

The Freedom of Access Act For Legislators



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The Freedom of Access Act a.k.a. “FOAA”

1 M.R.S. § 400, et seq.

▶ Why are you here?

- ▶ Legislators are public record “creators” with duties to manage, retain and produce public records. Your public records are subject to disclosure under FOAA.
- ▶ Grant Pennoyer and Nik Rende will cover IT aspects of legislative communications such as email.
- ▶ Legislature, committees and subcommittees governed by FOAA public proceedings requirements.

▶ Purpose today?

- ▶ Landmarks of the Freedom of Access Act, required training and resources for questions.

FOAA Training Requirements

- ▶ **Who?**

- ▶ Elected state and local officials
- ▶ Public access officers

- ▶ **What?**

- ▶ Public records and proceedings rules
- ▶ Procedures compliance
- ▶ Penalties and consequences of noncompliance

- ▶ **When?**

- ▶ Within 120 days of oath of office

- ▶ **How?**

- ▶ Complete this session; certificate of completion

Declaration of Intent

“... public proceedings exist to aid in the conduct of the people’s business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly...”



Liberal Construction

“This subchapter shall be liberally construed and applied to promote its underlying purposes and policies...”



1 M.R.S. §401

FOAA During the State of Emergency

- ▶ Have the FOAA requirements of open government been suspended during the declaration of a state of emergency in Maine due to COVID-19?
 - ▶ No.
 - ▶ Emergency legislation enacted in March 2020 amended the statute to allow for public proceedings through remote access under certain conditions. LD 2167
 - ▶ The provision allowing remote proceedings does not apply to public proceedings of the Legislature, a legislative committee or the Legislative Council except that such bodies may restrict attendance by the public to remote access.

1 M.R.S. § 403-A

FOAA

FOIA

Maine's Freedom of Access Act

- ▶ First enacted in 1959, then replaced in 1976 with current structure
- ▶ Covers public records and proceedings
- ▶ Applies to executive and legislative officials and bodies

U.S. Freedom of Information Act

- ▶ Became law in 1967, then amended in 1974 to protect citizens' rights to information about themselves
- ▶ Covers only records
- ▶ Applies only to federal executive agencies and not to Congress

What Does the Law Cover?

Public Records

- ▶ Written, graphic or electronic
- ▶ Possession or custody of an agency or official of State or political subdivisions
- ▶ Received, prepared or containing information related to transaction of public business

Public Proceedings

- ▶ Transaction of any function affecting citizens
- ▶ By one of the covered bodies
- ▶ Deliberations and decisions

Rights of the Public: Records

To receive an acknowledgement within five working days

To be told within five working days if the request will be denied, in whole or in part

To receive an estimate of costs in a reasonable amount of time

To inspect and copy records within a reasonable time after making a request

- BUT agency/official is not required to create records or arrange information in a specific form

To appeal a denial of records to Superior Court

True or False?

- ▶ Your bill drafts and proposed committee amendments are not public records.

We hold these truths to be ^{self-evident} ~~saered & undeniable~~; that
all men are created equal [^] ~~& independent~~; that ~~from~~
~~that equal creation they derive in rights~~ ^{creator with equal rights some of which are} ~~inherent &~~ [^]
~~inalienable~~ ^{rights; that} among ~~which~~ ^{these} ~~are the preservation~~ [^] of life,
& liberty, & the pursuit of happiness.

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- ▶ **TRUE**, legislative papers and reports are not public records until signed and publicly distributed



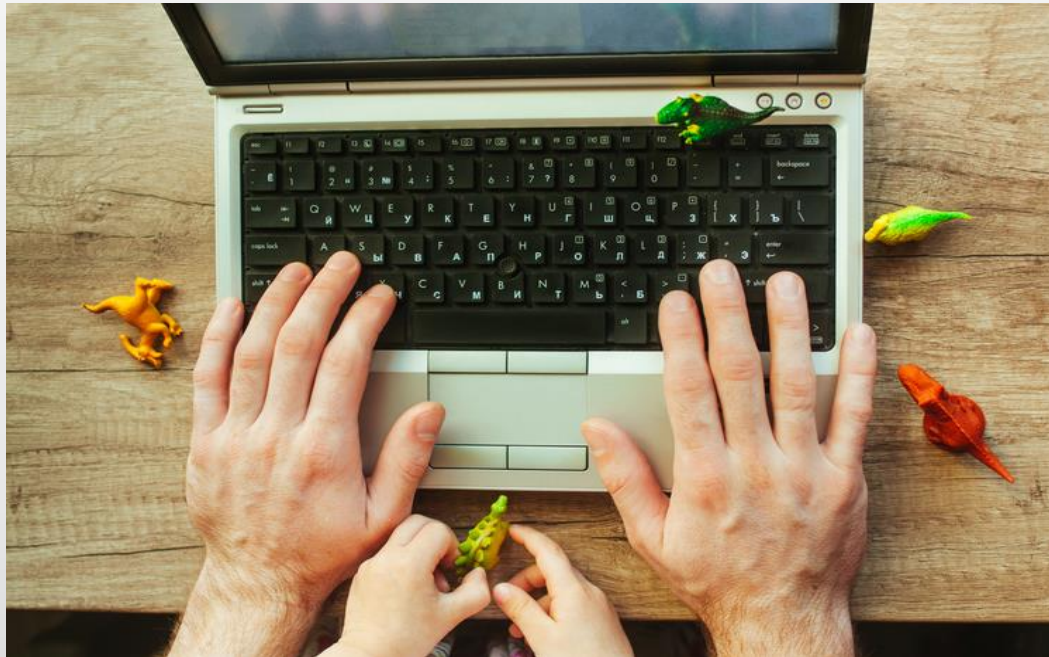
- ▶ Working papers, drafts, records, and memoranda used to prepare proposed legislative papers or reports are not public records until the end of the legislative session in which the papers or reports are prepared or considered or to which they are carried over

True or False?

- ▶ Documents on a legislator's personal laptop, tablet or smartphone are not public records.



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- ▶ **TRUE**, they are private if they are personal
 - ▶ **FALSE**, they are public records if they concern the conduct of your business as a legislator



- ▶ **KEY: Records of your business as a legislator are public regardless of their location**

True or False?

- ▶ Communications from a constituent to a legislator are public records.



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- ▶ **TRUE**, except personal information in the communication concerning:
 - ▶ Medical information of any kind
 - ▶ Credit or financial information
 - ▶ Personal history, general character or conduct of the constituent or a family member
 - ▶ Complaints, charges of misconduct or disciplinary action
 - ▶ Social Security number
 - ▶ Information that would be confidential if in the possession of another public agency or official

Should a legislator's email include a disclaimer about privacy?

- ▶ YES, even though some information is protected by the exception. Constituents should be aware that the contents of emails they send to their legislators could be released as a public document under FOAA.



- ▶ *“Please be advised that anything sent to me in my capacity as a legislator may become a matter of public record, per the Maine Freedom of Access Act www.maine.gov/foaa/, which means that other people can ask to read these messages.”*
- ▶ *IT can help set this up for you.*

Meetings Open to the Public

“...all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.”



1 M.R.S. §403

Meetings: What governmental bodies are subject to FOAA?

- ▶ The Legislature, its committees and subcommittees (three or more members appointed by the committee to do its business)
- ▶ Boards or commissions of state agencies, county or municipal agencies, school or other governmental districts
- ▶ Advisory organizations created by statute, resolve or executive order
- ▶ **KEY: Agencies where multi-member bodies make the decisions (e.g., Leg. Council), but not single agency heads (e.g., the Speaker or President)**

Rights of Public: Meetings

To attend any public proceeding and get minutes

- BUT not to speak unless the body permits it

To record or broadcast

- BUT not in a way that interferes with the meeting

To get advance notice of when and where

- EVEN emergency meetings, if practicable

To challenge in Superior Court the legality of final actions taken in executive session

- AND have the court declare the action null and void

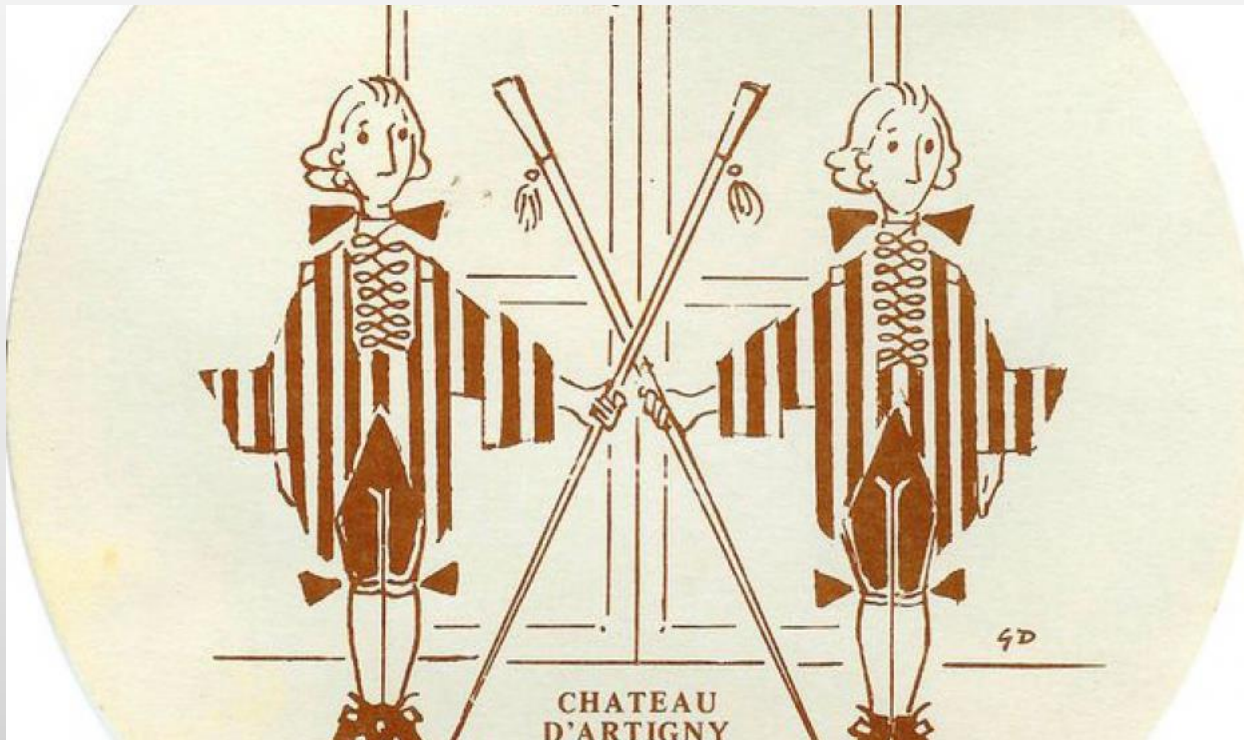
Remote Meeting Access During COVID

- ▶ Remote public meetings are allowed if:
 - ▶ Telephonic, video, electronic or other means are feasible;
 - ▶ Notice includes method by which public may attend;
 - ▶ Each member of the body can hear all others and speak to all other members of the body;
 - ▶ Members of the public can hear all members of the body;
 - ▶ The body determines that participation by the public is through telephonic, video, electronic or other similar means;
 - ▶ All votes taken are by roll call vote.

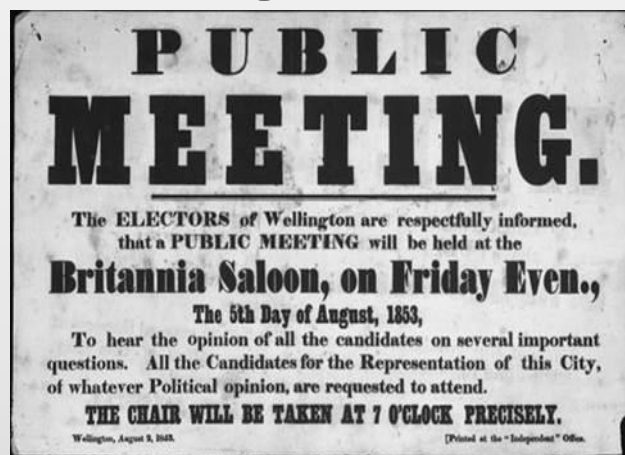
- ▶ This section is repealed 30 days after the termination of the state of emergency.

True or False?

- ▶ A legislative committee can meet privately to discuss sensitive issues before a public committee session begins.



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- ▶ **FALSE**, committees and subcommittees must conduct business in public.
 - ▶ Members must be present to participate: If you listen in to a meeting by phone, you do not count toward a quorum and cannot participate.
 - ▶ Must give notice of meeting time and place.



- ▶ Party caucuses are *likely* outside scope of the law. What if decisions are being made in caucus? Does this circumvent the purpose of open deliberations and actions?

Exceptions: Executive Sessions

- ▶ Strictly limited grounds
 - ▶ Confidential by statute
 - ▶ Certain employment related matters
 - ▶ Consideration of the condition, acquisition or use of property
 - ▶ Labor contracts
 - ▶ Consultations with legal counsel
 - ▶ School board student suspensions or expulsions
- ▶ Procedural Safeguards
 - ▶ Precise description of business
 - ▶ Cite authority for the executive session
 - ▶ 3/5 vote
 - ▶ Cannot take action or vote in executive session



True or False?

- ▶ The law doesn't apply if fewer than three members of a committee meet to do business.



- ▶ What if a committee asks two members to meet with interested parties to negotiate a compromise on a bill and the public is excluded from that meeting?

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- ▶ **TRUE**, not covered as a subcommittee but a court might conclude the meeting should have been public if decisions were made.



- ▶ **KEY:** It isn't the *number* of participants but the *purpose* of the meeting that is determinative; communicating with other members outside of the public meeting is permitted as long as those communications are not used to defeat the purpose of the law.

Penalties

- ▶ A willful violation of FOAA is subject to a civil penalty of not more than \$500 for the first violation, not more than \$1,000 for the second violation not more than 4 years after the previous adjudication and not more than \$2,000 for the third violation not more than 4 years after the previous adjudication.
- ▶ Same agency but can involve different officers or employees.



- ▶ It is a Class D crime to intentionally remove, alter or destroy state public records.
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Attorneys' Fees

- ▶ Reasonable attorneys' fees can be awarded to a plaintiff who substantially prevails if a public agency or official acted in bad faith:

In denying access to public records, or

In taking final action in an executive session



Right to Know Advisory Committee

- ▶ Provide guidance in ensuring access to public meetings and public records
- ▶ Review exceptions to public access on a schedule and as needed in specific cases
- ▶ Support to Judiciary Committee on review of new exceptions to public access

Resources

- ▶ Maine Freedom of Access Website:

<http://www.maine.gov/foaa>

- ▶ Right to Know Advisory Committee Website:

<http://www.maine.gov/legis/opla/righttoknow.htm>

- ▶ For constituent questions, the list of public access officers may be found at:

<http://maine.gov/foaa/contactlist/index.htm>

- ▶ Maine Public Access Ombudsman:

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