

RIGHT TO KNOW ADVISORY COMMITTEE

**Monday, October 21, 2024
1:00 p.m.**

Location: State House, Room 228 (Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
<https://legislature.maine.gov/Audio/#228>

1. Introductions
2. Maine Chiefs of Police Association update – Chief Jason Moen, Interim President
3. Subcommittee updates
4. Committee discussion: use of personal email and other communication methods under FOAA and record retention schedules
5. Committee discussion: unfulfilled records requests
6. Adjourn
 - Next meeting: Monday, November 18, 2024 at 1pm



Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS

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MEMORANDUM

TO: Members, Right to Know Advisory Committee
FROM: Advisory Committee Staff
DATE: October 21, 2024
RE: October 7, 2024 Meeting Discussions

At the third Right to Know Advisory Committee meeting on October 7, 2024, staff were asked to prepare a summary of the members' discussions for the next Advisory Committee meeting; a full summary is included in the materials for today's meeting. Staff prepared this memo outlining some of the ideas discussed by the Advisory Committee on specific topics that are scheduled for discussion.

Topic: Use of personal email and other communication methods under FOAA and record retention schedules

Ideas discussed by the Advisory Committee:

Record Retention/Management

1. Provide more guidance in records management training materials regarding the types of records that are meant to be retained (e.g., text messages, personal emails, other communication technologies)
2. For boards and commissions with staff who are state employees, seek to have such staff share record management training information with board members
 - *Are there boards and commissions without staff who are state employees? If so, should these be addressed?*
3. Require board and commission members to complete records management training

FOAA Training Requirement pursuant to 1 MRSA §412(4)

1. Expand list in statute of those who must participate in FOAA training to include members of boards and commissions
 - *Which boards and commissions should be included?*
 - *If not all of the boards and commissions, which ones? 37 boards and commissions within DPFR/OPOR?*

Topic: Unfulfilled records requests
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Ideas discussed by the Advisory Committee:

1. Amend §408-A(4) to require greater specificity in the denial reason
 - Use language similar to that in §405(4) applicable to motions to go into executive session?
2. Obtain more specific examples/data related to unfulfilled requests
 - Survey media representatives for examples/data related to unfulfilled request such as the Maine Press Association and the Maine Association of Broadcasters
 - *“Unfulfilled request” – is this a records request pursuant to FOAA that was denied or is it something broader?*
 - *What specific information would the Advisory Committee want to receive?*

For reference, below is language from last year’s survey to responding entities regarding burdensome/abusive requests.

1. Please provide examples of the types of public records requests that your organization considers to be “burdensome” requests for public records.
2. Please provide examples of the types of public records requests or situations that your organization believes represent an abuse of the FOAA process.
3. Do you have any recommendations for statutory changes to FOAA to address the examples described in questions 1 or 2? If so, please describe your recommendations.

Right to Know Advisory Committee
October 7, 2024 (Hybrid: Zoom and Room 228)
Meeting Summary

Convened 1:01 p.m. in person and remote on Zoom; public access on Legislature's website at:
<https://legislature.maine.gov/audio/#228?event=91835&startDate=2024-10-07T13:00:00-04:00>

Present in Room 228:

Rep. Erin Sheehan
Jon Bolton
Lynda Clancy
Kevin Martin
Eric Stout

Remote:

Amy Beveridge
Sen. Anne Carney
Julie Finn
Betsy Fitzgerald
Jen Lancaster
Brian MacMaster
Judy Meyer
Tim Moore
Cheryl Saniuk-Heinig
Connor Schratz

Absent:

Justin Chenette
Linda Cohen
Kim Monaghan

Staff:

Lindsay Laxon
Elena Roig

Welcome and introductions

Rep. Erin Sheehan convened the meeting and all members introduced themselves and identified the interests they were appointed to represent on the Advisory Committee.

Subcommittee updates

Rep. Sheehan asked the subcommittee chairs to provide an update regarding the subcommittees' recent meetings.

Public Employee Disciplinary Records Subcommittee.

Staff provided an update on behalf of Subcommittee Chair Judy Meyer. Staff advised that the subcommittee met on September 23rd and will hold its next meeting on October 17th. For its second meeting, the subcommittee has requested that representatives of the Office of Employee Relations, the Department of Public Safety, and local law enforcement attend the meeting to discuss the questions raised in the Judiciary Committee's letter to the RTKAC and other issues.

Public Records Exception Subcommittee.

Subcommittee Chair Cheryl Saniuk-Heinig explained that the subcommittee met on September 30th and has reviewed the agency responses regarding public records exceptions that have been received to date. The subcommittee also discussed the proposed public records exception for "personally identifiable information" received by the Permanent Commission on the Status of Racial, Indigenous, and Tribal Populations. The subcommittee's next meeting is scheduled for October 24th.

Burdensome FOAA Requests Subcommittee.

Subcommittee Chair Kevin Martin explained that the subcommittee has met twice: September 23rd and October 7th. He explained that the subcommittee has reviewed responses to the survey sent out last year and an overview document prepared by subcommittee staff. The subcommittee is now considering possible processes for mediation or other forms of alternative dispute resolution related to FOAA records requests that could be established in conjunction with the work of the Public Access Ombudsman. The subcommittee will hold its next meeting on October 21st.

The Advisory Committee had requested that a representative of the Maine Chiefs of Police Association attend the meeting to provide an update regarding the recommendation in last year's report on the reporting on or releasing information related to public safety incidents and ongoing criminal investigations. Staff advised that a representative of the Association could not attend the meeting on October 7th, but could be available for the Advisory Committee's next meeting on October 21st.

Use of personal email and other communication methods under FOAA and record retention schedules

At the last Advisory Committee meeting, members requested more information regarding the training that state employees receive regarding records management as well as any trainings that are provided to members of boards and commissions. Staff shared with members records management training materials provided by State Archivist, Kate McBrien, including the acknowledgement form that state employees must sign after completing the training. Staff also shared a memo from the Public Access Ombudsman, Brenda Kielty, that provides examples of policies and procedures for managing records created by local or state boards, commissions and committee/subcommittees. Staff explained that there does not appear to be a uniform required training for boards and commission members. For additional background, staff also provided the members with materials from 2019 Advisory Committee subcommittee meetings in which a subcommittee considered expanding the training requirements in 1 MRSA §412 to include boards and commissions.

Rep. Sheehan commented that public officials should understand what types of records are meant to be retained. For boards and commissions with an executive director or other support staff, the members discussed those individuals' ability to convey FOAA and record retention requirements to board and commission members. Eric Stout pointed out that during the subcommittee discussions in 2019, the members had sought an incremental approach to expanding the FOAA training requirement, and Rep. Sheehan wondered if the Advisory Committee should prioritize expanding training requirements for certain boards and commissions.

The Advisory Committee asked the Public Access Ombudsman, Brenda Kielty, to share her perspective on what may be necessary for training for boards and commissions. Ms. Kielty explained that there are often volunteer members coming from nonprofit or private sector backgrounds who are used to communicating electronically, but not used to record retention or FOAA requirements. She mentioned that a power dynamic may exist in some cases, as the Advisory Committee has discussed at a previous meeting, in which a member may be unwilling to follow guidance provided by an executive director. She did not have suggestions for which boards and commission the Advisory Committee should prioritize; however, she expressed that ensuring that an executive director of a board or commission receives training would be a good place to start.

Lynda Clancy referred to the materials from the subcommittee's 2019 meetings and asked if all boards and commission on the list conduct public business. She noted that the training materials provided by the State Archivist seem appropriate for board and commission members. Eric Stout shared that, if the executive director is a state employee, they would receive this training. He added that last year the compliance rate for completing the training was 93%. Rep. Sheehan asked Mr. Stout if there are any boards or commissions without an associated state employee; he was unsure, but added that some may

have part time staff support. Rep. Sheehan questioned which boards and commissions have the greatest issues with members' compliance with records management and FOAA requirements and Judy Meyer added that she would like to hear from Ms. Kielty's on this question. Kevin Martin added that FOAA may not apply to all boards and commissions and he would be concerned about placing a burden on the board or commission to make that determination, as these issues may be more complex at the local level. Eric Stout shared with the Advisory Committee language on the Attorney General's website that explains the Professional/Financial Regulation Division's role, including providing legal advice to the Office of Professional and Occupational Regulation which consists of 37 licensing boards, commissions, and registration programs. The members discussed that these boards and commissions may be a place to start if they recommend expanding training requirements.

Role of the Public Access Ombudsman

Staff shared a copy of the authorizing statute for the Public Access Ombudsman and, in response to a member question at the last meeting, explained that the total costs associated with the position are approximately \$185,000. Lynda Clancy asked Ms. Kielty if, given her increasing workload, she needs additional assistance. Kevin Martin explained that the Burdensome FOAA Requests Subcommittee discussed the role of the Public Access Ombudsman in its meeting that morning. The subcommittee is discussing providing the position with additional authority and developing a formal dispute resolution process which might result in an increase in the duties associated with the position. Rep. Sheehan noted that it seems that the current resources are adequate, but would need to be increased if the role were expanded. She suggested that the Advisory Committee defer conversations about this topic until the subcommittee returns with its recommendations. Sen. Carney shared that the explanation Ms. Kielty provided at the subcommittee meeting of the different levels of conflict was helpful and that expanding her role in situations of higher conflict (e.g., bad faith) may necessitate more resources.

Committee discussion of unfulfilled records requests

At the last Advisory Committee meeting, members had requested any specific data or information from past Advisory Committee meetings on the topic of unfulfilled requests. Staff did not locate any specific information to share, although the issue has come up in various contexts many times. Staff directed members to a copy of a Maine Supreme Judicial Court case *MaineToday Media, Inc. v. State*, 82 A.3d 104 (2013) mentioned by Brian MacMaster at the last Advisory Committee meeting. In the case, the state had denied a FOAA records request based on the grounds that the records were "intelligence and investigative information" in a pending criminal matter and were confidential pursuant to the Criminal History Records Information Act. The Court found that the state failed to meet its burden for establishing just a proper cause for the denial of the FOAA request, specifically that the requested records met a statutory public records exception under the Criminal History Records Information Act.

Rep. Sheehan commented that it might be useful to think about how the *MaineToday Media, Inc.* case might be drafted into a recommendation to ensure that the statute makes clear that it is the agency's responsibility to explain why a particular record is not a public record. She noted that the provision of FOAA related to a public body going into executive session requires a specific citation. She also raised the possibility of sending out a survey regarding unfulfilled requests to gather more specific examples. Tim Moore asked if there a larger state agency that keeps track of FOAA records requests made to state agencies. Staff advised that they were unaware of any central repository for this information. Betsy Fitzgerald suggested that the Advisory Committee could consider creating a generic checklist to assist responding entities in determining whether a records request is requesting a public record. Rep. Sheehan noted that the public records statute provides a list of exceptions that address what is confidential, but the Advisory Committee had received anecdotal examples of records requests that were denied without much explanation. Eric Stout said that the statutory requirements for going into executive session would be easy to add to the denial language in section 408-A(4). He noted, however, that there are many statutory public records exceptions, so it may be challenging at times for a responding entity to determine which are

applicable. Kevin Martin commented that the language in section 408-A(4) already requires the responder state the reason for the denial and that agencies likely provide more detail in their denials. Judy Meyer explained that she has often seen records requests to non-agency responders denied for general reasons such as on “privacy grounds” and those denials do may be harder to appeal; Lynda Clancy shared Ms. Meyer’s concerns. Rep. Sheehan asked staff to provide a summary of the Advisory Committee’s discussions for the next meeting. The members then discussed methods for obtaining more specific data on this issue and Kevin Martin suggested that members of the press may have examples that they can share. Judy Meyer said that not all requestors track their requests based on length of time for a response, but she thinks it is worth looking into gathering more information. Rep. Sheehan suggested that the Advisory Committee could seek more information and specific examples from the Maine Press Association and the Maine Association of Broadcasters.

November meeting date

At the last meeting, the Advisory Committee had discussed the possible need for a fifth meeting date. Rep. Sheehan confirmed that the members should plan on a fifth meeting on November 18th.

The meeting was adjourned at 2:29 p.m.

DRAFT