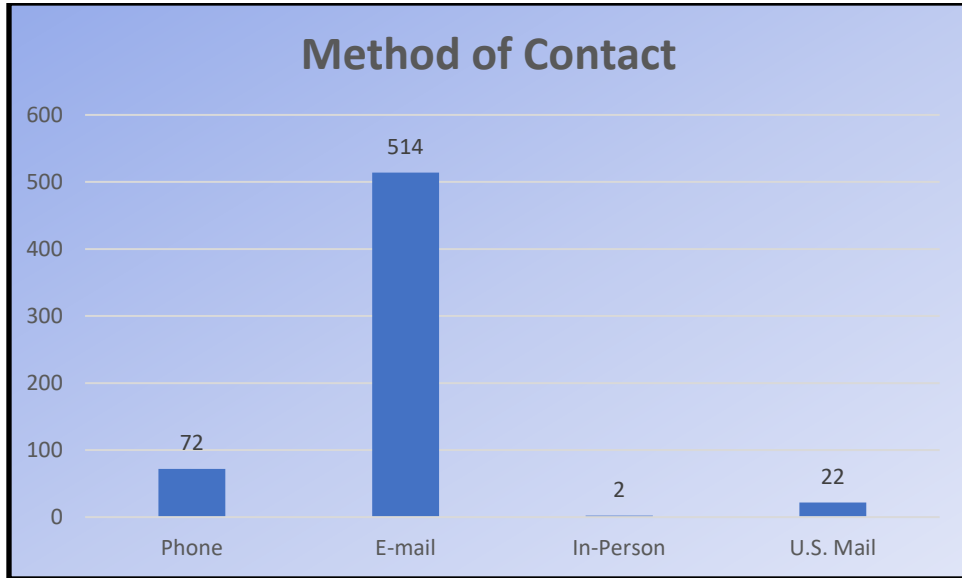
2022 Contacts with the Ombudsman

In 2022 I logged 610 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.



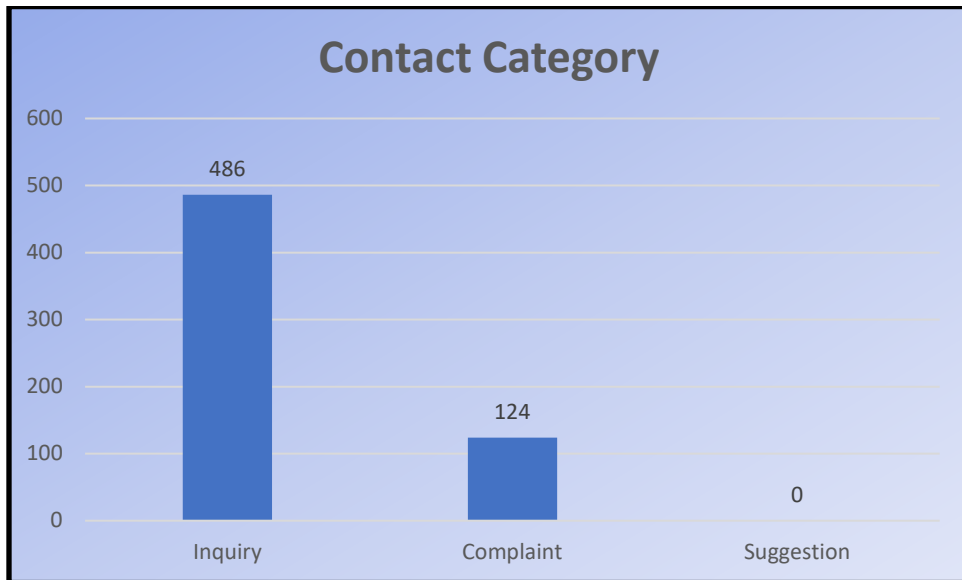
Method of Contact

The bulk of initial contacts was by email (514) followed by telephone (72) U.S. Mail (22) and in-person (2).



Contacts Included Inquiries, Complaints and Suggestions

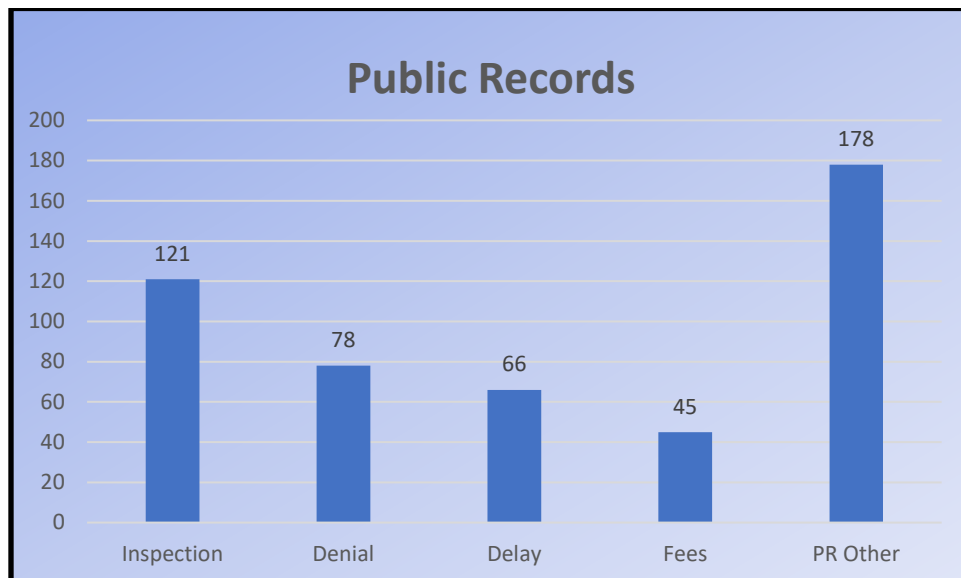
The 610 contacts included general inquiries (486), complaints (124) and suggestions (0). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



Contacts Concerning Public Records

Of the contacts about public records (488), 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



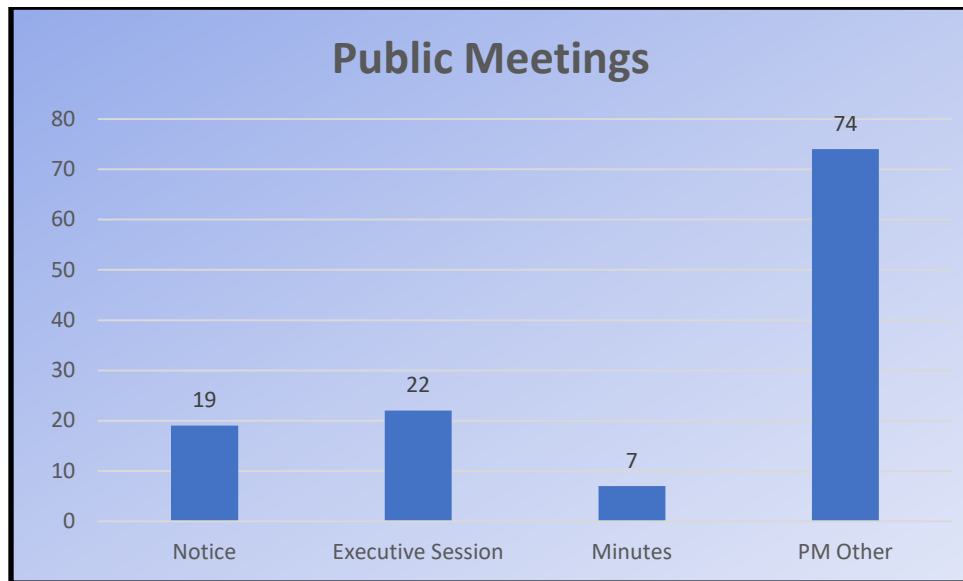
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- 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 (119), most questions concerned:

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

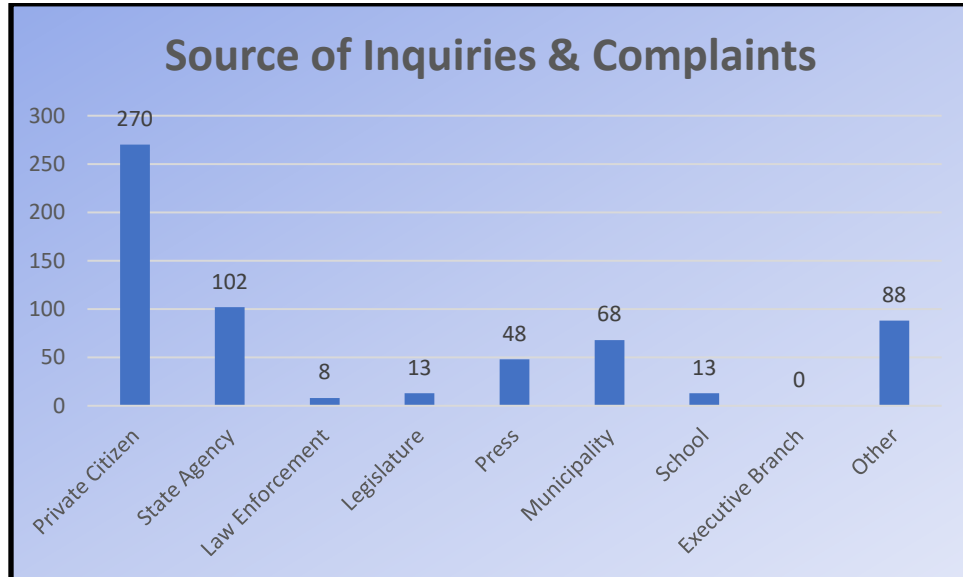


All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

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

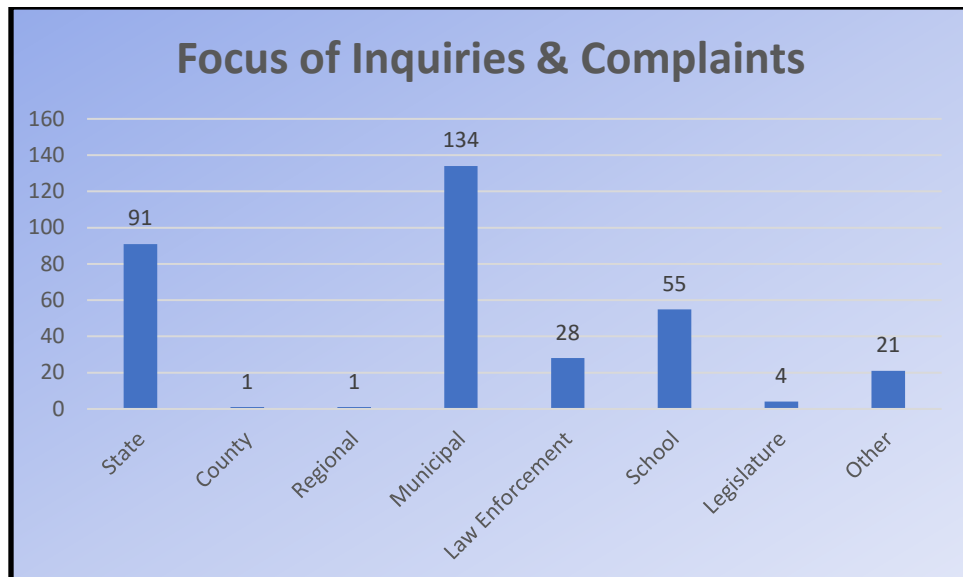
Source of Inquiries, Complaints and Suggestions

Of the 610 inquiries, complaints and suggestions, 270 came from private citizens, 102 from state agencies, 8 from law enforcement agencies, 13 from the Legislature, 48 from members of the media, 68 from municipal officials, 13 from school districts, 0 from the executive branch and 88 from others including attorneys and commercial requesters.



Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (134) and state agencies (91). The remainder concerned school administrative units (55), law enforcement agencies (28), county agencies (1), regional agencies (1) and the Legislature (4). Others (21) 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

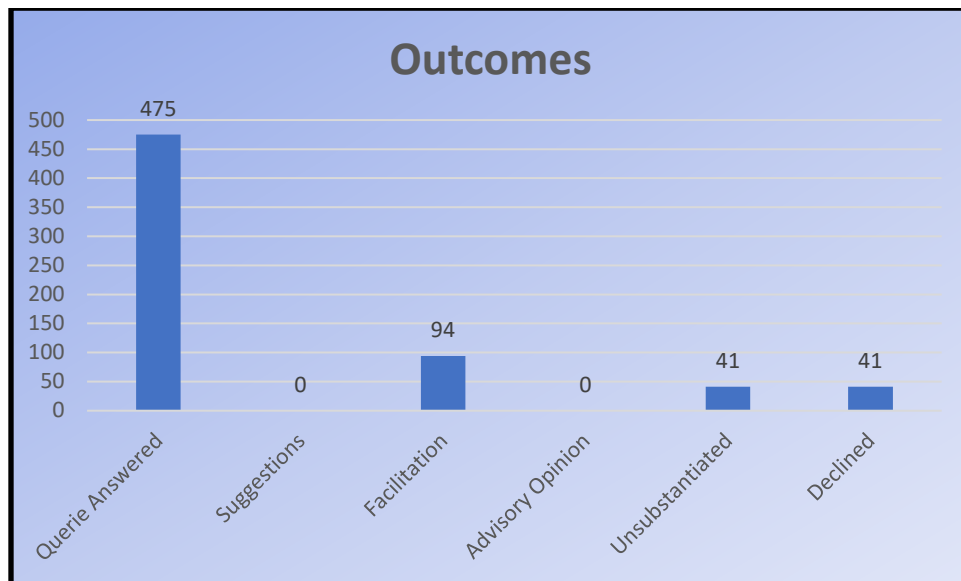
A contact may be logged as “resolved” for the following reasons:

- 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 2022 a total of 41 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 610 contacts included 475 answers to inquiries and 94 facilitated resolutions.

There were no advisory opinions issued in 2022.



OUTREACH & TRAINING

I provided remote and in-person FOAA trainings and presentations to a variety of governmental entities, such as the Department of Health and Human Services, District Attorneys' Offices, the Maine Office of Cannabis Policy, the Maine Recovery Council and the 131st Maine Legislature. As with last year, there was more demand for one-on-one training resources this year and those are logged as inquiries in the data.

I continue to serve as the Attorney General's designee to the [Maine Archives Advisory Board](#). The Board serves in an advisory role to the Maine State Archivist and reviews proposed records retention schedules and issues related to proper records management for both Maine state and local government. The right of access to public records provided in the Freedom of Access Act is dependent on the capture, preservation and management of public records. I am grateful to be able to participate in the work of ensuring that our records management systems serve the needs of not only government and persons seeking records today, but also future generations who will witness in the permanent archival collections the aspirations and challenges of our era.

STATE AGENCY ANNUAL FOAA REPORTING

Pursuant to [5 M.R.S. § 200-I\(2\)\(F\)](#) the Ombudsman report for 2022 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 2022
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

STATE AGENCY 2022 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 2022 REQUESTS
Administrative & Financial Services	167	18	58	24	30 2 0	n/a	n/a	35
Agriculture, Conservation & Forestry	91	44	25	6	0 0 0	\$2,200	228	0
Corrections								
Defense, Veterans & Emergency Management	14	9	4	0	0 1 0	n/a	25	0
Economic & Community Development	14	6	2	2	2 1 0	Average \$184	Average 4.3	1
Education	185	54	71	11	11 1 0	\$858	163	0
Environmental Protection	177	82	67	13	7 0 0	\$ 3,425	460.25	8
Health & Human Services	252	60	85	49	48 10 0	\$ 4,228	653.5	0
Inland Fisheries & Wildlife	49	27	8	7	1 0 0	\$ 508	100	6
Labor								
Marine Resources	34	10	10	4	8 0 0	\$ 570	n/a	0
Professional & Financial Regulation	51	29	17	4	5 0 0	\$ 327	156.5	0
Public Safety	1530	1064	275	62	48 14 0	\$ 1,459	493	0
Transportation	61	20	17	3	11 1 0	\$ 1,950	425	9
TOTALS	2,625	1,423	639	185	171 30 0	\$ 15,709	\$ 2,764	59

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.

Time and Cost Estimates to Respond to a Request for Records

I fully support the Right to Know Advisory Committee's current recommendation that the Legislature amend 1 M.R.S. § 408-A to clarify that an agency or official must specify the estimated time frame within which the agency or official will comply with a request for public records. Currently, the statute requires an agency to provide a good faith, non-binding estimate of both the cost to process the request and the time needed to complete the request. These critical metrics can provide a starting point for dialogue between the requestor and agency about how to tailor a request to target the most relevant records in the most efficient manner. Particularly with complex requests, the estimate is highly valuable in the clarification process.

The language of the statute causes some confusion between estimating the time to be charged for staff to perform the activities required to comply with a request, such as searching, reviewing, and redacting, and estimating the time frame for production of the records. The time charged for labor is part of the estimated fee and is separate from the estimated date of production. The minor language amendments should eliminate any confusion about the time spent processing versus the time frame for making the records accessible. This will promote better estimates and a better FOAA process.

In addition, the statute requires that an agency inform a requestor before proceeding if the estimated total cost of a request will be over \$30. The costs associated with requests can be unknown to the requestors. This early communication set at a threshold amount allows requestors who might otherwise have assumed there would be no cost with a request to either affirmatively agree to the estimate, withdraw the request, or attempt to clarify. The \$30 amount reflects an hourly fee of \$15 for two hours of labor. The hourly fee was changed to \$25 after the first two hours free by Public Law 2021, chapter 375. The threshold of \$30 should be amended to \$50 be consistent with the new fee structure, thus reflecting two free hours plus two charged hours of labor. For any request that meets this threshold, the requestor must be informed before the agency begins processing the request.

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 2021 First Regular Session of the 130th Legislature.