

Right to Know Advisory Committee

State Approaches to Abusive, Repetitive, or Unduly Burdensome Public Records Requests

State and Citation	Declaratory or Injunctive Relief Available to Agency	Agency May Withhold Records or Limit Ability to Request Records	Advance Fees Required or Fines Imposed
<p>Alaska</p> <p>ALASKA STAT. §40.25.100 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>No relevant provisions.</p>	<p>If production of records in a calendar month for a single requester exceeds five person-hours, an agency shall require the requester to pay personnel costs of compliance and may require such fees to be paid in advance.</p> <p>ALASKA STAT. §40.25.110.</p>
<p>California</p> <p>CAL. GOV'T CODE §6250 <i>et seq.</i></p>	<p><i>NOT ENACTED – Legislature considered but did not enact a bill that would allow an agency to petition a court for a protective order against an individual who has sought records “for an improper purpose, which includes, but is not limited to, the harassment of a public agency....”</i></p> <p>A.B. 520, introduced February 2009.</p>	<p>Agency may justify withholding a requested record where it can demonstrate, on the facts of the particular case, that the public interest served by not disclosing the record outweighs the public interest served by disclosure of the record.</p> <p>CAL. GOV'T CODE §6255.</p>	<p>No relevant provisions.</p>
<p>Connecticut</p> <p>CONN. GEN. STAT. §1-200 <i>et seq.</i></p>	<p>Freedom of Information Commission (FIC) hears appeals of denied requests.</p> <p>Where an individual’s appeal of a denied record request has been denied by the FIC, the agency may seek a court injunction to prevent the individual from filing any further appeals with the FIC that “would perpetrate an injustice or would constitute an abuse of the commission’s administrative process.”</p> <p>CONN. GEN. STAT. §1-241.</p>	<p>No relevant provisions.</p>	<p>The FIC may impose a civil penalty ranging from \$20 to \$1000 for an individual’s appeal of an agency denial of that is made “frivolously, without reasonable grounds and solely for the purpose of harassing the agency.”</p> <p>CONN. GEN. STAT. §1-206.</p>

State and Citation	Declaratory or Injunctive Relief Available to Agency	Agency May Withhold Records or Limit Ability to Request Records	Advance Fees Required or Fines Imposed
<p>Georgia</p> <p>GA. CODE ANN. §50-18-70 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>No relevant provisions.</p>	<p>Agency may require prepayment of fees associated with a records request by an individual who has outstanding unpaid fees from previous requests.</p> <p>GA. CODE ANN. §50-18-71.</p>
<p>Illinois</p> <p>5 ILL. COMP. STAT. 140/1 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>Agency may properly deny an “unduly burdensome” bulk records request where there is no way to narrow the request and “the burden on the public body outweighs the public interest in the information.”</p> <p>Repeated requests by the same individual for the same records that are unchanged or identical to records previously provided or properly denied may be deemed “unduly burdensome” and denied under this provision.</p> <p>5 ILL. COMP. STAT. 140/3.</p>	<p>Agency may require a “recurrent requestor” of records to pay in advance for the costs of compliance.</p> <p>5 ILL. COMP. STAT. 140/3.2.</p>
<p>Kansas</p> <p>KAN. STAT. ANN. §45-201 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>Agency may properly deny a request (1) that places an unreasonable burden on the agency, or (2) if there is reason to believe that repeated requests are intended to disrupt other essential agency functions.</p> <p>A denial under this provision must be sustained by a preponderance of the evidence.</p> <p>KAN. STAT. ANN. §45-218.</p>	<p>No relevant provisions.</p>

State and Citation	Declaratory or Injunctive Relief Available to Agency	Agency May Withhold Records or Limit Ability to Request Records	Advance Fees Required or Fines Imposed
<p>Kentucky</p> <p>KY. REV. STAT. ANN. §61.800 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>Agency may properly deny a request (1) that places an unreasonable burden on the agency, or (2) if there is reason to believe that repeated requests are intended to disrupt other essential agency functions.</p> <p>A denial under this provision must be sustained by clear and convincing evidence.</p> <p>KY. REV. STAT. ANN. §61.872.</p>	<p>No relevant provisions.</p>
<p>New Jersey</p> <p>N.J. STAT. ANN. §47:1a-1 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>If a request for access to a record would substantially disrupt agency operations, the custodian may deny access after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.</p> <p>N.J. STAT. ANN. §47:1a-5.</p>	<p>No relevant provisions.</p>
<p>Pennsylvania</p> <p>65 PA. CONS. STAT. §67.101 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>Agency may properly deny a request if the requester has made repeated requests for the same record and those requests have placed an unreasonable burden on the agency.</p> <p>65 PA. CONS. STAT. §67.506.</p>	<p>No relevant provisions.</p>
<p>Tennessee</p> <p>TENN. CODE ANN. §10-7-503 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>No relevant provisions.</p>	<p>State Office of Open Records Counsel is statutorily authorized to establish a separate fee schedule for frequent and multiple requests for public records.</p> <p>TENN. CODE ANN. §8-4-604.</p>

State and Citation	Declaratory or Injunctive Relief Available to Agency	Agency May Withhold Records or Limit Ability to Request Records	Advance Fees Required or Fines Imposed
<p>Utah UTAH CODE ANN. §63G-2-101 <i>et seq.</i></p>	<p>No relevant provisions.</p>	<p>Agency may refuse an individual's request if it unreasonably duplicates prior records requests from that person. UTAH CODE ANN. §63G-2-201.</p>	<p>Under the schedule, an agency may charge a requester filing more than 4 requests per month for the necessary labor to provide the requested records. Agency may require individuals with outstanding fees from previous requests to pay future estimated fees in advance. UTAH CODE ANN. §63G-2-203.</p>
<p>Virginia</p>	<p>NOT ENACTED – Legislature considered but did not enact a bill that would provide an agency the ability to seek injunctive relief from abusive requests via the court system. <i>H.B. No. 449, introduced January 2010.</i></p>	<p>No relevant provisions.</p>	<p>No relevant provisions.</p>
<p>Washington</p>	<p>NOT ENACTED – Legislature considered but did not enact a bill that would allow an agency to petition a court for an injunction against an individual whose request, among other things, and as based upon a preponderance of the evidence, “was made to harass or intimidate” the agency; “was made in retaliation or to punish the [] agency for an action or actions [it] took or proposed to take”; or “creates an undue burden” on the agency. <i>H.B. 1128, introduced January 2013.</i></p>	<p>No relevant provisions.</p>	<p>No relevant provisions.</p>

Other Notes

Additional Time for Compliance (New Mexico) – agency may deem a request excessively burdensome or broad and thereby allow itself additional time to comply with the request so long as appropriate notice is provided to the requestor (N.M. STAT. ANN. §14-2-10).

Attorney's Fees and Costs – a number of states, including New Hampshire, North Carolina, Oklahoma, Pennsylvania, and Rhode Island, will allow a court to award attorney's fees and other costs of litigation to a prevailing public agency if an individual's appeal of the agency's denial is determined to be frivolous.

Custodian of Records – two state public records statutes allow the custodian of records of a public agency some discretion in setting rules for complying with requests that might interfere with their duties:

- (1) *West Virginia* (W. VA. CODE §29B-1-3): Custodian of records may make reasonable rules and regulations necessary for the protection of records and to prevent interference with the regular discharge of their duties;
- (2) *Wyoming* (WYO. STAT. ANN §16-4-202): Custodian of records may make rules and regulations with reference to the inspection of the records as is reasonably necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

Unreasonable Burden/Substantial Disruption – Case Law – a number of states whose public records statutes provide exceptions for records requests placing a burden on/disrupting an agency have been interpreted by their courts in a variety of ways, as summarized below:

- (1) *Illinois* (5 ILL. COMP. STAT. 140/3):
 - o A records request that would have required the agency to examine 9,200 records by hand and to redact exempt information from those records would impede staff's ability to perform duties and thus constituted an unreasonable burden (*Shehadeh v. Mladigan*, 996 N.E.2d 1243 (Ill. App. Ct. 2013)).
- (2) *Kentucky* (KY. REV. STAT. ANN. §61.872):
 - o Just because complying to a request was tedious and time-consuming did not automatically constitute an unreasonable burden (*Com. v. Chestnut*, 250 S.W.3d (Ky. 2008));
 - o Hostile nature of the requestor did not impose an unreasonable burden in and of itself (*Op. Att'y Gen. 09-ORD-028* (Ky. 2008));
 - o Separating various requested records containing exempt and non-exempt information constituted an unreasonable burden (*Op. Att'y Gen. 97-ORD-88* (Ky. 1997)).
 - o A requestor's numerous and often duplicative requests constituted an unreasonable burden on the agency (*Op. Att'y Gen. 92-91* (Ky. 1992));
- (3) *New Jersey* (N.J. STAT. ANN. §47:1a-5):
 - o Where requestor did not specifically identify the documents it sought and the request was extensive, complying within the seven-day period would have substantially disrupted agency operations (*N.J. Builders Ass'n v. N.J. Council on Affordable Hous.*, 915 A.3d 23 (N.J. Super. Ct. App. Div. 2007)).
- (4) *Pennsylvania* (65 PA. CONS. STAT. §67.506):
 - o A records request submitted to an agency having only a small staff to handle such requests did not constitute an unreasonable burden (*Borough of W. Easton v. Mezzacappa*, 74 A.3d 417 (Pa. 2013)).

Right to Know Advisory Committee

Draft: Government relief from overly burdensome FOAA requests

Sec. 1. 1 MRSA §410-A is enacted to read:

§410-A. Government remedy; just and proper cause

1. Petition for determination. A body, agency or official who has custody or control of a public record may petition the Superior Court for a determination that a request by a person to inspect or copy the public record may be denied for just and proper cause. Petitions may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Order. After a trial de novo, the court shall either dismiss the petition or enter an order appropriately limiting or denying the request to inspect or copy the public record.

3. Just and proper cause. For the purposes of this section, in determining whether a request to inspect or copy a public record may be denied with just and proper cause a court shall consider the identity of the requesting person and the historical frequency, scope and manner of the requesting person's requests for inspection or copying of records under section 408-A, and whether the probative value of the information to the public outweighs any substantial burden on the body, agency or official.

SUMMARY

This bill adds a statutory provision to allow a public body, agency or official to seek relief from overly burdensome requests under the Freedom of Access Act by filing an action in Superior Court seeking a determination whether the request may be denied. The court must determine if the request to inspect or copy a record may be denied for just and proper cause. In making the determination, the court must consider the identity of the requesting person and the historical frequency, scope and manner of the requesting person's requests for inspection or copying, and whether the probative value of the information to the public outweighs any substantial burden on the government body, agency or official. After a trial de novo the court may issue an order limiting or denying the request to inspect or copy the public record, or may dismiss the petition.

Right to Know Advisory Committee

Draft: New schedule for review of existing public records exceptions

Sec. 1. 1 MRSA §433, sub-§2 is repealed and the following enacted in its place:

2-A. Scheduling guidelines. The advisory committee shall use the following list as a guideline for scheduling reviews of public records exceptions and reporting its recommendations to the review committee:

A. Exceptions enacted after 2004 and before 2013 are scheduled to be reviewed by the review committee no later than 2017.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2019:

- (1) Title 1;
- (2) Title 2;
- (3) Title 3;
- (4) Title 4;
- (5) Title 5;
- (6) Title 6;
- (7) Title 7; and
- (8) Title 7-A.

B. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2021:

- (1) Title 8;
- (2) Title 9-A;
- (3) Title 9-B;
- (4) Title 10;
- (5) Title 11; and
- (6) Title 12.

C. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2023:

- (1) Title 13;
- (2) Title 13-B;
- (3) Title 13-C;
- (4) Title 14;
- (5) Title 15;
- (6) Title 16;
- (7) Title 17;
- (8) Title 17-A;
- (9) Title 18-A;
- (10) Title 18-B;
- (11) Title 19-A;
- (12) Title 20-A; and
- (13) Title 21-A.

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Draft: New schedule for review of existing public records exceptions

D. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2025:

- (1) Title 22;
- (2) Title 22-A;
- (3) Title 23;
- (4) Title 24; and
- (5) Title 24-A.

E. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2027:

- (1) Title 25;
- (2) Title 26;
- (3) Title 27;
- (4) Title 28-A;
- (5) Title 29-A;
- (6) Title 30;
- (7) Title 30-A;
- (8) Title 31; and
- (9) Title 32.

F. Exceptions codified in the following Titles are scheduled to be reviewed by the review committee no later than 2029:

- (1) Title 33;
- (2) Title 34-A;
- (3) Title 34-B;
- (4) Title 35-A;
- (5) Title 36;
- (6) Title 37-B;
- (7) Title 38; and
- (8) Title 39-A.

Sec. 2. 1 MRSA §433, sub-§3 is amended to read:

3. Scheduling changes. The advisory committee may make adjustments to the scheduling guidelines provided in subsection 2 2-A as it determines appropriate and shall notify the review committee of such adjustments.

SUMMARY

This draft repeals the public records exceptions review schedule that was completed in 2014 and replaces it with a new review schedule. The advisory committee

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Draft: New schedule for review of existing public records exceptions

will review public records exceptions enacted after 2004 but before 2013 and report its recommendations to the review committee over the course of 2 years, with the final review by the review committee completed no later than 2017. The advisory committee will then begin to review all the public records exceptions codified in the statutes over a 12-year period. The review committee will conduct its review of the advisory committee's recommendations in 2019, 2021, 2023, 2025, 2027 and 2029. The "advisory committee" is the Right to Know Advisory Committee and the "review committee" is the joint standing committee of the Legislature having jurisdiction over judiciary matters.

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Right to Know Advisory Committee

Draft: Add Information Technology expert to RTK AC membership

of communication technologies to support meetings, including audio and web conferencing; databases for records management and reporting; and information technology system, development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

SUMMARY

This bill adds one additional member to the Right to Know Advisory Committee, appointed by the Governor. The new position will bring information technology expertise to the Advisory Committee.

DRAFT

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Draft: Statutory changes to public records exceptions

Sec. 1. 22 MRSA c. 271, sub-c. 2 (§1696-A to §1696-F) is repealed.

Sec. 2. 26 MRSA §3 is repealed and the following enacted in its place:

§3. Confidentiality of records

1. Confidential records. Except as provided in subsections 2 and 3, all information and reports received by the director or the director's authorized agents under this Title are confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

2. Exceptions. Reports of final bureau action taken under the authority of this Title are public records for the purposes of Title 1, chapter 13, subchapter 1.

3. Authorized disclosure. The director shall make or authorize any disclosure of information of the following types or under the following circumstances with the understanding that the confidentiality of the information will be maintained:

A. Information and reports to other government agencies if the director believes that the information will serve to further the protection of the public or assist in the enforcement of local, state and federal laws; and

B. Information and records pertaining to the work force, employment patterns, wage rates, poverty and low-income patterns, economically distressed communities and regions and other similar information and data to the Department of Economic and Community Development and to the Governor's Office of Policy and Management for the purposes of analysis and evaluation, measuring and monitoring poverty and economic and social conditions throughout the State and to promote economic development.

Sec. 3. 26 MRSA §934 is amended to read:

§934. Conciliation; notification of dispute; proceedings in settlement; report

Whenever it appears to the employer or employees concerned in a labor dispute, or when a strike or lockout is threatened, or actually occurs, he or they may request the services of the board.

If, when the request or notification is received, it appears that a substantial number of employees in the department, section or division of the business of the employer are involved, the board shall endeavor, by conciliation, to obtain an amicable settlement. If the board is unable to obtain an amicable settlement it shall endeavor to persuade the employer and employees to submit the matter to arbitration.

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The board shall, upon notification, as soon as practicable, visit the place where the controversy exists or arrange a meeting of the interested parties at a convenient place, and shall make careful inquiry into the cause of the dispute or controversy, and the board may, with the consent of the Governor, conduct the inquiry beyond the limits of the State.

The board shall hear all interested persons who come before it, advise the respective parties what ought to be done by either or both to adjust the controversy, and shall make a confidential written report to the Governor and the Executive Director of the Maine Labor Relations Board. The Governor or executive director ~~may~~ shall make the report public if, after 15 days from the date of its receipt, the parties have not resolved the controversy and the public interest would be served by publication. In addition, either the Governor or the executive director may refer the report and recommendations of the board to the Attorney General or other department for appropriate action when it appears that any of the laws of this State may have been violated.

Sec. 4. 29-A MRSA §152, sub-§3 is amended to read:

3. Central computer system. Notwithstanding any other provisions of law, purchase and maintain a central computer system for purposes of administering this Title and conducting departmental operations. All other uses must be approved by the Secretary of State. The Secretary of State ~~shall adopt rules regarding the maintenance and use of data processing information files required to be kept confidential and shall distinguish those files from files available to the public;~~

Sec. 5. 29-A MRSA §257 is repealed.

Sec. 6. 29-A MRSA §517, sub-§4 is amended to read:

4. Unmarked law enforcement vehicles. An unmarked motor vehicle used primarily for law enforcement purposes, when authorized by the Secretary of State and upon approval from the appropriate requesting authority, is exempt from displaying a special registration plate. Records for all unmarked vehicle registrations are confidential.

~~Upon receipt of a written request by an appropriate criminal justice official showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.~~

Sec. 7. 35-A MRSA §8703, sub-§5 is amended to read:

5. Confidentiality. ~~Relay service communications must be~~ The providers of

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Draft: Statutory changes to public records exceptions

telecommunications relay services must keep relay service communications confidential.

Sec. 8. 38 MRSA §414, sub-§6 is amended to read:

6. Confidentiality of records. Any records, reports or information obtained under this subchapter is available to the public, except that upon a showing satisfactory to the department by any person that any records, reports or information, or particular part of any record, report or information, other than the names and addresses of applicants, license applications, licenses and effluent data, to which the department has access under this subchapter would, if made public, divulge methods or processes that are entitled to protection as trade secrets as defined in Title 10, section 1542, subsection 4, these records, reports or information must be confidential and not available for public inspection or examination. Any records, reports or information may be disclosed to employees or authorized representatives of the State or the United States concerned with carrying out this subchapter or any applicable federal law, and to any party to a hearing held under this section on terms the commissioner may prescribe in order to protect these confidential records, reports and information, as long as this disclosure is material and relevant to any issue under consideration by the department.

Sec. 9. 38 MRSA §585-B, sub-§6 is amended to read:

6. Mercury reduction plans. An air emission source emitting mercury in excess of 10 pounds per year after January 1, 2007 must develop a mercury reduction plan. Except as provided in subsection 7, the mercury reduction plan must be submitted to the department no later than September 1, 2008. The mercury reduction plan must contain:

A. Identification, characterization and accounting of the mercury used or released at the emission source; and

B. Identification, analysis and evaluation of any appropriate technologies, procedures, processes, equipment or production changes that may be utilized by the emission source to reduce the amount of mercury used or released by that emission source, including a financial analysis of the costs and benefits of reducing the amount of mercury used or released.

~~The department may keep information submitted to the department under this subsection confidential as provided under section 1310-B.~~

The department shall submit a report to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than March 1, 2009 summarizing the mercury emissions and mercury reduction potential from those emission sources subject to this subsection. In addition, the department shall include an evaluation of the appropriateness of the 25-pound mercury standard established in subsection 5. The

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Draft: Statutory changes to public records exceptions

evaluation must address, but is not limited to, the technological feasibility, cost and schedule of achieving the standards established in subsection 5. The department shall submit an updated report to the committee by March 1, 2013. The joint standing committee of the Legislature having jurisdiction over natural resources matters is authorized to report out to the 126th Legislature a bill relating to the evaluation and the updated report.

Sec. 10. 38 MRS §585-C, sub-§2, ¶D is repealed.

Sec. 11. 38 MRS §1310-B, sub-§2 is amended to read:

2. Hazardous waste information and information on mercury-added products and electronic devices and mercury reduction plans; chemicals. Information relating to hazardous waste submitted to the department under this subchapter, information relating to mercury-added products submitted to the department under chapter 16-B, information relating to electronic devices submitted to the department under section 1610, subsection 6-A, ~~information relating to mercury reduction plans submitted to the department under section 585-B, subsection 6,~~ information related to priority toxic chemicals submitted to the department under chapter 27 or information related to products that contain the "deca" mixture of polybrominated diphenyl ethers submitted to the department under section 1609 may be designated by the person submitting it as being only for the confidential use of the department, its agents and employees, the Department of Agriculture, Conservation and Forestry and the Department of Health and Human Services and their agents and employees, other agencies of State Government, as authorized by the Governor, employees of the United States Environmental Protection Agency and the Attorney General and, for waste information, employees of the municipality in which the waste is located. The designation must be clearly indicated on each page or other portion of information. The commissioner shall establish procedures to ensure that information so designated is segregated from public records of the department. The department's public records must include the indication that information so designated has been submitted to the department, giving the name of the person submitting the information and the general nature of the information. Upon a request for information, the scope of which includes information so designated, the commissioner shall notify the submitter. Within 15 days after receipt of the notice, the submitter shall demonstrate to the satisfaction of the department that the designated information should not be disclosed because the information is a trade secret or production, commercial or financial information, the disclosure of which would impair the competitive position of the submitter and would make available information not otherwise publicly available. Unless such a demonstration is made, the information must be disclosed and becomes a public record. The department may grant or deny disclosure for the whole or any part of the designated information requested and within 15 days shall give written notice of the decision to the submitter and the person requesting the designated information. A person aggrieved by a

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decision of the department may appeal only to the Superior Court in accordance with the provisions of section 346. All information provided by the department to the municipality under this subsection is confidential and not a public record under Title 1, chapter 13. In the event a request for such information is submitted to the municipality, the municipality shall submit that request to the commissioner to be processed by the department as provided in this subsection.

SUMMARY

This proposed legislation implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Title 22 and Titles 26 to 39-A. The legislation does the following.

Section 1 repeals the Community Right to Know Act, a program within the Department of Health and Human Services intended to provide disclosure of information about hazardous substances in the community that has never been implemented.

Section 2 makes clear that reports of final bureau action are public records, removing the language in current law that gives the director of the Bureau of Labor Standards the discretion to release reports.

Section 3 relates to reports of the State Board of Arbitration and Conciliation in a labor dispute. The amendment makes clear that the report must be released 15 days after its receipt by the Governor and Executive Director of the Maine Labor Relations Board if the conciliation process is not successful.

Section 4 repeals language authorizing the Secretary of State to adopt rules relating to maintenance and use of data processing files concerning motor vehicles as the confidentiality of personal information is already protected under federal law.

Section 5 repeals a provision relating to the Secretary of State's motor vehicle information technology system because the confidentiality of the system is already addressed in another provision of law.

Section 6 removes language that is redundant with another section of law.

Section 7 clarifies that it is the responsibility of the providers of telecommunications relay services to keep relay services communications confidential.

Section 8 adds a cross-reference to the definition of "trade secret".

Section 9 repeals language making mercury reduction plans for air emission source emitting mercury confidential.

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Section 10 repeals language making hazardous air pollutant emissions inventory reports confidential.

Section 11 removes language cross-referencing language repealed by Section 9 of this bill relating to the confidentiality of mercury reduction plans for air emission sources emitting mercury.

DRAFT

Right to Know Advisory Committee
Draft: FOAA deadlines and appeals (PL 2013, c. 350)

Sec. 1. 1 MRSA §408-A is amended to read:

§408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

1. Inspect. A person may inspect any public record during reasonable office hours. ~~An~~ A body, agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the body, agency or official may charge a fee as provided in subsection 8.

2. Copy. A person may copy a public record in the office of the body, agency or official having custody of the public record during reasonable office hours or may request that the body, agency or official having custody of the record provide a copy. The body, agency or official may charge a fee for copies as provided in subsection 8.

A. A request need not be made in person or in writing.

B. The body, agency or official shall mail the copy upon request.

3. Acknowledgment; clarification; time estimate; cost estimate. The body, agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request, ~~and~~ The body, agency or official may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the body, agency or official shall provide a good faith, nonbinding estimate of the time within which the body, agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The body, agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this section, the date a request is received is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record.

4. Refusals; denials. If a ~~body,~~ ~~or an~~ agency or official having custody or control of any public record refuses permission to inspect or copy ~~or abstract~~ a public record, the ~~body,~~ ~~or~~ agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. Failure to ~~comply with~~ provide the notice required by this subsection within 10 working days of the receipt of the request is considered ~~failure a~~ denial to allow inspection or copying and is subject to appeal as provided in section 409.

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time

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Draft: FOAA deadlines and appeals (PL 2013, c. 350)

that will not delay or inconvenience the regular activities of the body, agency or official having custody or control of the public record requested. If the body, agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the body's, agency's or official's records must be posted in a conspicuous public place and at the office of the body, agency or official, if an office exists.

6. No requirement to create new record. An A body, agency or official is not required to create a record that does not exist.

7. Electronically stored public records. An A body, agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the body, agency or official is not required to provide access to an electronically stored public record as a computer file if the body, agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the body, agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the body, agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an a body, agency or official to provide a requester with access to a computer terminal.

8. Payment of costs. Except as otherwise specifically provided by law or court order, an a body, agency or official having custody of a public record may charge fees for public records as follows.

A. The body, agency or official may charge a reasonable fee to cover the cost of copying.

B. The body, agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than \$15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. The body, agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.

D. ~~An~~ The body, agency or official may not charge for inspection unless the

Right to Know Advisory Committee

Draft: FOAA deadlines and appeals (PL 2013, c. 350)

public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.

E. The body, agency or official may charge for the actual mailing costs to mail a copy of a record.

9. Estimate. The body, agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than \$30, the body, agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

10. Payment in advance. The body, agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the public record if:

A. The estimated total cost exceeds \$100; or

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

11. Waivers. The body, agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or

B. The body, agency or official considers release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

Sec. 2. 1 MRSA §409, sub-§1 is amended to read:

§409. Appeals

1. Records. Any person aggrieved by a ~~refusal or denial~~ to inspect or copy a record ~~or the failure to allow the inspection or copying of a record~~ under section 408-A may appeal the ~~refusal, denial or failure~~ within 30 calendar days of the receipt of the written notice of ~~refusal, denial or failure~~ or 40 days from the date of the request if no written notice is provided under section 408-A, subsection 4 to any the Superior Court within the State as a trial de novo for the county in which the person resides or in which

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the body or agency maintains an office to which the person made the request. The body, agency or official shall file an answer a statement of position within 14 calendar days of service of the appeal. If a court, after a trial de novo review and taking testimony and other evidence it determines necessary, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the ~~refusal~~ denial under subsection 1 or the illegal action under subsection 2 if the court determines that the ~~refusal~~ denial or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

SUMMARY

This bill amends the Freedom of Access Act to clarify that the date of receipt of a request to copy or inspect a public record is the date a sufficient description of the public record is received by the body, agency or official at the office responsible for maintaining the public record.

Current law requires a body, agency or official to provide, within 5 days of the receipt of a request to inspect or copy a public record, a written notice that the request is denied. This bill clarifies that refusing to allow inspection or copying is considered a denial, as is the failure, within 10 days of the receipt of a request, to provide a written notice that the request is denied.

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Draft: FOAA deadlines and appeals (PL 2013, c. 350)

This bill amends the Freedom of Access Act with regard to appeals of denials of requests to inspect or copy public records. Under current law, a person whose request has been denied may appeal the denial to any Superior Court within 30 calendar days of receipt of the written notice of denial. If no written notice of denial is provided, the requestor may file an appeal within 40 calendar days of the request. The bill provides that the appeal must be filed in the Superior Court for the county where the requestor resides or where the body or agency maintains an office to which the request was made. Current law requires the agency or official to file an answer within 14 calendar days. This bill requires the body, agency or official to file a statement of position within 14 calendar days of service of the appeal. This bill provides that the court does not have to convene a trial, but must conduct a de novo review and take testimony and other evidence it determines necessary, and if it determines that the denial was not for just and proper cause, the court shall enter an order for disclosure.

This bill revises the language in sections 408-A and 409 to clarify that the provisions apply to public bodies as well as agencies and officials.

Right to Know Advisory Committee

Draft: Deadlines and appeals (proposed by Attorney General's Office)

Sec. 1. 1 MRSA §408-A, sub-§4 is amended to read:

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial or the expectation that the request will be denied in full or in part following a review, within 5 working days of the receipt of the request for inspection or copying. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

Sec. 2. 1 MRSA §409, sub-§1 is amended to read:

1. Records. Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to ~~any~~ the Superior Court within the State for the county where the person resides or the agency has its principal office ~~a trial de novo~~. The agency or official shall file ~~an answer~~ a statement of position explaining the basis for denial within 14 calendar days of service of the appeal. If a court, after a ~~trial~~ trial de novo review, with taking of testimony and other evidence as determined necessary, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

Sec. 3. 1 MRSA §413, sub-§1 is amended to read:

1. Designation; responsibility. Each agency, county, municipality, school administrative unit and regional or other political subdivision shall designate an existing employee as its public access officer to serve as the contact person for that agency, county, municipality, school administrative unit and regional or other political subdivision with regard to requests for public records under this subchapter. The public access officer is responsible for ensuring that each public record request is acknowledged within a reasonable period of time 5 working days of receiving the request and that a good faith estimate of when the response to the request will be complete is provided according to section 408-A. The public access officer shall serve as a resource within the agency, county, municipality, school administrative unit and regional or other political subdivision concerning freedom of access questions and compliance.

SUMMARY

This draft amends the Freedom of Access Act to make clear that an agency's or official's written notice of denial in response to a request to copy or inspect records may be a statement that the agency or official expects to deny the request in full or in part, but that decision can be made only after reviewing the records subject to the request. The

Right to Know Advisory Committee

Draft: Deadlines and appeals (proposed by Attorney General's Office)

agency or official shall provide the written response within 5 days of the receipt of the request.

This draft clarifies the procedures for an appeal from a denial of a request to inspect or copy public records. Current law allows the appeal to be filed in any Superior Court; this draft requires the appeal to be filed in the Superior Court for the county in which either the request lives or in which the agency or official has its principal office. Instead of filing an answer to the complaint, the agency or official may file a more informal statement of position explaining the basis for denial with 14 days of the service of the appeal. This draft eliminates the need for a de novo trial, and instead requires the Superior Court to conduct a review de novo, taking whatever testimony or other evidence the Court determines is necessary. The basis for the decision – whether the refusal, denial or failure was not for just and proper cause – is not changed from current law.

This draft amends the laws governing public access officers by specifically requiring that a request for public records be acknowledged within 5 working days of the receipt of the request. This is consistent with the current acknowledgement deadline in the Maine Revised Statutes, Title 1, section 408-A, subsection 3.

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Draft



SEN. CHRISTOPHER K. JOHNSON, SENATE CHAIR
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MAINE STATE LEGISLATURE
GOVERNMENT OVERSIGHT COMMITTEE

July 31, 2014

Honorable Janet Mills
Attorney General
6 State House Station
Augusta, Maine 04333-0006

Honorable Matthew Dunlap
Secretary of State
148 State House Station
Augusta, Maine 04333-0148

Dear Attorney General Mills and Secretary of State Dunlap:

In the months since the Office of Program Evaluation and Government Accountability released its December 2013 report on Healthy Maine Partnerships' FY13 Contracts and Funding, our committee has been considering potential actions on associated issues with records retention policies and practices at the Maine Center for Disease Control and Prevention, as well as Statewide. Chief Deputy Attorney General Linda Pistner, FOAA Ombudsman Brenda KIELTY, Senior Attorney General Phyllis Gardiner and State Archivist David Cheever have provided information and perspective that have helped us to understand where weaknesses exist in the State's records retention and management framework and helped brainstorm possible ideas for improvements. We greatly appreciate their interest and assistance in these matters.

As a result of these discussions, the Government Oversight Committee would like to accept the offer extended by your offices for the FOAA Ombudsman and Director of the State Archives Records Management to convene a working group to develop and/or make specific recommendations to the GOC regarding improvements to the State's Records Retention framework. Specifically, the GOC requests that:

- A. A working group be convened by the FOAA Ombudsman and the Director of Maine State Archives Records Management and include, at a minimum, representatives of the Attorney General's Office, the Office of Information Technology, the Bureau of Human Resources and the Department of Audit.

82 State House Station, Room 107 Cross Building
Augusta, Maine 04333-0082
TELEPHONE 207-287-1901 FAX: 207-287-1906

- B. The working group make specific recommendations concerning the following:
 - a. improved guidance for agencies on record retention, including specifically the issue of draft documents and the appropriate criteria for determining the extent to which drafts should be retained;
 - b. model policies on record retention;
 - c. training requirements, including additional requirements for supervisors, and a system of accountability to assure that all state employees receive appropriate training on record retention policies, schedules and procedures; and
 - d. establishing, or promoting/enhancing existing, avenues for employees to get consistent and accurate answers to records retention questions.

- C. The working group also make suggestions on how best to implement the following ideas with the goal of ensuring expectations regarding records retention are clear and well understood by all employees and that all employees are accountable for complying with those expectations:
 - 1. All executive branch agencies shall review and update their record retention policies, procedures and schedules consistent with the improved guidance and model policies; train incoming and existing employees and supervisors on those updated record retention policies and procedures (in addition to, or in conjunction with FOAA training); and require staff to review and acknowledge receipt of the State of Maine Policy on Preservation of State Government Records on an annual basis.
 - 2. Consistent with collective bargaining agreements, civil service law and rule and other applicable law, compliance with record retention policies, procedures and schedules should be included as part of each employee's performance expectations. Employees who fail to fulfil their obligations under applicable record retention policies, procedures and schedules will be subject to disciplinary action, up to and including discharge.
 - 3. The FOAA Ombudsman's ongoing training of state agency personnel continue to address the importance of record retention, as well as the obligation of each agency to update their record retention schedules, policies and procedures, and to assure that all agency staff receive training on those policies and procedures.

- D. The working group make recommendations on guidelines that should be used by agencies in determining costs for responding to a FOAA such that costs are reasonable, consistent across State government and do not present an unnecessary barrier to FOAA requests.

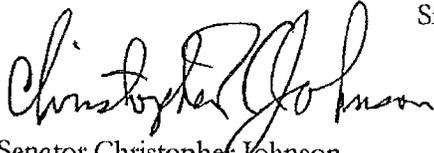
- E. In developing its recommendations and suggestions, that the working group seek input from the Right to Know Advisory Committee, other State agencies and/or stakeholders as appropriate.

- F. The working group report back to the GOC by February 1, 2015, on the results of its work and include recommendations for any additional steps, including those that may require legislative action.

We understand that your offices have very limited staff resources to support this effort and, consequently, there may not be time or resources to involve or seek feedback from a broad stakeholder group, even if the working group feels that would be appropriate. If it seems that the working group's recommendations should be vetted with stakeholders more than you have opportunity to do before February 1st, the GOC can do so through its public consideration of those recommendations.

Please confirm with OPEGA Director Beth Ashcroft that your offices intend to honor this request. Director Ashcroft can also answer any questions you may have.

Sincerely,



Senator Christopher Johnson
Senate Chair



Representative Chuck Kruger
House Chair

Cc: Members of the Government Oversight Committee

Records Management

Basic Principles for All State Employees

Why Does the Records Management Program Exist?

The program was established under Title 5, Chp. 6, §95 and states:

7. The head of each state agency or local government agency shall establish and maintain an active, continuing program for the economical and efficient management of any records in compliance with the standards, procedures and regulations issued by the State Archivist.

8. Transfer of state records. To provide for the transfer to the archives of state records, disposed of under subsection 7, paragraph C, that have archival value;

9. Destruction of state records. To authorize and receive confirmation of the destruction of the state records of any state or local agency that, in the opinion of the head of the agency, are no longer of value to the state or local government agency, and that, in the opinion of the State Archivist and the Archives Advisory Board, have no archival value to the State.

What is Records Management?

Records management is the continuous and efficient program by which we identify and classify records, establish schedules and manage records throughout their lifecycle. In other words, what to keep, how long you keep it and whether or not it is destroyed or kept as Archival.

What are Your Responsibilities?

According to the Rules of Chapter 1 (Under APA Rule 29/255) it is the responsibility of the head of each agency to maintain an efficient and continuous records management program. It is also the responsibility of the head of each agency to appoint a Records Officer.

The appointed Records Officer will appoint Assistants as needed. The Records Officer will have a thorough knowledge of the agency, its records and functions. The Records Officer will create and maintain appropriate records schedules.

All state employees are responsible for creating records needed to do the business of their agency, and documenting activities for which they are responsible. As a government employee, you are responsible for managing any and all public records (including email) for which you are the custodian.

All state employees are responsible for maintaining records so that information can be found when needed. This means setting up good directories and files, and properly filing records in a manner that allows them to be stored and efficiently retrieved when necessary.

All employees are responsible for carrying out the disposition of records under their control in accordance with agency records schedules. All employees should be made aware of records schedules and which records they are responsible for keeping (custodian of the record).

Why Is Records Management Important?

Agencies produce records every day. They are the vital component to the functionality of the agency for administrative, fiscal, legal and historical purposes. Not knowing what to keep is not the answer to Records Management and neither is keeping everything. There are implications for both.

An effective records management program offers several benefits:

Promotes a positive reputation for State Agencies

In the height of public access, government agencies need to remain accountable for the records they create and maintain. Public records document agency business and with proper management agencies can show they are taking the correct action for the appropriate amount of time and for the right reasons. When an agency demonstrates proper public records organization, a management program where records are controlled, and destroyed in accordance to law, the state's reputation is improved as is the public's confidence in state government.

Helps the Agency Fulfill its Mission

It will help identify and protect the essential records of your agency; those records needed to keep the agency functional. Locating what you need, when you need it is a vital component to running an agency effectively.

Promotes Cost Effective Business Practice

A proper records management program will reduce the volume of records stored; improve storage and retrieval systems and help to get the right record to the right person effectively and efficiently. Records on current schedules will be destroyed when they should be, making the best use of physical and digital space (both which state agencies can pay for). An efficient records program will limit the risk and cost associated with FOIA requests and any possible litigation. Any penalties for the inability to produce requests could be avoided by having an organized program where employees can locate records.

What is a Record?

"Record" means all documentary material (books, papers, photographs, maps or other documentation, including digital records such as e-mail messages and attachments), made or received and maintained by an agency in accordance with law or rule or in the transaction of its official business; because they serve as evidence of the agency's functions, policies, decision, procedures, operations and other activities; or because of their informational value. Records can have varying purposes per agency. What are vital records to one agency, another agency may not even have or produce; different laws and statutes can mandate record retention periods for the different types of agencies. Therefore, it is very difficult to impose a "global" records program and give a tidy two column list of what to keep and what not to keep.

Examples of records:

- Board and Commission Minutes of Meetings
- Contracts
- Commissioner’s Correspondence
- Project files
- Client Case Files
- Personnel files

Non-record examples:

- Duplicate copies of documents maintained in the same file
- Informational copies on which no administrative action is recorded or taken
- Documents received that provide information but are not connected to the transaction of agency business
- Extra copies of printed or processed materials for which complete record sets exist

How Do Agencies Manage Their Records?

Records are managed by creating agency schedules. Schedules provide the guidance necessary to prevent unneeded records from cluttering agency offices help preserve mid to long-term records until they have served their purpose. The purpose of the Records Management Division is to apply retention periods to ALL state government records and update them as changes occur.

Four Key Items Every Employee Needs to Know

- Records must be managed throughout their life cycle, according to their retention schedules
- All agency records should be on up-to-date retention schedules
- All agencies should have an active Records Officer
- There are General Schedules and Agency Specific Schedules
 - ✓ General Records Schedules (for records common to most agencies):
www.maine.gov/sos/arc/records/state/gensched2.html
 - ✓ State Agency Schedules (pertaining to specific agencies):
www.maine.gov/sos/arc/records/state/stsched.html

The Records Everyone Has - General Schedules

General Record Schedules are issued by the Maine State Archives to provide retention and disposition standards for records common to several or all State agencies. They are located on our website. Before an agency schedule is created, be sure a General Schedule does not already exist.

Determining Retention Periods

In order to dispose of records at the appropriate time, it is necessary to evaluate them in relation to their period of usefulness to the department.

Total Retention Period - Time kept in your agency **PLUS** Time kept in the Records Center **EQUALS Total Retention Period**

Some specific questions in determining how long records are retained:

- **Administrative use:** *What is the value of the records in carrying out the functions of your department? How long will you need to be able to retrieve them immediately?* Day to day business operation; correspondence, memos, reports – typically need for these records is short lived
- **Legal requirements:** *Are there any State Statutes or Federal regulations involved?* Records mandated by law or regulation; may be needed as evidence in legal cases or leases, titles, contracts, court case files
- **Fiscal requirements:** *How much time must you allow for the completion of fiscal activities such as audit or budget?* (Typically 7 years) Document an agency's fiscal responsibilities; invoices, receipts, purchase orders
- **Historical/Archival:** *Do these records document important events, or the history and development of your department?* Document history of the agency; board minutes, agency policy decisions, Commissioner's correspondence

Disposition Archives or Destroy?

Five hundred years from now, may someone want or need to look at these records? Will they be needed that far in the future for any legal or historical reasons?

- *Non-archival (non-permanent) retention* is based completely on the record's time-value to the business functions of the agency, including audit or other statutory requirements, and reasonable access by interested parties.
- *Archival (Permanent) retention* is based on the record's value after it no longer serves the agency's business.

The Structure of the Archives

The State Records Center, located in Hallowell is for those records which have a disposition destroy. The State Archives is for permanent records with historical/archival value. All records in Records Center status, including pre-archival records, remain under legal control of the agency that created them. Records in the Records Center are released only to cardholders of the creating agency. Any records sent to the Records Center must first be on an approved records retention schedule before they will be accepted for transfer.



AG Opinion
Decision over
telephone

1 of 100 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF MAINE

[NO NUMBER IN ORIGINAL]

1979 Me. AG LEXIS 133

June 15, 1979

REQUESTBY:

[*1]
Honorable Frank P. Wood
House of Representatives
State House
Augusta, Maine 04333

OPINIONBY:

STEPHEN L. DIAMOND, Deputy Attorney General

OPINION:

In your letter of May 24, 1979 and in a subsequent conversation, you have raised two questions concerning the provisions of *1 M.R.S.A. § 401*, et seq (1979)(Maine's Freedom of Access Law) in connection with meetings held by boards of county commissioners. In particular, you have inquired whether a decision to expend public funds, made over the telephone and not at a public meeting but later approved (by means of an article in the warrant) by the commissioners at their next regularly scheduled meeting, complies with the Freedom of Access Law. n1 You have stated your inquiries as follows:

"(1) Does an after the fact instrument such as a warrant fulfill the requirements of Maine's [Freedom of Access] Law?

(2) Is voting over the phone allowed under the [Freedom of Access] Law and if it is under what circumstances can this practice occur?" n2

n1 For the purposes of this opinion, I assume that these facts, as stated in your letter of May 24, 1979, are true.

[*2]

n2 In your letter you refer to Maine's "Right to Know Law," which is more appropriately referred to as the "Freedom of Access Law."

As recently articulated by the Maine Supreme Judicial Court, the Legislature's purpose in enacting the Freedom of Access Law was to assure "that to a maximum extent the public's business must be done in public." *Moffett v. City of*

Portland, Me. 400 A.2d 340, 347-48 (1979). See also 1 M.R.S.A. § 401 (1979). n3 In furtherance of this declared purpose, the Legislature has statutorily mandated that, except as otherwise specifically provided,

"all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection."

n3 1 M.R.S.A. § 401 (1979) provides in relevant part:

"The Legislature finds and declares that 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."

[*3]

1 M.R.S.A. § 403(1979). The term "public proceedings" includes meetings of a board of county commissioners. n4 See 1 M.R.S.A. § 402(2) (c)(1979). n5

n4 The commissioners for each county are statutorily required to conduct meetings at certain times each year. See 30 M.R.S.A. § 151 (1978).

n5 1 M.R.S.A. § 402(2)(c)(1979) provides in pertinent part:

"The term 'public proceedings' as used in this subchapter shall mean the transactions of any functions affecting any or all citizens of the State by any of the following:

* * *

C. Any board, commission, agency or authority of any county, municipality, school district or any other political or administrative subdivision." (emphasis supplied).

While the Freedom of Access Law mandates that public proceedings be open to the public, this legislative policy of openness in government business [*4] would be seriously compromised if the public remained ignorant of the time and place of such proceedings. Accordingly, 1 M.R.S.A. § 406 (1979) provides that

"public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons and the body or agency will deal with the expenditure of public funds or taxation, or will adopt policy at the meeting. This notice shall be given in ample time to allow public attendance." n6

n6 The board of commissioners for each county consists of a chairman and two other commissioners. See 30 M.R.S.A. § 101 (1978).

Finally, although *1 M.R.S.A. § 405(1979)* permits governmental bodies or agencies falling within the scope of the Freedom of Access Law to conduct executive sessions under certain circumstances, "no ordinances, orders, rules, resolutions, regulations, contracts, [*5] appointments or other official actions shall be finally approved at executive sessions." *1 M.R.S.A. § 405(2) (1979)*.

We now turn to a consideration of your specific inquiry, which is, whether a decision made over the telephone by a board of county commissioners, concerning the expenditure of public funds, complies with Maine's Freedom of Access Law. After a review of the relevant opinions from both the Maine Law Court and this office, it is our conclusion that such a telephone vote does not comply with the provisions of *1 M.R.S.A. § 401 et seq. (1979)*.

A decision made by the members of a board of county commissioners concerning the expenditure of public funds is a "public proceeding" within the meaning of *1 M.R.S.A. § 402(2) (1979)* since it involves the transaction of a government function affecting citizens of this State. See note 5, *supra*. Consequently, that decision, being a "public proceeding," is subject to the provisions of the Freedom of Access Law, including the requirement that it be open to the public and that it be preceded by public notice sufficient to allow public attendance. See *1 M.R.S.A. § 402 [*6] , 406 (1979)*.

The practice, by public officials, of voting on the expenditure of public funds over the phone does not comply with the Freedom of Access Law. By the very nature of the practice, the public is not afforded the opportunity to observe and participate in the actions and deliberations of those who conduct public business. *1 M.R.S.A. § 401(1979)*. See also *Op. Atty.Gen., July 3, 1974*. The practice of conducting "public proceedings" over the telephone is inimical to the fundamental purpose embodied in the Freedom of Access Law that, except in those instances where executive sessions are authorized,⁷ all "public proceedings" are to be conducted openly and subject to the public's eye. See *1 M.R.S.A. § 403 (1979)*. See also *Op. Atty.Gen., May 17, 1977; Op. Atty. Gen., April 6, 1977; Op. Atty.Gen., March 25, 1977*.

n7 It should be observed that there are very stringent restrictions on the authority of a body or agency to convene in executive session. See *1 M.R.S.A. § 405(1979)*. Among other limitations, an executive session "may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies." *1 M.R.S.A. § 405(3)(1979)*.

[*7]

The Legislature recognized that circumstances may arise which necessitate the convening of emergency meetings by bodies and agencies subject to the Freedom of Access Law, and provided:

"In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding."

1 M.R.S.A. S 406(1979).

In such situations the Freedom of Access Law permits a relaxation of the notice requirements which must precede all public proceedings. However, the requirement that the meeting be public is not eliminated by its emergency nature. Thus, the practice of conducting a "public proceeding" by telephone cannot be justified, under the Freedom of Access Law, on the ground that an emergency exists. Cf. *Op. Atty.Gen. July 3, 1974* (telephone poll of commission members held to violate statute governing Lottery Commission).

The subsequent approval by a board of county commissioners at their next regularly scheduled meeting n8 of a prior decision made during the course of a private telephone conversation, [*8] does not alter the fact that the initial telephone decision did not comply with the "open meeting" and "notice" requirements of the Freedom of Access Law. The underlying purpose of the Freedom of Access Law is to permit and encourage the citizens of this State to attend those meetings at which the public's business will be discussed and to provide an opportunity for them to present their views, on particular matters, to those officials charged with the responsibility of conducting the "people's business." To the maximum extent possible, the Freedom of Access Law contemplates that the public's business will not be discussed

or conducted without public notice and the opportunity to be heard. See *Moffett v. City of Portland, supra*. As stated in the Legislature's declaration of policy appearing in 1 M.R.S.A. § 401(1979)

"it is... the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter."

n8 For the purposes of this opinion, I assume that the regularly scheduled commissioner's meeting referred to above, was conducted in accordance with the Freedom of Access Law.

[*9]

This principle has been emphasized in numerous opinions from this office. See, e.g., Op.Atty.Gen., May 17, 1977; Op.Atty.Gen., April 6, 1977; Op.Atty.Gen., March 25, 1977; Op.Atty.Gen., November 23, 1976. Stated simply, the subsequent ratification or approval by a board of county commissioners, of a decision previously reached over the telephone, cannot make public a "telephone vote" which was, in fact, private. n9

n9 I wish to emphasize that I intimate no opinion as to the legal validity of the decision ultimately approved by the county commissioners at a meeting which, I assume, complied with the requirements of the Freedom of Access Law. See, e.g., 1 M.R.S.A. § 409(2)(1979).

I hope this information is helpful. Please feel free to call upon me if I can be of further assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsFinance

Right to Know Advisory Committee
 Summary of State Provisions Concerning Remote Participation By Members of Public Bodies

1. Remote participation by member of a public body

Statute silent	<p>Arkansas: AG opinion that public body may take a vote by telephone if public can hear or monitor the conversation</p> <p>Maine: AG interpretation that remote participation not permitted unless expressly authorized by statute</p> <p>Michigan: Case law and AG: legal to use telecommunications technology to allow participation in meetings in which members can't be physically present</p> <p>Pennsylvania: Case law: remote participation permitted unless prohibited by bylaws or policy (statute allows agency to adopt rules and regulations necessary to conduct its meetings and maintain order, as long as they do not violate intent of open meeting chapter)</p> <p>Washington: AG interpretation that one member can attend by telephone if speaker phone available at official location of meeting, but only if member unable to travel</p> <p>Wisconsin: AG opinion that a telephone conference call is very similar to an in-person conversation and thus qualifies as a convening of members</p>
Prohibited	<p>Louisiana: statute prohibits "proxy voting" which AG interprets as prohibiting participation by telephone to reach a quorum or to vote</p> <p>Ohio: statute requires a member of a public body to be present in person to be considered present, to determine a quorum and to vote</p>
General policy statement only	<p>Alabama: Electronic communications shall not be used to circumvent any provisions of this chapter</p> <p>Massachusetts: AG may by regulation or letter authorize remote participation by members not present if all are clearly audible to each other and chair and quorum are physically present at meeting location (AG has developed regulations that authorize remote participation)</p>
Included in definition or description of "meeting" and no other details in statute	<p>Arizona: meeting means the gathering, in person or through technological devices, of a quorum of a public body . . .</p> <p>Connecticut: meeting means any hearing or other proceeding . . . whether in person or by means of electronic equipment</p> <p>Kansas: meeting means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication</p> <p>Montana: meeting means the convening of a quorum . . . whether corporal or by means of electronic equipment</p> <p>New Jersey: meeting includes any gathering whether corporeal or by means of communication equipment</p> <p>New York: meeting means the official convening . . . including the use of videoconferencing for attendance and participation by the members</p> <p>South Carolina: meeting means the convening of a quorum . . . whether corporal or by means of electronic equipment</p> <p>West Virginia: meetings may be held by telephone conference or other electronic means</p>

Right to Know Advisory Committee
Summary of State Provisions Concerning Remote Participation By Members of Public Bodies

Statutes specifically allow and provide details for circumstances and procedures	Alaska California Colorado Delaware (statute prohibits use by a public body in which members are elected by the public to serve on the public body) Florida (but only for State bodies; members of local bodies must be physically present unless extraordinary circumstances) Georgia (only for bodies with statewide jurisdiction; others only if emergency conditions) Hawaii Idaho Illinois Indiana Iowa Kentucky Maryland Minnesota Missouri Mississippi Nebraska Nevada New Hampshire New Mexico North Carolina North Dakota Oklahoma Oregon Rhode Island (statute allows electronic communication for scheduling only, except that a member can use for a meeting while on active duty or if the member has a disability) South Dakota Tennessee Texas Utah Virginia (local governments prohibited except during Governor-declared emergency) Vermont Wyoming
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Right to Know Advisory Committee
 Summary of State Provisions Concerning Remote Participation By Members of Public Bodies

2. Medium: description of allowable media or characteristics

- Teleconferencing
- Technological devices
- Electronic equipment
- Telephone, electronically or other means of communication
- Video-conferencing
- Interactive conference technology
- Telecommunications devices which allow all members to communicate with each other
- Video or audio conference, telephone call, electronic chat, instant messaging or other means of contemporaneous interactive communication
- Electronic means
- Video teleconferences
- Telephone, internet or satellite enabled audio or video conferencing or any other technology that enables all persons to be clearly audible (MA AG rule)
- Telecommunication technology
- Interactive television
- Conference call, video conference, internet chat or internet message board
- Audible at location specified
- Audio or both audio and video
- All participants can communicate with each other at the same time
- Allows interaction among all members and the public
- Meeting must be terminated if audio communications can't be continued at all locations even if quorum is physically present
- All members can see and hear one another and all discussion and testimony presented at any location at which at least one member is present
- Each member is visible and audible to each other and the public
- Must be able to simultaneously hear each other and speak during the meeting
- Cannot be used if verbatim transcript is required for court proceeding

3. Quorum

Must be physically present	<p>Florida (local only: quorum must be physically present)</p> <p>Georgia</p> <p>Illinois (quorum must be physically except for body with statewide jurisdiction)</p> <p>Indiana (minimum number present must be the greater of 2 or 1/3 of the members) (statute provides that a local government member participating remotely may not be counted as present or take part in final action unless expressly authorized by statute; state member participating remotely counts as present and may vote unless policy prohibits)</p> <p>Massachusetts (AG rules)</p> <p>Missouri (but only if participation is by telephone, facsimile, internet or any other voice or electronic means)</p> <p>Tennessee (except can make a determination that necessity exists to conduct without a quorum physically present)¹</p> <p>Texas</p> <p>Utah</p> <p>Virginia</p>
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¹ Tennessee statute provides that member participating remotely is not eligible for per diem, but can be reimbursed for communication costs

Right to Know Advisory Committee
 Summary of State Provisions Concerning Remote Participation By Members of Public Bodies

Remote participant counted for quorum	<p>California (at least one member must be physically present)</p> <p>Delaware</p> <p>Hawaii</p> <p>Idaho (at least one member must be physically present)</p> <p>Iowa</p> <p>Maryland (joint physical access not a prerequisite)</p> <p>Minnesota (at least one member must be physically present)</p> <p>Nebraska (at least one member must be physically present at each location)</p> <p>New Hampshire (quorum not required in an emergency)</p> <p>Oklahoma</p> <p>Oregon (no member required to be present where public has access)²</p> <p>Vermont (at least one member or staff at each designated location)</p>
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4. Adopt policy	<p>Indiana (required)</p> <p>Utah (may prohibit by policy; must vote to allow participation electronically)</p>
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5. Executive/closed sessions

Permitted	<p>California</p> <p>Indiana (state permitted)</p> <p>Iowa</p> <p>Massachusetts (AG rules: remote member must state that no other person present or able to hear discussion unless body approves presence)</p> <p>Oregon</p> <p>South Dakota</p>
Prohibited	<p>Indiana (local prohibited)</p> <p>Kentucky</p> <p>Oklahoma</p>

6. Reasons may participate remotely	<p>Florida: If absence is due to extraordinary circumstances (AG interpretation)</p> <p>Georgia: Under circumstances necessitated by emergency conditions involving public safety or the preservation of property or public services Written opinion of a physician or other health professional that reasons of health prevent a member's presence (but no more than twice a year)</p> <p>Hawaii: Member with a disability that limits or impairs ability to physically attend (must identify where and who else is there)</p> <p>Iowa: Only in circumstances where impossible or impractical and minutes must include why</p>
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² Oregon statute provides that member participating remotely is not eligible for compensation for attendance

Right to Know Advisory Committee
Summary of State Provisions Concerning Remote Participation By Members of Public Bodies

Massachusetts: Chair must determine if the following makes physical attendance unreasonably difficult: (1) personal illness; (2) personal disability; (3) emergency; (4) military service; or (5) geographic distance (AG rules)
Michigan: Can't be physically present (Case law and AG interpretation)
New Mexico: Otherwise difficult or impossible to attend
Rhode Island: A member can use for a meeting while on active duty or if the member has a disability
Texas: Only if only location is difficult or impossible
Washington: Only if member is unable to travel to meeting location

7. Materials

Arkansas: agency materials that are to be considered at the meeting shall be made available at the teleconference locations if practicable
Hawaii: if visual aids not available at all locations where audio only, that topic cannot be acted upon
Kentucky: available at all video teleconference locations
Nebraska: at least one copy available at all locations
Oklahoma: any materials shared electronically between members before the videoconference shall also be immediately available to the public in the same form and manner as shared with members
Tennessee: member not physically present must be provided before the meeting with any documents that will be discussed, with substantially the same content
Virginia: materials must be available at all locations and to the public

8. Meeting restrictions and requirements

Georgia: a member may not attend remotely more than twice a year
Nebraska: no more than 1/2 of all the meetings in a calendar year are held by videoconference or telephone conference
Virginia: at least one meeting annually where members in attendance are physically assembled in one location and no electronic communication; report annually to Virginia Freedom of Information Advisory Council about electronic meetings

Right to Know Advisory Committee
Detailed State Statutes About Remote Participation

Indiana

IC 5-14-1.5

(g) A policy adopted by a governing body to govern participation in the governing body's meetings by electronic communication may do any of the following:

(1) Require a member to request authorization to participate in a meeting of the governing body by electronic communication within a certain number of days before the meeting to allow for arrangements to be made for the member's participation by electronic communication.

(2) Subject to subsection (e), limit the number of members who may participate in any one (1) meeting by electronic communication.

(3) Limit the total number of meetings that the governing body may conduct in a calendar year by electronic communication.

(4) Limit the number of meetings in a calendar year in which any one (1) member of the governing body may participate by electronic communication.

(5) Provide that a member who participates in a meeting by electronic communication may not cast the deciding vote on any official action.

(6) Require a member participating in a meeting by electronic communication to confirm in writing the votes cast by the member during the meeting within a certain number of days after the date of the meeting.

(7) Provide that in addition to the location where a meeting is conducted, the public may also attend some or all meetings of the governing body, excluding executive sessions, at a public place or public places at which a member is physically present and participates by electronic communication. If the governing body's policy includes this provision, a meeting notice must provide the following information:

(A) The identity of each member who will be physically present at a public place and participate in the meeting by electronic communication.

(B) The address and telephone number of each public place where a member will be physically present and participate by electronic communication.

(C) Unless the meeting is an executive session, a statement that a location described in clause (B) will be open and accessible to the public.

(8) Require at least a quorum of members to be physically present at the location where the meeting is conducted.

(9) Provide that a member participating by electronic communication may vote on official action only if, subject to subsection (e), a specified number of members:

(A) are physically present at the location where the meeting is conducted; and

(B) concur in the official action.

(10) Establish any other procedures, limitations, or conditions that govern participation in meetings of the governing body by electronic communication and are not in conflict with this chapter.

(h) The policy adopted by the governing body must be posted on the Internet web site of the governing body, the charter school, or the public agency.

Right to Know Advisory Committee
Detailed State Statutes About Remote Participation

New Hampshire

91-A:2

III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Right to Know Advisory Committee
Detailed State Statutes About Remote Participation

Utah

52-4-207. Electronic meetings -- Authorization -- Requirements.

(1) Except as otherwise provided for a charter school in Section 52-4-209, a public body may convene and conduct an electronic meeting in accordance with this section.

(2) (a) A public body may not hold an electronic meeting unless the public body has adopted a resolution, rule, or ordinance governing the use of electronic meetings.

(b) The resolution, rule, or ordinance may:

(i) prohibit or limit electronic meetings based on budget, public policy, or logistical considerations;

(ii) require a quorum of the public body to:

(A) be present at a single anchor location for the meeting; and

(B) vote to approve establishment of an electronic meeting in order to include other members of the public body through an electronic connection;

(iii) require a request for an electronic meeting to be made by a member of a public body up to three days prior to the meeting to allow for arrangements to be made for the electronic meeting;

(iv) restrict the number of separate connections for members of the public body that are allowed for an electronic meeting based on available equipment capability; or

(v) establish other procedures, limitations, or conditions governing electronic meetings not in conflict with this section.

(3) A public body that convenes or conducts an electronic meeting shall:

(a) give public notice of the meeting:

(i) in accordance with Section 52-4-202; and

(ii) post written notice at the anchor location;

(b) in addition to giving public notice required by Subsection (3)(a), provide:

(i) notice of the electronic meeting to the members of the public body at least 24 hours before the meeting so that they may participate in and be counted as present for all purposes, including the determination that a quorum is present; and

(ii) a description of how the members will be connected to the electronic meeting;

(c) establish one or more anchor locations for the public meeting, at least one of which is in the building and political subdivision where the public body would normally meet if they were not holding an electronic meeting;

(d) provide space and facilities at the anchor location so that interested persons and the public may attend and monitor the open portions of the meeting; and

(e) if comments from the public will be accepted during the electronic meeting, provide space and facilities at the anchor location so that interested persons and the public may attend, monitor, and participate in the open portions of the meeting.

(4) Compliance with the provisions of this section by a public body constitutes full and complete compliance by the public body with the corresponding provisions of Sections 52-4-201 and 52-4-202.

Public Proceedings: remote participation by members

Email responses from query to State FOA Contacts in 2013

AGENCY	REMOTE PARTICIPATION
State Treasurer	Do not have regularly scheduled meetings where off-site members participate
Maine Turnpike Authority	No remote participation; would be nice for a member with a conflict to call in
State Auditor	No public body
Office of Professional and Occupational Regulation, Department of Professional and Financial Regulation	OPOR and affiliated licensing boards do not permit board members to participate in board meetings via phone or other electronic connections. (Witnesses are permitted to testify at adjudicatory hearings via telephone.)
Maine State Board of Nursing	Board conducts public meetings, but participate in person only
Department of Corrections	No public meetings in the way other departments do, so probably does not apply
Department of Environmental Protection	Do not hold public meetings remotely, although do provide access to the public to listen to rulemakings over the website. Although they cannot participate remotely, they can listen.
Department of Marine Resources	In rare circumstances some of the boards and advisory councils do allow members to conference call into a meeting, normally only when a quorum may not be met and depends on topics to be discussed (meetings include discussing changes in regulation, consideration and approval for special licenses, legislative updates, etc.): <ol style="list-style-type: none"> 1. DMR Advisory Council 2. Lobster Advisory Council 3. Lobster Zone Councils 4. Sea Urchin Zone Council 5. Scallop Advisory Council 6. Commercial Fishing Safety Council 7. Shellfish Advisory Council
Maine Human Rights Commission	May conduct an emergency telephonic Commission meeting if notify local representatives of the media and make a reasonable effort to notify the parties affected by the meeting. See 2009 memo.

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
Public Utilities Commission	<p>Three commissioners who typically hold public deliberations once a week. Occasionally, one or two may be out of town and telephone into deliberations which would be broadcast throughout the Commission’s hearing room for those in the room and can be heard over the internet at the PUC’s website. The sound recording is also archived on the PUC website.</p> <p>No quorum or attendance requirements apply to hearings; all hearings are transcribed so absent commissioner can read the transcript.</p>
Maine Emergency Management Agency, Department of Defense, Veterans and Emergency Management	<ul style="list-style-type: none"> • State Emergency Response Commission: meets quarterly, occasionally has members participate remotely via teleconference and/or webinar-style internet connection • River Flow Advisory Commission: meets at least annually, occasionally also has similar remote participation
Maine Historic Preservation Commission	<p>Quarterly meetings – made one exception in last ten years: member participated by speaker phone (could not drive from York to Augusta for health reasons)</p>
Maine Drug Enforcement Agency, Department of Public Safety	<p>MDEA Advisory Board meetings using teleconferencing if one or more members participate from a location other than the actual location of the proceedings.</p>
University of Maine System	<p>UMS Board of Trustees Bylaws: A Trustee who cannot be in physical attendance may participate and vote by telephone, or other similar interactive technology where the Chair has determined on the record that the physical presence of the non-attending Trustee is prevented by an exceptional occasion which makes it inadvisable or impossible to attend the meeting. The presence of the non-attending Trustee in this manner shall be counted towards a quorum.</p> <p>Committees and subcommittees may meet by interactive technology.</p>
<p>Department of Agriculture, Conservation and Forestry</p> <ul style="list-style-type: none"> • Integrated Pest Council • Arborist Advisory Council • Board of Pesticide Control 	<p>Connect through use of telephone</p>

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
Workers' Compensation Board	<p>Specifically authorized in 39-A §151, sub-§5 <i>The board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.</i></p>
Finance Authority of Maine (FAME)	<p>Authorized; used only in rare and unique cases 10 §971. Actions of the members <i>Seven members of the authority constitute a quorum of the members. The affirmative vote of the greater of 5 members, present and voting, or a majority of those members present and voting is necessary for any action taken by the members. No vacancy in the membership of the authority may impair the right of the quorum to exercise all powers and perform all duties of the members.</i> <i>Notwithstanding any other provision of law, in a situation determined by the chief executive officer to be an emergency requiring action of the members on not more than 3 days' oral notice, an emergency meeting of the members may be conducted by telephone in accordance with the following.</i> 1. Placement of call. <i>A conference call to the members must be placed by ordinary commercial means at an appointed time.</i> 2. Record of call. <i>The authority shall arrange for recordation of the conference call when appropriate and prepare minutes of the emergency meeting.</i> 3. Notice of emergency meeting. <i>Public notice of the emergency meeting must be given in accordance with Title 1, section 406 and that public notice must include the time of the meeting and the location of a telephone with a speakerphone attachment that enables all persons participating in the telephone meeting to be heard and understood and that is available for members of the public to hear the business conducted at the telephone meeting.</i></p>
Maine Emergency Medical Services Board, Department of Public Safety	<p>Specifically authorized 32 §88, sub-§1, ¶D <i>The board may use video conferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.</i></p>

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
<p>Commission on Governmental Ethics and Election Practices</p>	<p>Authorized to hold telephonic meetings under certain circumstances: 21-A §1002, sub-§2 <i>2. Telephone meetings. The commission may hold meetings over the telephone if necessary, as long as the commission provides notice to all affected parties in accordance with the rules of the commission and the commission's office remains open for attendance by complainants, witnesses, the press and other members of the public. Notwithstanding Title 1, chapter 13, telephone meetings of the commission are permitted:</i> <i>A. During the 28 days prior to an election when the commission is required to meet within 2 business days of the filing of any complaint with the commission; or</i> <i>B. To address procedural or logistical issues before a monthly meeting, such as the scheduling of meetings, deadlines for parties' submission of written materials, setting of meeting agenda, requests to postpone or reschedule agenda items, issuing subpoenas for documents or witnesses and recusal of commission members.</i></p>

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Right to Know Advisory Committee
 Remote Participation: Comparison of 2013 RTK AC Majority recommendations with
 Judiciary Committee Majority Report

Recommendation of Majority of Right to Know Advisory Committee (2013)		LD 1809 Majority Report of Judiciary Committee
		Sec. 1. 1 MRSA §403-A is enacted to read:
§403-A. Public proceedings through communication technology		§403-A. Public proceedings using communications technology; governing bodies of quasi-municipal corporations and districts
This section governs public proceedings, including executive sessions, during which public or governmental business is transacted through telephonic, video, electronic or other means of communication.	<ul style="list-style-type: none"> • Application 	<p>1. Application. This section applies to public proceedings conducted by governing bodies, including boards of trustees, of quasi-municipal corporations or districts, defined in Title 30-A, section 2351, subsection 4, that provide water, sewer or sanitary services.</p>
<p>1. Requirements. A body subject to this subchapter may conduct a public proceeding during which one or more members of the body participate in the discussion or transaction of public or governmental business through telephonic, video, electronic or other means of communication only if the following requirements are met.</p>	<ul style="list-style-type: none"> • Can have member participating remotely only if all of the following are met 	<p>2. Authorized participation. A governing body may conduct a public proceeding during which one or more members of the governing body participate in the discussion or transaction of public or governmental business when not physically present only if all of the following requirements are met:</p>
<p>A. The body has adopted a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other means of communication in accordance with this section. The policy must establish criteria that must be met before a member may participate when not physically present. If the policy allows a member who is not physically present to participate in an executive session, the policy must specifically address the circumstances under which the executive session may be conducted to ensure privacy.</p>	<p>Policy:</p> <ul style="list-style-type: none"> • Type of technology that may be used • Criteria • Application to executive session 	<p>A. The governing body has adopted a written policy that authorizes a member of the governing body who is not physically present to participate in a public proceeding through combined audio and video means of communication in accordance with this section. The policy must establish criteria that must be met before a member may participate when not physically present. The policy may not allow a member who is not physically present to participate in an executive session;</p>
<p>B. Notice of the public proceeding has been given in accordance with section 406.</p>	<ul style="list-style-type: none"> • Notice 	<p>B. Notice of the public proceeding has been given in accordance with section 406;</p>

<p>Right to Know Advisory Committee Remote Participation: Comparison of 2013 RTK AC Majority recommendations with Judiciary Committee Majority Report</p>
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Recommendation of Majority of Right to Know Advisory Committee (2013)		LD 1809 Majority Report of Judiciary Committee
<p>C. Except as provided in subsection 3, a quorum of the body is assembled physically at the location identified in the notice required by section 406.</p>	<ul style="list-style-type: none"> • Quorum must be physically present 	<p>C. Except as provided in subsection 4, a quorum of the governing body is assembled physically at the location identified in the notice required by section 406;</p>
<p>D. Each member of the body participating in the public proceeding is able to hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations.</p>	<ul style="list-style-type: none"> • “hear” vs. “hear and see” each other • Public can “hear” vs. “hear and see” • Documents and visual materials – see while discussed or distributed 	<p>D. Each member of the governing body participating in the public proceeding is able to see and hear all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to see and hear all members participating from other locations. If documents or materials that include pictures, graphs, illustrations or other information presented in a visual format are part of the discussion, either the communications technology used must ensure that all members can see the documents and materials while the documents and materials are being discussed or the documents and materials must be provided to all members not physically present before or during the proceeding;</p>
<p>E. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication identifies the persons present in the location from which the member is participating.</p>	<ul style="list-style-type: none"> • Identify persons at remote location 	<p>E. Each member who is not physically present and who is participating through combined audio and video means of communication identifies the persons present at the location from which the member is participating;</p>
<p>F. All votes taken during the public proceeding are taken by roll call vote.</p>	<ul style="list-style-type: none"> • All votes by roll call 	<p>F. All votes taken during the public proceeding are taken by roll call vote; and</p>

Right to Know Advisory Committee
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Recommendation of Majority of Right to Know Advisory Committee (2013)		LD 1809 Majority Report of Judiciary Committee
<p>G. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.</p>	<ul style="list-style-type: none"> • Received materials 	<p>G. Each member who is not physically present and who is participating through combined audio and video means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.</p>
<p>2. Voting, quasi-judicial or judicial proceeding. A member of a body who is not physically present and who is participating in the public proceeding through telephonic, video, electronic or other means of communication may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.</p>	<ul style="list-style-type: none"> • Right to vote: if testimony provided, quasi-judicial proceeding • Participation • Definition of “quasi-judicial” 	<p>3. Voting; quasi-judicial proceeding. A member of a governing body who is not physically present and who is participating through combined audio and video means of communication may vote in all proceedings other than quasi-judicial proceedings. A member of a governing body who is not physically present may participate in a quasi-judicial public proceeding through combined audio and video means of communication, but may not vote on any issue concerning testimony or other evidence provided during the quasi-judicial public proceeding. For the purposes of this section “quasi-judicial proceeding” means a proceeding in which the governing body is obligated to objectively determine facts and draw conclusions from the facts so as to provide the basis of an official action when that action may affect the legal rights, duties or privileges of specific persons.</p>
<p>3. Exception to quorum requirement. A body may convene a</p>	<ul style="list-style-type: none"> • Exception to quorum: 	<p>4. Exception to quorum requirement. A governing body may</p>

<p>Right to Know Advisory Committee Remote Participation: Comparison of 2013 RTK AC Majority recommendations with Judiciary Committee Majority Report</p>
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Recommendation of Majority of Right to Know Advisory Committee (2013)		LD 1809 Majority Report of Judiciary Committee
public proceeding by telephonic, video, electronic or other means of communication without a quorum under subsection 1, paragraph C if:		convene a public proceeding by combined audio and video means of communication without a quorum under subsection 2, paragraph C if:
A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742, and:	<ul style="list-style-type: none"> • emergency 	A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742 and:
(1) The public proceeding is necessary to take action to address the emergency; and		(1) The public proceeding is necessary to take action to address the emergency; and
(2) The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency; or		(2) The governing body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency; or
B. The body is specifically authorized by its governing statute to convene a public proceeding by telephonic, video, electronic or other means of communication with less than a quorum assembled physically at the location identified in the notice required by section 406.	<ul style="list-style-type: none"> • Statutory authority to meet without quorum present 	B. The governing body is expressly authorized by its governing statute to convene a public proceeding by combined audio and video means of communication with less than a quorum of the body assembled physically at the location identified in the notice required by section 406.
4. Annual meeting. If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other means of communication from a different location.	<ul style="list-style-type: none"> • At least one meeting annually without remote participation 	5. Annual meeting. If a governing body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the governing body in attendance are physically assembled at one location and where no members of the governing body participate by combined audio and video means of communication from a different location.

PUBLIC COMMUNICATIONS POLICY

1. **APPLICABILITY.** This policy applies to employees of the Maine Department of [REDACTED] and is intended to guide their contact with the public and media in their roles as state employees and representatives of the department.
2. **PURPOSE.** As part of its commitment to transparency and to creating and maintaining public understanding and support for its objectives and programs, the Maine Department of [REDACTED] will provide the public and media with accurate and consistent information in an accessible, professionally-presented and timely manner. It also ensures the appropriate, coordinated use of Department-related materials, including its logo.
3. **OVERVIEW OF PUBLIC COMMUNICATIONS POLICY.** The Department has a fundamental responsibility to communicate consistently, clearly and effectively with all constituents. Working effectively with the public and media is critical to achieving this goal. The Office of Communications within the Commissioner's Office directs all Department communications and education efforts, including the development and dissemination of all official agency announcements including media releases, weekly highlights, educational columns and other documents/materials of interest to the public and regulated community; coordinates, prepares and promotes department staff public presentations and media conferences; responds to requests for public information; and manages all Department web content, including the Department website and social media presence. The Director of Communications serves as the agency spokesperson.
4. **PROCEDURES.**
 - 4.1 Providing Public Access to Departmental Information and Proceedings
 - 4.1.1 The Maine Department of [REDACTED] conforms to the letter and spirit of the Freedom of Access Act (FOAA). All files, except enforcement, personnel, and others required by law to be kept confidential, are available for inspection during business hours. Staff must follow the Department's Freedom of Access Act Guidelines in determining the appropriate response to requests for confidential information or consult the Department's FOAA Coordinator or Director of Enforcement for guidance.
 - 4.1.2 Media representatives and members of the public have rights to observe the conduct of state business. The FOAA governs those rights, both regarding "public records" and "public proceedings."
 - 4.1.3 All official state business conducted electronically must be sent through the state's email system, to allow for retention under state archival statutes. Official state business may not be conducted through any other electronic means, including but not limited to unofficial email, text messaging and instant messaging.
 - 4.2 Providing Information to the Public and Media In a Timely Manner
 - 4.2.1 The Maine Department of [REDACTED] is committed to providing the highest level of transparency and customer service. A critical element of that commitment is to the extent practicable, to respond to all requests from members of the public or media in a timely manner. Responding to media inquiries is a high priority, given their deadlines. To the extent possible and in accordance with Sections 4.3 and 4.4 of this Policy, requests from the media will receive a response immediately upon receipt, unless additional time is

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allowed by the requestor's articulated deadline. If staff cannot return the request, it should be forwarded directly to the Director of Communications.

4.3 Representing the Department on Departmental Policy or Position

The Commissioner and Director of Communications or their approved designee is responsible for articulating Department policy, positions and any public personnel information, including but not limited to budgetary matters, legislative and regulatory positions and staffing/structural decisions. Any media inquiries on these matters should be referred directly to the Director of Communications.

4.4 Responding to Press Inquiries Regarding Specific Projects, Technical Issues (non-policy) or Agency Processes

4.4.1 Upon the approval of the Director of Communications, staff has the authority to respond to a reporter's inquiries regarding specific projects or technical issues within their professional purview. The Director of Communications is always available to advise staff regarding effective communications and if requested, will respond on behalf of those uncomfortable performing this task. Inquiries regarding matters outside the request recipient's jurisdiction should be directly transferred to the appropriate agency contact if it known, or to the Director of Communications, who will either respond to the inquiry or forward it to the appropriate staff person for response.

4.4.2 Responding staff should provide objective facts and never engage in speculation or opinion. When answering questions, staff should take advantage of opportunities to cite additional background or Department-developed reference material, including relevant links to the Department's website.

4.4.3 Under no circumstances is it appropriate for a staff member to disclose a staff recommendation on an Order until it has been reviewed and approved according to Department policy. Typically this process requires bureau director involvement.

4.4.4 Many aspects of pending enforcement cases are not appropriate for discussion with the public or the media. (NOTE: A Notice of Violation that has been issued to the alleged violator is available as a public document. No other enforcement documents are in the public domain until they are final.) Any inquiries related to an active enforcement case should be reviewed with the Director of Enforcement in the Office of the Commissioner prior to a departmental response.

4.4.5 A Media Contact Form is used to document all calls or interviews with reporters. Copies of completed forms are to be sent electronically within the same day to appropriate bureau management and to the Director of Communications. If the form is inaccessible (for example, the staff person is in the field), a phone call or email to the Director of Communications and appropriate bureau management is an acceptable alternative.

4.5 Initiating Media Contacts

4.5.1 Media relations is the responsibility of the Office of the Commissioner. Suggestions for media releases, events and other public and media activities representing the Department to the public or media are welcomed and should be brought directly to the Director of Communications before any action is pursued with as much advanced notice as possible. If the suggestion is

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approved, the Director of Communications will delegate roles and responsibilities to move it forward, in consultation with the appropriate bureau management.

4.5.2 All media releases and media-related activities (events/activities orchestrated for the press and public with the intent of heightening awareness) must be approved by the Director of Communications and the Commissioner or their designee. Media releases will conform to Associated Press Style, be distributed by the Director of Communications, and also be displayed on the Department's website newsroom.

4.6 Corrections/Letters to the Editor/Opinion Pieces

When the media seems to have erred or unfairly represented Department staff, their actions or Department policy positions, it is important to correct the misinformation and/or mischaracterization via a request for a correction, letter to the editor, etc. Please contact the Director of Communications who will determine and coordinate the appropriate response in partnership with staff.

4.7 Public Speaking/Presentation Engagements

4.7.1 When a staff member is requested to represent the Department in a public speaking engagement or exhibition or policy-related forum (not including mandated public meetings or hearings), he/she must inform the Director of Communications and the Bureau Director of the engagement, audience, objective, subject matter and resources required before accepting. The Director of Communications in partnership with the Bureau Director will review the request and advise on the response. Staff is not permitted to present on behalf of the Department unless approved.

4.7.2 Requests from external entities for Department speakers may be submitted directly to the Director of Communications & Education or their designee, who will decide whether it is appropriate for the Department to be represented and coordinate and help to prepare the appropriate representatives. Department staff is not to solicit speaking/presentation engagements but can bring suggestions for potential opportunities to the Office of Communications for consideration.

4.7.3 All Department presentations must utilize the Department PowerPoint template (available at location), and be reviewed and approved by the Director of Communications and/or their designee prior to the presentation being given. PowerPoints are to be provided to the Director of Communications no less than three full working days in advance of the staff person's departure for the presentation for review.

4.8 Department Education and Outreach Materials

Any outreach materials –including but not limited to letters, brochures, postcards, technical bulletins, issue profiles, print/broadcast/web advertisements or promotions, reports, etc. – not specific to an individual facility, policy, project, etc. must be approved by the Director of Communications, and as necessary, additionally by the Policy Director. If staff require an outreach piece to be developed or wish to partner on an advertising/promotional campaign, they are to contact the Director of Communications or their designee who will coordinate staff within the Office of Communications to develop the appropriate materials in partnership with the relevant program staff if appropriate advanced notice has been provided. The Office of Communications

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has Department branded display materials available for use, including banners, tableskirts and general Department brochures and stands.

4.9 Sponsorships/Use of Department Logo

A sponsorship by the Department –whether monetary, in-kind or via logo– suggests endorsement of the sponsored initiative. Therefore, all requests for sponsorship or Department endorsement must be approved by the Office of the Commissioner and by the appropriate Bureau Director. Requests should be reviewed by the appropriate Division Director with the request and a recommendation made concurrently to the Director of Communications and the Bureau Director. If the sponsorship and use of the Department logo is approved, the Director of Communications will provide the correct logo file to the requestor.



**Maine State Government
Dept. of Administrative & Financial Services
Office of Information Technology**

Social Media Policy

I. Statement of Policy

State of Maine (the "State") agencies may use social media technologies to enhance communication, collaboration, and information exchange with citizens under the following guidelines and procedures.

II. Purpose

The purpose of this policy is to define the use of social media by state employees while contributing to or overseeing agency social media sites or providing comments or updates to the agency's social media identities.

In addition to this policy, social media content must be in compliance with all state and agency policies. This includes policies on harassment and discrimination, confidentiality, ethics, and workplace violence, along with any applicable codes of conduct.

III. Guidelines and Procedures

A. Each agency head shall designate a Social Media Supervisor who will oversee all social media requests and interactions. For those agencies that designate someone other than their Web Coordinator, the designated person should work closely with the Web Coordinator. OIT will maintain a list of Social Media Supervisors. It is the responsibility of the agency to notify OIT of its agency's designation.

B. The Social Media Supervisor shall authorize use consistent with this policy and the agency head's direction. Agency employees shall consult with their Social Media Supervisor prior to engaging in social media to ensure that participation and representation on social media sites is sanctioned. Legal counsel should be sought, when appropriate, prior to the agency engaging in social media.

C. Each agency must read and accept the social media site's terms of use and be prepared to comply with the terms of the accepted agreement.

D. Social Media Use:

1. **Required Work-Related Use:** This includes use of social media that is sanctioned as part of employee's job function (e.g. when an employee, as part of their job responsibilities, tweets on behalf of the agency on the agency's Twitter account). When this type of use is authorized the agency must ensure that:

- a. Any social media sites used by an agency to provide information must be established in the name of the agency.
- b. Any information posted is authorized by the designated agency Social Media Supervisor.
- c. Only authorized employees post information on the agency sites.
- d. Information posted is in compliance with the agency's Terms of Comment (see V.A.2.).

- e. Personal opinions are not to be posted on agency sites.
- f. The purpose for using the social media site is defined and understood by any authorized poster.
- g. Any authorized poster monitor the social media site to ensure compliance with this policy and all other applicable state policies.
- h. Any authorized poster and the Social Media Supervisor remove any scandalous, libelous, defamatory, pornographic, etc. material that is posted.
- i. A process will be instituted to save and retain all postings, outgoing and incoming, as all posted material is a public record.

2. Personal use at work: This includes personal use of social media while at work by an employee (e.g. logging onto Facebook and providing personal updates to a Facebook page or Twitter account during work hours using their own or their agency's information technology resources, when such activity is outside of the employee's official job function).

a. Any such use shall be consistent with the Policy Concerning the Use of State-Owned Information and Technology (I.T.) and Related Communications Equipment and Resources and any additional use policies adopted by the agency.

b. Excessive personal use of social media during work hours is prohibited.

3. Personal use outside of work: This includes use of social media by an employee in his or her personal capacity outside of work.

a. Employees are prohibited from posting official agency information on his or her personal media site.

b. Employees' personal use should not be attributable to the agency or employee's job function at agency.

E. State harassment and discrimination policies, confidentiality policies, ethics rules, code of conduct, and workplace violence policies are applicable to all social media usage.

F. Agencies linking from a State web page to a non-State social media site or landing page must indicate to users that the site is not an official Maine State government site and that a third party's website policies apply.

G. Social media participants must abide by laws governing copyright and fair use of copyrighted material owned by others. Entire articles or publications should not be reprinted without first receiving written permission from the publication's author/owner. Never quote more than a short excerpt of someone else's work and, if possible, provide a link to the original. When referencing a law, regulation, policy, or other website, if possible, provide a link or the citation.

H. Social media sites contain communications sent to or received by state agency and are therefore public records subject to State Records Retention law. These retention requirements apply regardless of the form of the record (digital text, photos, audio, or video, for example). See the record managements section of the Secretary of State's website for full details: <http://www.maine.gov/sos/arc/records/state/index.html>. Each agency must ensure that it retains a copy of the social media content in accordance with the State's records retention requirements. Agencies must review the social media service provider's terms of service for its records retention practices. While social media providers may save content for some period of time, they generally will not save it indefinitely. To the extent that the social media providers' policies are inconsistent with Maine's records retentions requirements, an agency must retain its own copies of social media posts.

I. Agencies making use of social media sites are to be aware that social media providers may incorporate advertisements into its site. State procurement and ethics laws prohibit employees or agencies from endorsing products or vendors. In addition, the .GOV registration program guidelines (applicable for those websites that are hosted within the Maine.gov domain) generally prohibit ad campaigns and endorsements. Thus, the agency must limit its association with advertising by (1) amending the Terms of Service of the social media provider if possible; (2) using, whenever possible, non-branded landing pages within the social media website or (3) not joining the social media site.

IV. Applicability

This policy applies to social media participation by all Executive Branch and semi autonomous state agencies. As the technology evolves, this policy may be amended to ensure consistency in the use of technologies by state employees.

Each agency's statutes, policies and procedures regarding confidential information apply to the use of social media. All federal and state statues and policies apply including:

- Section 508 of the Rehabilitation Act of 1973
- Accessibility Policy on Effective Electronic Communications
- Information Technology Security Policy (PDF), Web Accessibility Policy for the State of Maine
- Policy on Access to Data and Information on State Owned Computer Devices
- Policy Concerning the Use of State-Owned Information and Technology I.T.) and Related Communications Equipment and Resources
- Maine State Archive - Record Retention Schedules.
- Maine's Freedom of Access Act

V. Responsibility

A. Agency

Once an agency has decided to engage in the use of social media, the agency will

1. Designate a Social Media Supervisor who will authorize specific employees to post, update and monitor the agency's social media identity or page.
2. Create a Terms of Comment which will describe how the agency intends to manage user contributions to the agency's social media site (such as an agency's wiki or a blog). The Terms of Comment shall also describe the review process prior to posting comments and the selection criteria for comment posting (e.g. on-topic, non-duplicative, not obscene or offensive etc.). Comments shall be monitored by authorized agency staff. The Terms of Comment must be provided to each employee authorized by the Social Media Supervisor to post information on behalf for the agency.
3. Clearly indicate to employees and public users when social media used by the agency is hosted by a third party that has its own privacy policy and terms of service.
4. Advise its employees using social media sites that social media providers used by the agency may collect personal information through use of the social media site; that this personal information will be disseminated online via the social media site; and that its dissemination will not be subject to the restrictions described in State of Maine technology policies.

B. OIT – OIT is responsible for maintaining a list of agency Social Media Supervisors.

C. Chief Information Officer of the State of Maine - Title 5, Maine Revised Statutes, Chapter 163 §1973, Section 1, Paragraph B authorized the Chief Information Officer to “set policies and standards for the implementation and use of information and telecommunications technologies, including privacy and security standards and standards of the Federal Americans with Disabilities Act (ADA), for information technology.

VI. Definitions

A. Landing page - A landing page is the page website visitors arrive at after clicking on a link on another website. It could be a home page, or any other page in a site.

B. Semi-autonomous State Agency - An Agency created by an act of the Legislative Branch that is not a part of the Executive Branch. This term does not include the Legislative and Judicial Branches, Offices of the Attorney General, Secretary of State, State Treasurer, and Audit Department.

C. Social Media Identity – A social media identity is a user identity or account that has been registered on a third party social media site.

D. Social Media or Networking – The terms social media and social networking are used interchangeably. Social media is a set of technologies and channels targeted at forming and enabling a potentially massive community of participants to productively collaborate. Social media includes: blogs, wikis, microblogging sites, such as Twitter™; social networking sites, such as Facebook™ and LinkedIn™; video sharing sites, such as YouTube™; and bookmarking sites such as Del.icio.us™.

E. Social Media Sites – Social media sites refer to websites that facilitate user participation, networking and collaboration through the submission of user generated content.

F. Social Media Supervisor – The Social Media Supervisor is an individual within an agency who oversees all agency social media sites and ensures compliance with this and all other applicable state policies. This individual is responsible for authorizing employees to post on state sites and for the content of such postings. OIT will maintain a list of Social Media Supervisors as designated by each respective agency.

G. Web Coordinator – The Web Coordinator develops website management plans for their agencies and submits these plans to OIT. A website management plan identifies roles and responsibilities, site monitoring and evaluation, content maintenance, oversight, user feedback and other aspects of an agency's website. OIT maintains a list of agency Web Coordinators.

VII. References

A. IT Policies, Standards and Procedures

B. Website Standards

VIII. Document Information

A. Document Reference Number: 37

B. Category: Computing Environment and Platform

C. Adoption Date: August 3, 2010

D. Effective Date: August 3, 2010

E. Review Date: August 3, 2011

F. Point of Contact: Director, OIT Project Management Office

G. Approved By: Greg McNeal, Acting Chief Information Officer, State House Station #138, Augusta, ME 04333, (207) 624-8800.

H. Position Title(s) or Agency responsible for enforcement: Director, OIT Project Management Office

I. Legal Citation: Title 5, Maine Revised Statutes, Chapter 163 §1973, Section 1, Paragraph B authorizes the CIO to “set policies and standards for the implementation and use of information and telecommunications technologies.

J. Waiver Policy: <http://www.maine.gov/oit/policies/waiver.html>

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 Summary of Selected Social Media Policies Used by States

	Maine State Government Office of Information Technology: Social Media Policy <i>(under review)</i>	North Carolina Office of Governor and IT Services: Best Practices for State Agency Social Media Usage	Texas Department of Information Resources: Social Media Guidelines	New York Office of IT Services: Social Media Policy	Kansas: Social Media Policy	Washington Office of the Governor: Guidelines and Best Practices for Social Media Use
Purpose	Define the use of social media by state employees while contributing to or overseeing agency social media sites or providing comments or updates to agency's social media identities	Ensure that state agencies' social networking sites are secure and appropriately used and managed by outlining "best practices"; Designed to protect state employees and ensure consistency across agencies	Provide guidance for agencies and employees regarding use of social media for official state business	Encourage state entities to permit responsible use of social media; Set minimum requirements for use of social media; Help make NY State government accountable and more transparent	Establish standards for use of social media by agencies and employees; social media can facilitate information sharing and serve communication and outreach goals	Encourages use of social media to advance goals of State and missions of its agencies; Decision to use social media is business decision, not technology-based decision; provide guidelines for use of social media
Oversight/Authorization	Each agency shall designate social media supervisor to oversee all social media requests and interactions and notify OIT of that designation	Agency public information officers should evaluate and approve all requests for usage, verify staff authorized to use social media tools and provide training for use of social media	Must be authorized by each agency based on agency's specific needs and the appropriate scope of its use	Each agency's Public Information Officer must authorize all use of social media sites	Agency public information officers and communications directors are charged with administering the use of social media by the agencies in which they are employed	Requests to use social media should be approved by social media advisory board in each agency: deputy director, public affairs or communications team, information technology director, public disclosure and records retention officer, contracts administration officer and assistant attorney general

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	<p>Maine State Government Office of Information Technology: Social Media Policy <i>(under review)</i></p> <p>Use and posted information must be authorized prior to engaging in social media</p> <p>Personal opinions may not be posted on agency sites</p>	<p>North Carolina Office of Governor and IT Services: Best Practices for State Agency Social Media Usage</p> <p>All use should be consistent with applicable state, federal and local laws, regulations and policies</p>	<p>Texas Department of Information Resources: Social Media Guidelines</p> <p>Only public information may be posted on social media websites</p> <p>If personal information or other confidential information is posted, agency must remove as soon as practicable following discovery</p>	<p>New York Office of IT Services: Social Media Policy</p> <p>Content must comply with all applicable Federal and State laws, regulations and policies</p>	<p>Kansas: Social Media Policy</p> <p>Information may not be posted unless it has been verified as factual and been approved for release</p> <p>Material may not be posted that is inappropriate for public release or that is personal opinion or editorial comment</p>	<p>Washington Office of the Governor: Guidelines and Best Practices for Social Media Use</p> <p>All use is subject to all applicable state, federal and local laws, regulations and policies</p>
<p>Acceptable Use</p>						
<p>Moderation, Monitoring and Terms of Comment</p>	<p>Agency must ensure that any authorized poster and the social media supervisor monitor the social media site and "remove any scandalous, libelous,</p>		<p>Agency must determine if it will allow public comment on social media websites; if public comment permitted, agency must determine how</p>	<p>State entities may disable features that allow users to post content such as comments, videos or other types of shared files</p>	<p>Information will be posted on each site regarding under what circumstances posts will be removed: Comments not topically related;</p>	<p>To allow moderation of comments without running afoul of the First Amendment, agencies should consider creating a comment and moderation policy and disclose that policy to the public</p>

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			<p>social media content will be monitored</p> <p>Criteria for removing, rejecting or disavowing public content should be determined by each agency and communicated to the public</p> <p>Extent to which agency restricts or limits speech requires careful consideration of First Amendment</p>	<p>Entity reserves right to delete any content and block or remove users who violate terms of participation</p>	<p>profane or inappropriate language; sexual content or links to sexual content; solicitations of commerce; conduct or encouragement of illegal activity; information that may compromise safety and security of public; content that violates legal ownership interest of any party; content that holds the State of Kansas, its agencies, officials or employees in false light; or</p>	

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<p>Employee Access and Conduct</p>	<p>Only authorized employees may post information on agency sites</p> <p>Employees are prohibited from posting official agency information on personal social media sites and personal use of social media should not be attributable to the agency or the employee's job function at the agency</p>	<p>All agency-related communication through social media should remain professional in nature</p> <p>Employees must not use agency social media sites for political purposes, to conduct private commercial transactions or to engage in private business activities</p> <p>Employees may have personal social networking websites that must remain personal in nature and not be used to share</p>	<p>When using social media in any fashion connected to their agency position or job duties and when presenting oneself in a social media setting as an agency representative, employees must comply with applicable agency policies governing employee behavior and acceptable use of</p>	<p>State workforce members must obtain necessary authorization before communicating on behalf of state government entity</p> <p>Workforce members may not discuss or release proprietary, confidential or otherwise restricted information</p> <p>Employees' use of social</p>	<p>information that violates operational security or is protected by law</p> <p>Updating or posting to agency sites by employees as part of employee's official duties must be done with knowledge and approval of employee's supervisor</p> <p>Employees may have personal social media sites, but these may not be represented as official state agency sites and may not be used</p>	<p>Employees may not participate on social media websites or online forums on behalf of an agency without authorization</p> <p>Employees may not post or release proprietary, confidential, sensitive or personally identifiable information on state agency sites</p> <p>Employees' use of social networking for personal purposes is not permitted on agency equipment</p>

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<p>Freedom of Access</p>	<p>work-related information</p>	<p>electronic and information resources</p>	<p>networking for personal purposes must not substantially interfere with the operation of the State or a State government entity</p>	<p>during work hours unless approved; use of personal social media during work hours shall not interfere with work duties</p>	<p>All content published and received by the agency using social media in connection with the transaction of an agency's public business are public records</p>
<p>Social media sites contain communications sent to or received by a state agency and are therefore public records</p>	<p>Like email, communication via agency-related social networking websites is a public record, including posts made by the agency and any feedback from citizens</p> <p>Agencies should disclose on social networking site that communication may be considered a public record and subject to disclosure</p>	<p>Social media content posted by an agency or the public on an agency's social media website is a state record</p>	<p>Policy notes that Freedom of Information law may apply to social media content; makes clear that entities should be aware of legal implications</p>		

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<p>Records Retention</p> <p>Social media communications are subject to state records retention law and retention requirements apply regardless of form of the records</p> <p>Each agency must ensure that it retains a copy of the social media content in accordance with records retention requirements; to the extent that social media provider's records retention practices are inconsistent with state requirements, agency must retain own copies</p>	<p>Agencies must assume responsibility for and adhere to schedule for retention established by state archives</p> <p>Department of Cultural Resources may perform automated harvesting of social media content on behalf of an agency and, if an agency does not participate, agency must manually archive the public content</p>	<p>Social media content posted by an agency or the public on an agency's social media website is subject to state records retention requirements</p> <p>Agencies may consider common exceptions to records retention requirements when evaluating social media content: duplicate content and transitory information</p>	<p>Policy notes that Freedom of Information law may apply to social media content and, accordingly, may be subject to records retention requirements; makes clear that entities should be aware of legal implications</p>	<p>Social media public records are subject to records retention schedules</p> <p>Agency is responsible for capturing electronic copies of its public records made or received using social media, including those records made or received using third-party websites and must establish mechanisms/procedures for capturing social media public records</p>	

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Intellectual Property Rights	Social media participants must abide by laws governing copyright and fair use of copyrighted material owned by others	Content and communication on social media should include no form of copyright violations	Agency must ensure that it has right to post all social media content and is not infringing on intellectual property rights of others Intellectual property rights of content provided by the public will be governed by federal copyright law and the terms of service of the social media provider	Agencies must abide by copyright and other applicable laws relating to libel, defamation and data protection		Agencies must comply with laws governing copyright When posting materials, agencies should obtain copyright releases for all material to be posted or indemnification from the copyright owner If agency receives proper notice of possible copyright infringement, agency will remove or disable access to allegedly infringing material and terminate accounts of repeat infringers Agencies should consider how to prevent fraud or unauthorized access to social media sites and use best practices to mitigate
Security	State statutes and policies apply, including information technology security policy	In order to prevent potential harm, users should minimize the amount of information an attacker is likely to	Agency must comply with its own IT security policies, standards and guidelines	Agencies must ensure that security policies are in place and provide training for employees to		

Right to Know Advisory Committee
 Summary of Selected Social Media Policies Used by States

	<p>Maine State Government Office of Information Technology: Social Media Policy <i>(under review)</i></p>	<p>North Carolina Office of Governor and IT Services: Best Practices for State Agency Social Media Usage</p>	<p>Texas Department of Information Resources: Social Media Guidelines</p>	<p>New York Office of IT Services: Social Media Policy</p>	<p>Kansas: Social Media Policy</p>	<p>Washington Office of the Governor: Guidelines and Best Practices for Social Media Use</p>
		<p>gain from a successful attack</p> <p>Employees/authorized users should be educated about specific social media threats before being granted access to social media website</p>		<p>identify and defend against potential attacks</p>		<p>security risks</p>

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MAINE STATE LEGISLATURE
GOVERNMENT OVERSIGHT COMMITTEE

July 31, 2014

Honorable Janet Mills
Attorney General
6 State House Station
Augusta, Maine 04333-0006

Honorable Matthew Dunlap
Secretary of State
148 State House Station
Augusta, Maine 04333-0148

Dear Attorney General Mills and Secretary of State Dunlap:

In the months since the Office of Program Evaluation and Government Accountability released its December 2013 report on Healthy Maine Partnerships' FY13 Contracts and Funding, our committee has been considering potential actions on associated issues with records retention policies and practices at the Maine Center for Disease Control and Prevention, as well as Statewide. Chief Deputy Attorney General Linda Pistner, FOAA Ombudsman Brenda KIELTY, Senior Attorney General Phyllis Gardiner and State Archivist David Cheever have provided information and perspective that have helped us to understand where weaknesses exist in the State's records retention and management framework and helped brainstorm possible ideas for improvements. We greatly appreciate their interest and assistance in these matters.

As a result of these discussions, the Government Oversight Committee would like to accept the offer extended by your offices for the FOAA Ombudsman and Director of the State Archives Records Management to convene a working group to develop and/or make specific recommendations to the GOC regarding improvements to the State's Records Retention framework. Specifically, the GOC requests that:

- A. A working group be convened by the FOAA Ombudsman and the Director of Maine State Archives Records Management and include, at a minimum, representatives of the Attorney General's Office, the Office of Information Technology, the Bureau of Human Resources and the Department of Audit.

82 State House Station, Room 107 Cross Building
Augusta, Maine 04333-0082
TELEPHONE 207-287-1901 FAX: 207-287-1906

- B. The working group make specific recommendations concerning the following:
 - a. improved guidance for agencies on record retention, including specifically the issue of draft documents and the appropriate criteria for determining the extent to which drafts should be retained;
 - b. model policies on record retention;
 - c. training requirements, including additional requirements for supervisors, and a system of accountability to assure that all state employees receive appropriate training on record retention policies, schedules and procedures; and
 - d. establishing, or promoting/enhancing existing, avenues for employees to get consistent and accurate answers to records retention questions.

- C. The working group also make suggestions on how best to implement the following ideas with the goal of ensuring expectations regarding records retention are clear and well understood by all employees and that all employees are accountable for complying with those expectations:
 - 1. All executive branch agencies shall review and update their record retention policies, procedures and schedules consistent with the improved guidance and model policies; train incoming and existing employees and supervisors on those updated record retention policies and procedures (in addition to, or in conjunction with FOAA training); and require staff to review and acknowledge receipt of the State of Maine Policy on Preservation of State Government Records on an annual basis.
 - 2. Consistent with collective bargaining agreements, civil service law and rule and other applicable law, compliance with record retention policies, procedures and schedules should be included as part of each employee's performance expectations. Employees who fail to fulfil their obligations under applicable record retention policies, procedures and schedules will be subject to disciplinary action, up to and including discharge.
 - 3. The FOAA Ombudsman's ongoing training of state agency personnel continue to address the importance of record retention, as well as the obligation of each agency to update their record retention schedules, policies and procedures, and to assure that all agency staff receive training on those policies and procedures.

- D. The working group make recommendations on guidelines that should be used by agencies in determining costs for responding to a FOAA such that costs are reasonable, consistent across State government and do not present an unnecessary barrier to FOAA requests.

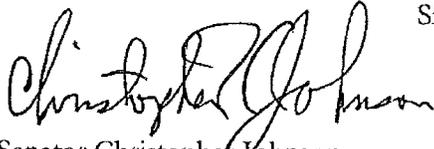
- E. In developing its recommendations and suggestions, that the working group seek input from the Right to Know Advisory Committee, other State agencies and/or stakeholders as appropriate.

- F. The working group report back to the GOC by February 1, 2015, on the results of its work and include recommendations for any additional steps, including those that may require legislative action.

We understand that your offices have very limited staff resources to support this effort and, consequently, there may not be time or resources to involve or seek feedback from a broad stakeholder group, even if the working group feels that would be appropriate. If it seems that the working group's recommendations should be vetted with stakeholders more than you have opportunity to do before February 1st, the GOC can do so through its public consideration of those recommendations.

Please confirm with OPEGA Director Beth Ashcroft that your offices intend to honor this request. Director Ashcroft can also answer any questions you may have.

Sincerely,



Senator Christopher Johnson
Senate Chair



Representative Chuck Kruger
House Chair

Cc: Members of the Government Oversight Committee

Records Management

Basic Principles for All State Employees

Why Does the Records Management Program Exist?

The program was established under Title 5, Chp. 6, §95 and states:

7. The head of each state agency or local government agency shall establish and maintain an active, continuing program for the economical and efficient management of any records in compliance with the standards, procedures and regulations issued by the State Archivist.

8. Transfer of state records. To provide for the transfer to the archives of state records, disposed of under subsection 7, paragraph C, that have archival value;

9. Destruction of state records. To authorize and receive confirmation of the destruction of the state records of any state or local agency that, in the opinion of the head of the agency, are no longer of value to the state or local government agency, and that, in the opinion of the State Archivist and the Archives Advisory Board, have no archival value to the State.

What is Records Management?

Records management is the continuous and efficient program by which we identify and classify records, establish schedules and manage records throughout their lifecycle. In other words, what to keep, how long you keep it and whether or not it is destroyed or kept as Archival.

What are Your Responsibilities?

According to the Rules of Chapter 1 (Under APA Rule 29/255) it is the responsibility of the head of each agency to maintain an efficient and continuous records management program. It is also the responsibility of the head of each agency to appoint a Records Officer.

The appointed Records Officer will appoint Assistants as needed. The Records Officer will have a thorough knowledge of the agency, its records and functions. The Records Officer will create and maintain appropriate records schedules.

All state employees are responsible for creating records needed to do the business of their agency, and documenting activities for which they are responsible. As a government employee, you are responsible for managing any and all public records (including email) for which you are the custodian.

All state employees are responsible for maintaining records so that information can be found when needed. This means setting up good directories and files, and properly filing records in a manner that allows them to be stored and efficiently retrieved when necessary.

All employees are responsible for carrying out the disposition of records under their control in accordance with agency records schedules. All employees should be made aware of records schedules and which records they are responsible for keeping (custodian of the record).

Why Is Records Management Important?

Agencies produce records every day. They are the vital component to the functionality of the agency for administrative, fiscal, legal and historical purposes. Not knowing what to keep is not the answer to Records Management and neither is keeping everything. There are implications for both.

An effective records management program offers several benefits:

Promotes a positive reputation for State Agencies

In the height of public access, government agencies need to remain accountable for the records they create and maintain. Public records document agency business and with proper management agencies can show they are taking the correct action for the appropriate amount of time and for the right reasons. When an agency demonstrates proper public records organization, a management program where records are controlled, and destroyed in accordance to law, the state's reputation is improved as is the public's confidence in state government.

Helps the Agency Fulfill its Mission

It will help identify and protect the essential records of your agency; those records needed to keep the agency functional. Locating what you need, when you need it is a vital component to running an agency effectively.

Promotes Cost Effective Business Practice

A proper records management program will reduce the volume of records stored; improve storage and retrieval systems and help to get the right record to the right person effectively and efficiently. Records on current schedules will be destroyed when they should be, making the best use of physical and digital space (both which state agencies can pay for). An efficient records program will limit the risk and cost associated with FOIA requests and any possible litigation. Any penalties for the inability to produce requests could be avoided by having an organized program where employees can locate records.

What is a Record?

"Record" means all documentary material (books, papers, photographs, maps or other documentation, including digital records such as e-mail messages and attachments), made or received and maintained by an agency in accordance with law or rule or in the transaction of its official business; because they serve as evidence of the agency's functions, policies, decision, procedures, operations and other activities; or because of their informational value. Records can have varying purposes per agency. What are vital records to one agency, another agency may not even have or produce; different laws and statutes can mandate record retention periods for the different types of agencies. Therefore, it is very difficult to impose a "global" records program and give a tidy two column list of what to keep and what not to keep.

Examples of records:

- Board and Commission Minutes of Meetings
- Contracts
- Commissioner’s Correspondence
- Project files
- Client Case Files
- Personnel files

Non-record examples:

- Duplicate copies of documents maintained in the same file
- Informational copies on which no administrative action is recorded or taken
- Documents received that provide information but are not connected to the transaction of agency business
- Extra copies of printed or processed materials for which complete record sets exist

How Do Agencies Manage Their Records?

Records are managed by creating agency schedules. Schedules provide the guidance necessary to prevent unneeded records from cluttering agency offices help preserve mid to long-term records until they have served their purpose. The purpose of the Records Management Division is to apply retention periods to ALL state government records and update them as changes occur.

Four Key Items Every Employee Needs to Know

- Records must be managed throughout their life cycle, according to their retention schedules
- All agency records should be on up-to-date retention schedules
- All agencies should have an active Records Officer
- There are General Schedules and Agency Specific Schedules
 - ✓ General Records Schedules (for records common to most agencies):
www.maine.gov/sos/arc/records/state/gensched2.html
 - ✓ State Agency Schedules (pertaining to specific agencies):
www.maine.gov/sos/arc/records/state/stsched.html

The Records Everyone Has - General Schedules

General Record Schedules are issued by the Maine State Archives to provide retention and disposition standards for records common to several or all State agencies. They are located on our website. Before an agency schedule is created, be sure a General Schedule does not already exist.

Determining Retention Periods

In order to dispose of records at the appropriate time, it is necessary to evaluate them in relation to their period of usefulness to the department.

Total Retention Period - Time kept in your agency **PLUS** Time kept in the Records Center **EQUALS Total Retention Period**

Some specific questions in determining how long records are retained:

- **Administrative use:** *What is the value of the records in carrying out the functions of your department? How long will you need to be able to retrieve them immediately?* Day to day business operation; correspondence, memos, reports – typically need for these records is short lived
- **Legal requirements:** *Are there any State Statutes or Federal regulations involved?* Records mandated by law or regulation; may be needed as evidence in legal cases or leases, titles, contracts, court case files
- **Fiscal requirements:** *How much time must you allow for the completion of fiscal activities such as audit or budget?* (Typically 7 years) Document an agency's fiscal responsibilities; invoices, receipts, purchase orders
- **Historical/Archival:** *Do these records document important events, or the history and development of your department?* Document history of the agency; board minutes, agency policy decisions, Commissioner's correspondence

Disposition Archives or Destroy?

Five hundred years from now, may someone want or need to look at these records? Will they be needed that far in the future for any legal or historical reasons?

- *Non-archival (non-permanent) retention* is based completely on the record's time-value to the business functions of the agency, including audit or other statutory requirements, and reasonable access by interested parties.
- *Archival (Permanent) retention* is based on the record's value after it no longer serves the agency's business.

The Structure of the Archives

The State Records Center, located in Hallowell is for those records which have a disposition destroy. The State Archives is for permanent records with historical/archival value. All records in Records Center status, including pre-archival records, remain under legal control of the agency that created them. Records in the Records Center are released only to cardholders of the creating agency. Any records sent to the Records Center must first be on an approved records retention schedule before they will be accepted for transfer.

DRAFT PROPOSAL TO ADDRESS UNDULY BURDENSOME OR OPPRESSIVE FOAA
REQUESTS

Amend 1 MRS Sec. 408-A(4):

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. A request for inspection or copying may be denied, in whole or in part, on the basis that the request is unduly burdensome or oppressive provided that the procedures established in subsection 4-A are followed. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.

[following para. all underlined, new language]

4-A. Action for protection. An agency or official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 14 days of receipt of the request.

A. If the following information is not included in the complaint, it shall be provided to the parties and filed with the court no less than five days before any scheduled hearing:

1. The terms of the request and any modifications agreed to by the requesting party;
2. A statement of the facts that demonstrate the burdensome or oppressive nature of the request, with a good faith estimate of the time required to search for, retrieve, redact if necessary and compile the records responsive to the request and the resulting costs calculated in accordance with subsection 8; and
3. A description of the efforts made by the agency or official to inform the requesting party of the good faith estimate of costs and to discuss possible modifications of the request that would reduce the burden of production.

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated herewith.

C. An action for protection may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require upon the request of any party.

D. If the court finds, after hearing, that the agency or official has demonstrated good cause to limit or deny the request, it shall enter an order making such findings and establishing the terms upon which production, if any, shall be made. If the court finds that the agency or official has not demonstrated good cause to limit or deny the request, it shall establish a date by which the records shall be provided to the requesting party.