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MEMORANDUM

TO: Members, Right to Know Advisory Subcommittee on Burdensome Requests
FROM: Subcommittee Staff
DATE: October 7, 2024
RE: State Laws Regarding Records Requests by Non-State Residents

Existing Maine FOAA FAQ on narrowing a request

At its first meeting, the subcommittee discussed improving the existing educational materials for Maine FOAA requestors, specifically in the form of a "frequently asked questions" list, with the intent of helping requestors narrow their requests and avoid a dispute around research time and/or fees. Currently, the FOAA webpage (maine.gov/foaa) has an FAQ page and included on this list is "*What should I say in my request?*" Below is the answer listed on the website in its entirety:

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.

Non-judicial mediation/dispute resolution in other states

Many states offer some type of mediation or dispute resolution option as it relates to public records requests that does not involve the judicial system. Below are several examples of more formalized processes as well as informal, voluntary mediation options.

New Jersey: Government Records Council

- Nine-member council established in NJ Open Public Records Act (OPRA)
- Establish informal mediation process to settle public records disputes
- Initiative an investigation and “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian”¹ in the event that mediation fails or if a party does not agree to mediation
- Issue advisory opinions about whether certain types of records are public records under OPRA
- Develops training on OPRA statutes

Connecticut: Freedom of Information Commission

- Nine-member commission established in CT Freedom of Information Act (FOIA)
- Has the power to investigate all alleged violations of the CT FOIA
 - In its investigation, the Commission may “hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question”²

Pennsylvania: Office of Open Records Mediation

- The Office of Open Records is given authority in the PA Right-to-Know Law (RTKL) to develop an informal mediation process for records disputes
 - Mediation is voluntary

Rhode Island: Administrative appeals

- In the event of a denied request, the requestor can appeal to the “chief administrative officer of that public body” for a review of the denial and to make a final determination within ten business days of appeal submission
- Complaint can be appealed further to the Attorney General

Treatment of out-of-state requests

Every state has a version of a public records law that provides for access by the public to records held by governmental entities. The subcommittee requested information as to whether any state’s public records law limited access to public records based on state residency or citizenship. OPLA staff conducted a brief review of each state’s public access law and determined that, while most states provided for access to records by any person, a small number of states did limit access to their own citizens or residents. These state laws are described below.

Distinguishing between citizens and noncitizens

Arkansas

Arkansas’s Freedom of Information Act grants public access only to citizens of the state. AR Code Ann. § 25-19-105(1)(A) states that

Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying, including without limitation copying through image capture, including still and moving photography and video and

¹ N.J.S.A 47:1A-7

² Conn. Gen. Stat. §1-205

digital recording, *by any citizen of the State of Arkansas* during the regular business hours of the custodian of the records.

Delaware

Delaware's Freedom of Information Act grants public access to "citizens." While the term is not defined, the context appears to indicate that the term applies to citizens of the state. 29 Del. Laws, c. 100 § 10001(a) states that:

"All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen."

Kentucky

Kentucky's Open Record Law grants public access to residents of the Commonwealth. KRS § 61.872(1) states that:

"All public records shall be open for inspection by any resident of the Commonwealth, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right."

New Hampshire

New Hampshire limits access to public records to "citizens," which appears to refer to citizens of the state. NH Rev. State. §91-A:4 reads,

Minutes and Records Available for Public Inspection. – I Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

New Jersey

New Jersey's Open Records Act limits access to public records to citizens of the state (but see litigation section below). NJ Rev. Stat. § 47:1A-1 reads,

The Legislature finds and declares it to be the public policy of this State that: government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access; all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order; a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any

way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

Tennessee

Tennessee limits access to public records to citizens of the state. Tenn. Code Ann. § 10-7-503(a)(2)(A) reads,

All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Virginia

Virginia's Freedom of Information Act limits access to public records to citizens of the Commonwealth. VA Code § 2.2-3704(A) reads,

Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records.

Litigation

Public access laws with citizenship restrictions have faced legal review. In *McBurney v. Young*, 569 U.S. 221 (2013) the United States Supreme Court heard a challenge to Virginia's Freedom of Information Act, which restricts access to records to citizen of the state. The plaintiff argued that this restriction violated the Privileges and Immunities Clause of the US Constitution, as well as the dormant commerce clause. The Court dismissed the case, holding that the citizen/noncitizen distinction did not violate the Privileges and Immunities Clause because the distinction was non-protectionist in nature, and that non-citizens did not have the same need for information that citizens had. The Court also reaffirmed its opinion that there is no fundamental right to access public records. Finally, the Court determined that the statute did not violate the dormant commerce clause, in that it did not prohibit access to an interstate market nor impose burdensome regulation on that market.

While the ruling in *McBurney* stands, it has been distinguished in other court rulings, most notably in *Scheeler v. Atlantic County Municipal Joint Insurance Fund*, 454 N.J.Super. 621 (2018). In this case, three plaintiffs who each resided out of state challenged new Jersey's Open Public Records Act (OPRA), which limits access to records to state citizens. The appellate court, in considering the construction of the statute, found that there was additional context to indicate a more liberal application. It wrote,

We conclude that the reference to "citizens"—found in N.J.S.A. 47:1A-1 and nowhere else in OPRA—expresses the Legislature's general intent to make New Jersey government records open to the public, rather than expressing an intent to limit access to only New Jersey residents or domiciliaries. Because the more specific provisions of OPRA refer to "any person," and because OPRA is to be construed broadly to achieve the Legislature's over-arching goal of making public records freely available, we conclude that the right to request records under OPRA is not limited to "citizens" of New Jersey.³

³ *Scheeler v. Atlantic County Municipal Joint Insurance Fund*, 454 N.J.Super. 621, 625.

This ruling suggests that legislatures seeking to truly limit access to public records to state citizens would require tightly constructed language to achieve that limitation.

Finally, it should be noted that while the statutes discussed above grant access to public records to state citizens or residents, it is not clear how these states treat requests for records by out of state citizens, or how they verify the citizenship of individuals who submit freedom of access requests.

A. Dispute resolution before resorting to court action

Questions

Who oversees, arranges the dispute resolution

Costs

Enforcement

Timing

Examples of states that provide an avenue in addition to court action for compliance (This information comes from the 2015 report by the Colorado Freedom of Information Coalition's report Freedom of Information: State-by-State Evaluation of Alternative Dispute Resolution Processes; Ohio and Colorado information is new.):

Arizona

Arizona Ombudsman-Citizens' Aide Office is a neutral resource for both citizens and government officials. Part of the legislative branch and has the authority to investigate any governmental bodies (other than the judiciary and state universities). Engages in coaching, informal assistance (including mediation) and investigation, but it does not have the power to write legally binding opinions.

Arkansas

Attorney General is statutorily required to review custodians' decisions concerning the release of "personnel records" or "employee evaluation or job performance records" that a records custodian has identified as responsive to a request. The records cannot be disclosed until the AG has issued an opinion. Otherwise, the AG issues legal opinions that are not binding but may possess persuasive power.

Colorado (new in 2017)

At least 14 days before filing in district court, person who has been denied the right to inspect record files written notice with custodian that has denied inspection. During the 14-day period, the custodian is required to meet in person to communicate over the telephone to determine if the dispute may be resolved without filing with the district court. Any method of dispute resolution agreeable to both parties. Common expenses shared among the parties unless parties agree to something different. If person who has been denied access states in the written notice to the custodian that the person needs to pursue access on an expedited basis, the notice includes statement of factual basis for the expedited access, and the notice is provided at least three days before the person files with the district court, no meeting to determine if dispute resolution may resolve the dispute is required

Connecticut

Connecticut Freedom of Information Commission provides an appeals process outside of the courts, and its decisions have the force of law. If parties don't resolve disputes with the assistance of a CFOIC staff attorney, the

Commission conducts hearings and issues decisions, which have the force of law. (But consolidation of government activities and budget cuts have reduced effectiveness.)

Florida

Office of the Attorney General administers a formal mediation program: Open Government Mediation Program. Voluntary and both parties must consent. Not mandatory, so unresolved cases result when the government agency refuses mediation, forcing the requester to go through the court system.

Georgia

Attorney general has the authority to help citizens and government agencies mediate public records and open meetings disputes, usually resolved through education. But if a local government refuses to comply, the AG can bring both civil and criminal actions to enforce compliance; because of limited budget, the AG usually does not file in court but advises the complainant to hire independent counsel.

Hawaii

The Office of Information Practices (within the lieutenant governor's office): to provide an informal dispute resolution process as an alternative to court actions. Also offers "attorney-of-the-day" service which advises members of the public and government agencies. The Office has the power to order agency compliance, and the law requires courts to defer to decisions requiring disclosure unless the factual and legal determinations are found to be "palpably erroneous." No cost to participants, but timeliness has deteriorated because of decreased resources and budget cuts.

Illinois

Public Access Counselor leads the Public Access and Opinions Division of the Office of the Attorney General. After a non-commercial records request has been denied, the requester can ask that the case be reviewed. If the agency does not cooperate, the AG can issue a subpoena to gather additional information. The AG has authority to make findings of act and conclusions of law and issue binding opinions, subject to administrative review. The AG can also opt for mediation, and can issue advisory opinions.

Indiana

The Office of the Indiana Public Access Counselor can respond to informal requests from the public and public agencies. Public bodies must cooperate with the Public Access Counselor, which can issue advisory opinions, but a complainant must go to court to appeal a denial. Must file a complaint with the Public Access Counselor first to collect attorney's fees.

Iowa

The Office of Citizen's Aide/Ombudsman is an independent state agency to which citizens can bring complaints about government. The position of Citizens' Aide is appointed by the Legislative Counsel. The office can investigate and make recommendations but has no formal enforcement powers.

The Iowa Public Information Board was created to provide a free, efficient way for Iowans to receive information and resolve public records disputes. Once the Board accepts a complaint, it has the power to stay any court actions. Board attorneys try to negotiate compromises to satisfy both parties. A decision made by the Board is a final decision, and the Board is empowered to enforce its decisions with legal action and civil penalties. Parties can opt to use an administrative law judge. A final Board order is subject to judicial review.

Kentucky

The attorney general serves as an impartial tribunal, issuing legally binding decisions in disputes related to the open records and open meetings laws. Both parties can appeal the AG's decision in court; appeal must be filed within 30 days or the AG decision will have the force and effect of law and can be enforced in court.

Maryland

The Maryland Open Meetings Compliance Board (OMCB) and the State Public Information Compliance Board (PICB) can resolve disputes over public meetings and unreasonable fees, respectively. In addition, the Public Access Ombudsman may review any dispute "relating to requests for public records." OMBC opinions are advisory.

Massachusetts

The Supervisor of Public Records is responsible for maintaining the commonwealth's public records and handling administrative appeals in disputes relating to the Public Records Law. The Supervisor can order the custodian to comply, and ask the attorney general for assistance. Judicial remedies are available directly.

Minnesota

The Information Policy Analysis Division of the Department of Administration provides an alternative appeal mechanism for FOI request denials. Commissioner of Administration may issue written advisory opinions; opinions are not binding but must be given deference by a court. Complainant must bring a court action to compel compliance.

Nebraska

A person denied access under either the open meetings or public records law can request the attorney general to review. The attorney general also issues decisions interpreting the laws. The attorney general can order the public agency to comply, but if the agency refuses, the requester can bring suit or demand in writing that the attorney general bring suit.

New Jersey

The Government Records Council (GRC) created to establish an informal mediation program for facilitating the resolution of records disputes, hear complaints concerning denials of access to records, issue advisory opinions and prepare information for requesters and custodians.

After a requester files a formal complaint of denial of access, the GRC offers an opportunity to resolve the dispute through mediation with an impartial third-party attorney with knowledge of the law serving as mediator. Mediation is voluntary and at no cost to either party. If no mediation or mediation not successful, GRC can initiate a more formal investigation. Does not apply to the legislature or judiciary.

New York

Committee on Open Government provides advice, issues written advisory opinions and provides the public with resources to file requests or appeal denials of requests. Advisory opinions do not have the force of law, so requester must bring court action to enforce.

North Dakota

Any interested party may ask the attorney general for an opinion regarding an alleged violation of records or meetings laws. The AG issues opinions free of charge. If the AG finds the public entity violated the law, the entity has seven days to address and correct the issue; failing to comply can result in potential personal liability for the person or persons responsible, although the AG does not have the authority to change, void or overrule a decision of or action taken by the public entity. At any time, the aggrieved party can bring a civil action.

Ohio (new in 2016)

Requesters can file a complaint with the Ohio Court of Claims (\$25 filing fee), and require the public office to work with the requester and a mediator to try to resolve any issues. If mediation is not successful, the question is referred to a "Special Master" who will decide whether the public office must turn over the records.

The alternative (existing law) is for the requester to file a mandamus action – which allows the requester to collect court costs if wins, plus attorney's fees if records withheld in bad faith.

Addresses "vexatious litigator" who repeatedly brings baseless complaints for the purpose of harassing a defendant: can be prevented from bringing further complaints without prior permission from the courts.

Pennsylvania

Office of Open Records is authorized to hear and decide appeals from requesters who have been denied access to records by state and local agencies. Informal mediation program to resolve disputes without undergoing a formal

administrative review process and appellate litigation. An administrative appeal process is required before any court action. Mediation is voluntary. If mediation does not resolve the issues, the Office will issue a final determination within 30 days. If the parties do not opt for mediation, the Office has 30 days to issue a final determination, with or without a hearing. The final determination is binding on the agency and the requester, but the requester must seek court help to enforce, as the Office does not have enforcement powers.

Rhode Island

The attorney general investigates complaints on both public records and open meetings. The chief administrative office for the agency responsible for the records handles administrative appeals after a denial. If the chief administrator officer does not release the record, the requester can file a formal complaint with the AG. The AG may file suit in superior court. If the AG decides not to take legal action, citizens can file suit in superior court.

South Dakota

The Open Meetings Commission (five attorneys appointed by the Attorney General) handles disputes related to the open meetings law; the Office of Hearing Examiners handles disputes over public records. Citizens can take complaints about open meetings to the state's attorney or the AG; the AG decides whether to prosecute, or can send the complaint to the Open Meetings Commission for further action. The Commission evaluates the complaint and issues a written determination, which is final, reprimanding the offending official or government entity rather than imposing criminal charges or a fine. Citizens with public records access disputes can file notice of review with the Office of Hearing Examiners, which will make written findings of fact and conclusions of law, which could be after a hearing. State's attorneys and the AG do not prosecute any decisions.

Tennessee

Office of Open Records Counsel (in the Comptroller of the Treasury) was created to deal with local government open records issues. The office issues informal advisory opinions, informally mediates disputes with local governmental entities (not state) and works with the Advisory Committee on Open Government on open meetings and open records issues. Opinions are advisory and citizens seeking enforcement of public records or open meetings laws must go to court.

Texas

Requesters and governmental bodies are required to consult with the attorney general before claiming exemptions or proceeding to litigation. If a governmental body wishes to withhold records from a requester, and there has not been a previous AG's determination on the disclosure of those records, it must ask the AG for a decision within 10 business days of receiving the request. The AG must issue a written opinion within 60 working days after the request. If the AG determines that the information is public, the governmental body must file a cause

of action seeking relief from compliance in order to avoid criminal violation of the act. The AG can pursue civil actions in open-government cases but cannot prosecute those complaints in criminal court. The AG does not have jurisdiction over Texas Open Meetings Act violations (district courts and county and district attorneys do). Citizen has to bring an action for refusal to request an AG's decision or for refusal to supply public information or information that the AG determined is a public record.

Utah

Requesters can appeal a records denial by appealing to the head of the state agency, or they can appeal to the State Records Committee. If unsuccessful, they can appeal to district court. The State Records Committee serves as an appeals board from agency denials, including local agencies

Government Records Ombudsman provides information.

Virginia

Freedom of Information Advisory Council (FOIAC), within the legislative branch, renders advisory opinions that clarify the law and provide guidance to government agencies. FOIAC cannot compel production of documents or issue orders, does not have authority to mediate, but can be called upon as a resource to issue advisory opinions that have persuasive value. FOIAC issues formal written opinions as well as informal opinions. Opinions are merely advisory and not binding; appeals and remedies are still funneled through the courts systems.

Washington

Open Government Ombudsman, also called the Assistant Attorney General for Open Government, to help public agencies and citizens comply with laws. A citizen or public agency can call or email the ombudsman, who may provide an informal written analysis and follow up with the agency and ask it to reconsider its position where appropriate. The opinions of the ombudsman are nonbinding, but they may be persuasive to the agency or to a court considering a public access dispute.

B. Violations – fines and penalties, attorney's fees, costs, damages

1. Examples of individual liability when a violation is found by a court:

Florida

Any public officer who violates a provision of the public records law commits a noncriminal infraction, punishable by fine not exceeding \$500.

Idaho

If a public official has deliberately and in bad faith improperly refused a legitimate request for inspection or copying, the court shall assess a civil penalty not to exceed \$1,000.

Louisiana

If the custodian arbitrarily or capriciously withheld requested record/failed to respond, court may award the requester actual damages, as well as \$100 for each day the custodian failed to give required notice. The custodian is personally liable for the payment of damages, and liable with the agency for attorney's fees.

Mississippi

Any person who denies access to a public record may be liable civilly in a sum not to exceed \$100 per violation, plus all reasonable expenses incurred by such person bringing the proceeding.

New Hampshire

Officer, employee or other official of a public body or public agency who violates law in bad faith, court shall impose civil penalty of \$250 - \$2,000. May also be required to reimburse the public body or public agency for any attorney's fees or costs. Penalty payable to the state if person is a state employee, and payable to the political subdivision of the person is an employee of the political subdivision.

New Jersey

A public official, officer, employee or custodian who knowingly and willfully violates the law is subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation within 10 years of the initial violation.

Pennsylvania

A court may impose a penalty of not more than \$1,500 if an agency denies access to a public record in bad faith.

An agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than \$500 per day until the public records are provided.

Rhode Island

The court shall impose a civil fine not exceeding \$2,000 against a public body or official found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed \$1,000 against a public body found to have recklessly violated this chapter.

Virginia

If violation was willfully or knowingly made, the court shall impose the officer, employee or member of a public body in the individual's individual capacity a civil penalty of not less than \$500 or more than \$2,000 which amount shall be paid to the State Library Fund.

For second or subsequent violation, the civil penalty must be not less than \$2,000 nor more than \$5,000.

*Note: some states provide for criminal penalties for violations, including fines and imprisonment.

**Kansas law provides that civil penalties imposed against public agencies must be paid to the attorney general's open government fund.

2. Attorney's fees, court costs and damages

When can attorney's fees and court costs be awarded? Mandatory or discretion of the court?

Bad faith

Knowing, reckless

Prevailing plaintiff

Prevailing defendant

Only if vexatious or for harassment?

Examples of provisions for damages:

Louisiana

Court may award actual damages.

New Mexico

The court shall award damages, costs and reasonable attorney's fees to any person whose written request has been denied and is successful in a court action to enforce the provisions the Inspection of Public Records Act.

Ohio

Statutory damages fixed at \$100 for each business day during which the public office or person failed to comply, up to a maximum of \$1,000

South Carolina

The court may award actual or compensatory damages, or reasonable attorney's fees and other costs of litigation, unless there is a specific finding of good faith