



## Maine Freedom of Information Coalition

PO Box 232, Augusta, Maine 04332

### **Maine State Agency Policies on Access to Public Records: Findings and Recommendations**

**December 8, 2017**

The Maine Freedom of Access Act (“FOAA”) does not require that state agencies adopt policies describing their process for responding to requests for public records, but many have chosen to spell out exactly how they handle such requests. To assess how many agencies have policies, whether their policies adhere to the requirements of the FOAA, and to identify areas for improvement, the Maine Freedom of Information Coalition asked state government for copies of all applicable FOAA policies.

The effort began in January 2017 with a public records request for policies or procedures applicable to requests for public records. The request went to all of the public records officers, representing 49 units of state government, listed on the State’s Freedom of Access Act page at <http://www.maine.gov/foaa/contactlist/index.htm>. Those agencies that did not respond quickly received a reminder the next month.

The responses ranged from prompt and complete to a few agencies that ignored the request. Some agencies have robust written policies, while others have none. And the contents of the policies varied—in some ways significantly—from agency to agency. Overall, the responses shed light on the state’s attitude toward the public records law and highlight areas for improvement.

#### **Too Many Agencies Failed to Respond**

It turns out that the list of public records officers on the State’s FOAA contact webpage is not current. Out of the 40 contacts, 5 had moved on, but the website had not been updated.

The FOAA requires that agencies acknowledge receipt of a request within five working days. Many agencies promptly acknowledged the request, but 3 failed even to do that. Unsurprisingly, the agencies that never acknowledged the request never provided a response. And some of the agencies that acknowledged the request never actually responded. Eight fell into this category.

The take-home message: 11 of 49 agencies failed to respond to the Coalition’s request for a copy of their FOAA policies or procedures. When an agency does not respond to a request for its public records policy it gets a failing grade on FOAA compliance. The agencies that fell into this category include such large and important agencies as the Department of Corrections and the Department of Health and Human Services.

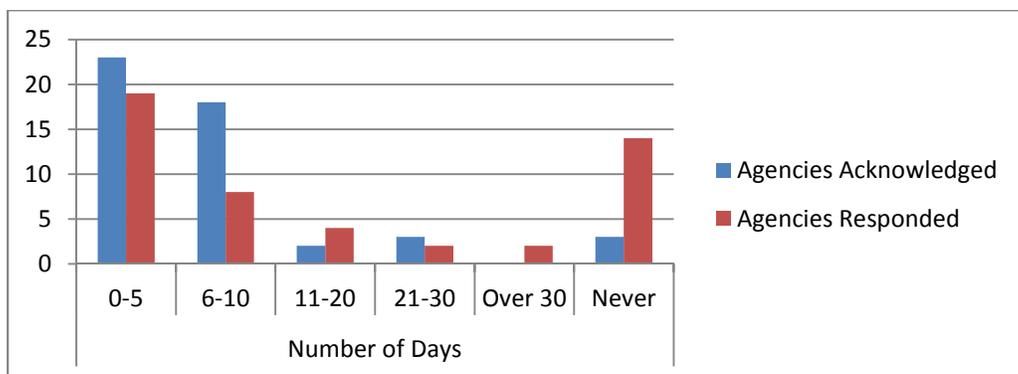
## **What’s the Point of a FOAA Policy If You Can’t Find It Quickly?**

The FOAA does not set a fixed deadline for a response a public records request, but instead requires a response “within a reasonable time.”<sup>1</sup> Because the public records officer for an agency—the person charged with responding to incoming FOAA requests—should have the agency’s FOAA policy at hand, a response to a request for the policy should be easy to fulfill. If no policy exists, a simple note saying that the agency has none should suffice.

How quickly did agencies respond by either providing their public records policy or confirming that they have none?

Of those agencies that acknowledged the request, 5 needed more than 20 days to do so—something the FOAA required them to do within 5 working days (FOAA policies and procedures are, of course, public records). The implications of this are troubling. What are the odds that the agency is following its own policy if it cannot even find it within the timeframe the statute provides? If an agency cannot produce its own policy on handling FOAA requests in a timely fashion, what are the odds of a quick response to other requests for public records? Not good.

Timeliness of FOAA Response



## **How Many Agencies have FOAA Policies?**

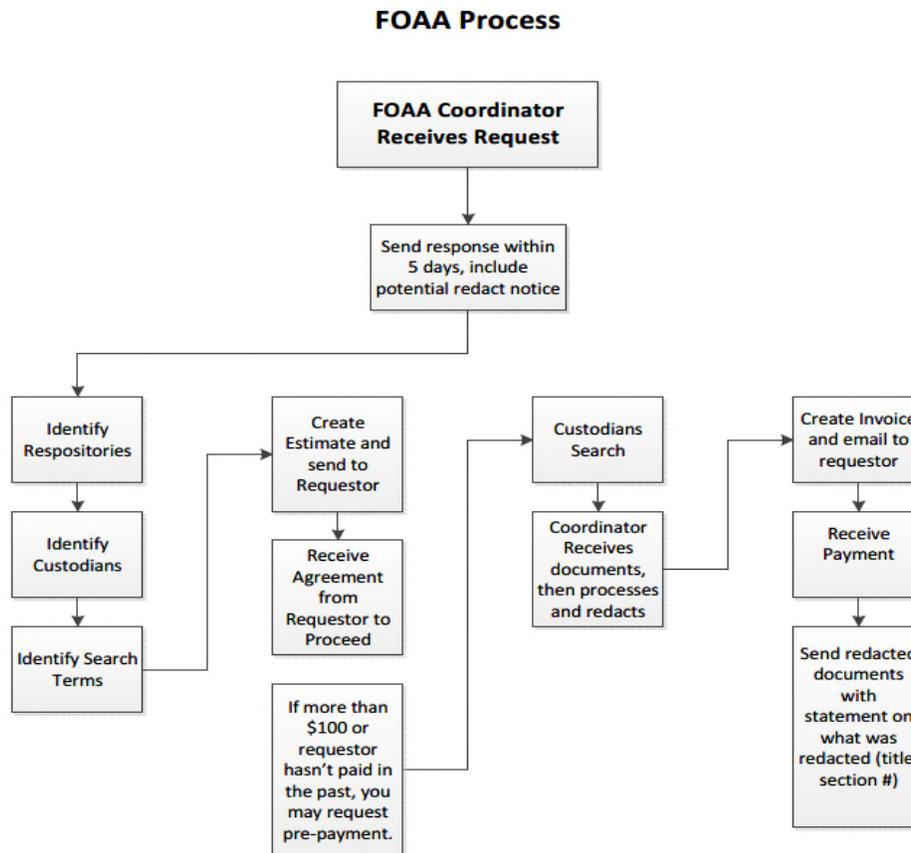
No statute requires state agencies to have a FOAA policy, but about half have adopted one. Why don’t more agencies have policies? Some are small or only get a few FOAA requests. As the Maine Arts Commission put it, “We simply respond to requests as we receive them.” Other agencies said that they have had success in reducing the volume of public records requests by placing frequently requested information online. For example, the Bureau of Insurance places licensing decisions, hearing decisions, most form and rate filings, and other information online. “This transparency has reduced the volume of document requests to the Bureau as well as the time required to respond to those requesters who can simply be directed to our website[.]”<sup>2</sup>

<sup>1</sup> 1 M.R.S. § 408-A.

<sup>2</sup> Letter from Thomas M. Record (Feb. 3, 2017).

## The Content of Maine State Government FOAA Policies: Good, Bad & Ugly

The FOAA policies range from elaborate multi-page procedures to short statements.



Source: Department of Inland Fisheries and Wildlife

Some of the policies are excellent, but not all—and some include requirements that are seemingly at odds with state law.

Formal v. Informal Requests. Some policies distinguish between formal FOAA requests and informal requests.<sup>3</sup> Agency staff may be authorized to respond to informal requests without going through the agency's FOAA officer. That means that persons requesting information may receive a faster response if they make a no-frills request for information without invoking the statute. As a legal matter, however, the FOAA does not distinguish between informal and formal requests. Agencies recognize that FOAA requests need not be made in writing, but often state a preference for written requests.<sup>4</sup>

<sup>3</sup> See, e.g., Dept. of Agriculture FOAA Guidelines, § 6.11; Department of Inland Fisheries FOAA Policy § 1; Secretary of State Procedure at 1.

<sup>4</sup> See DOE FOAA Policy § 4.3; DEP SOP § 5.1.

Electronic Records. The policies uniformly recognize that electronic records are subject to FOAA, and that records must be provided in electronic format when available.<sup>5</sup> Some agencies make clear that electronic records include more than just e-mail. The Department of Inland Fisheries says that a search for records responsive to a request must include hard drives, cellular phones, voice mail, and any databases.<sup>6</sup>

Pricing. Some (but not all) of the policies establish fee schedules. The fees set by the policies varied considerably, from up to \$10 for a one-page response to \$0.10 per page.

- The Department of Public Safety charges a fee of \$10 per twenty-five pages (i.e., \$10 for 1 to 25 pages, \$20 for 26 to 50 pages, etc.)<sup>7</sup>.
- Dept. of Agriculture: \$1 for the first page, \$0.25 for each additional page.<sup>8</sup>
- Office of the Attorney General & Department of Labor: \$0.38 per page.<sup>9</sup>
- The Public Utilities Commission charges \$0.25 per page for copies made by the Commission, but \$0.10 per page if the requester makes the copies.<sup>10</sup>
- Secretary of State: \$0.15 per page.<sup>11</sup>
- Human Rights Commission: \$0.12 per page.<sup>12</sup>
- Department of Inland Fisheries, Maine State Housing, and the Office of the Public Advocate charge \$0.10 per page. The Department of Inland Fisheries says that it adds sales tax, a dubious proposition.<sup>13</sup>

Records Tracking. Many agencies log incurring requests and responses, which is a best practice.<sup>14</sup>

Redaction. Many agencies require that records be redacted when reasonably possible to segregate confidential information within a record from public information subject to disclosure. For example, the Attorney General’s policy requires that the agency “[r]edact confidential or privileged material where reasonably possible rather than withholding the entire public record.”<sup>15</sup> This should be included in all policies, as redaction is required by law when public information can be segregated from other non-public information in the same record.

Personal E-Mail. Some agencies prohibit the use of personal or unofficial e-mail, text messaging, or instant messaging for the conduct of public business.<sup>16</sup> But if personal or unofficial electronic communications are used to conduct public business, those records are

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<sup>5</sup> See, e.g., Dept. of Agriculture § 6.08.

<sup>6</sup> Id. § 7(c).

<sup>7</sup> Dept. of Public Safety Uniform Freedom of Access Fee Schedule (Oct. 16, 2013)

<sup>8</sup> (§ 6.10)

<sup>9</sup>Office of the Attorney General Policy at 3; DOL Policy § 4(13).

<sup>10</sup> High Level Process for Responding to MPUC Freedom of Access Act Requests at 3.

<sup>11</sup> Secretary of State Procedure at 3.

<sup>12</sup> MHRC Policy at § 3(A).

<sup>13</sup> See, e.g., DOIF Policy at § 9(b).

<sup>14</sup> See, e.g., Office of the Attorney General Policy at 1; DOE Policy at § 4.4.

<sup>15</sup> Office of the Attorney General Policy at 2.

<sup>16</sup> See Dept. of Veterans and Emergency Mgmt Public Communications Policy § 4.1.1 (April 2, 2014).

public records and would have to be made available to the public. Some agencies make clear that personal e-mail is still a public record if “sent or received in the course of, or for the purpose of, conducting official State of Maine business.”<sup>17</sup> The same logic (and rules) that apply to e-mail apply to all forms of electronic communication.

Deadlines for Response. Some agencies emphasize the need for a timely response. The Department of Veterans and Emergency Management’s policy requires response to media inquiries “immediately upon receipt,” to the extent possible. If a response must be delayed, “the reporter’s deadline should be respected.”<sup>18</sup> The Department of Labor’s policy says, “It is essential to respond to FOAA requests in a timely manner.”<sup>19</sup> One agency sets an internal goal of responding within two weeks of the request.<sup>20</sup> No other agency appears to have set an internal deadline for responding to requests. Others should consider doing so to ensure that the public gets information reasonably quickly after asking for it.

## **Conclusion**

The state’s response to public records requests, and more generally its compliance with the FOAA, is uneven.

Many agencies have made substantial efforts to develop internal procedures to efficiently and uniformly respond to public records. This is admirable, but review of the policies reveals need for improvement in three areas:

- Agencies are left to set their own fees. This should stop. The law permits fees, but limits them to the actual cost of making copies. The actual cost of making copies, as measured by the cost of having copies made at commercial copy shops, is not more than 10 cents per page. The public would benefit from a uniform state-wide fee schedule of no more than 10 cents per page for standard copies. This is what several agencies charge now.
- Aside from the Department of Transportation, which aims to satisfy requests within two weeks, none of the agencies have internal deadlines to respond to public records requests. Because of the wide variety of requests agencies receive, it may not be practical to set a deadline to respond to *all* public records requests. But deadlines are clearly needed, given that some agencies did not even provide their policy on responding to public records requests until weeks after receipt of the request. Deadlines could be set according to the level of effort required to respond to a request. For example, a response should be provided to a request that requires less than thirty minutes of staff time within 24 hours of the request. A response should be provided within two days if the request requires less than one hour of staff time, and so on. Too often, straightforward requests fall into a black hole, with the response not forthcoming until weeks or even months after receipt—if ever.

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<sup>17</sup> Maine State Police Policy Regarding Public Access, No. M-9 (eff. Jan. 5, 2017) § IV(6)(B)(1).

<sup>18</sup> § 4.2.1.

<sup>19</sup> *Id.* §4(5).

<sup>20</sup> Maine Dept. of Transp., Freedom of Access Act Facts at § 8.

- Agencies should be required to post a copy of their FOAA policies on their websites, along with relevant statistics, including the number of requests, and data on the length of time before the agency responds to requests. This would help the Legislature and other stakeholders to track agency compliance with FOAA and encourage prompt responses to requests.

For those agencies that never responded, a more fundamental problem exists. To solve that problem, the Legislature should enhance remedies for non-compliance. Those enhanced remedies should include increasing the \$500 civil penalty for non-compliance to a more meaningful amount, making the penalty payable to members of the public unlawfully denied timely access to public records, creating personal liability for public officials engaged in willful non-compliance, and allowing recovery of attorneys' fees incurred by persons who successfully enforce requests for public records in court. Without enhanced remedies, too many agencies will continue to operate in secret, unlawfully denying to the public access to public records and information.

Attachments: Request Letter dated January 25, 2017  
Reminder Email dated February 17, 2017

January 25, 2017

VIA EMAIL

Robert Weaver  
Administrative and Financial Services  
Office of the Commissioner  
Cross Building  
Augusta, ME 04333

RE: Request for Agency Policy or Procedure Applicable to  
Freedom of Access Act Requests

Dear Mr. Weaver:

Please accept this letter as a request on behalf of the Maine Freedom of Information Coalition ("MFOIC") for any generally applicable policy, procedure, or similar document used by the agency for complying with or responding to requests for records under the Freedom of Access Act, 1 M.R.S. §§ 401 *et seq.* ("FOAA"). Such documents might, for example, address the routing of incoming requests for records, applicable deadlines, staff responsible for locating documents responsive to requests, process for locating records, any forms for tracking requests and responses to them, or other matters related to the agency's practices and procedures for responding to FOAA requests.

If the agency has a responsive record, please e-mail it to my assistant at [jcharron@preti.com](mailto:jcharron@preti.com). If the record is available on the internet, please provide a link in lieu of a copy. Some agencies may not have any record responsive to this request. If that is the case, would you please confirm? The purpose of this letter is to better understand which agencies have policies or procedures and to better understand the range of practices and procedures employed by state agencies.

I would be pleased to discuss any questions you may have about this request. Thank you.

Very truly yours,



Sigmund D. Schutz  
MFOIC Board Member

SDS:jac

## Charron, Jean A.

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**From:** Charron, Jean A.  
**Sent:** Friday, February 17, 2017 4:20 PM  
**To:** robert.weaver@maine.gov  
**Cc:** Schutz, Sigmund D.  
**Subject:** FOAA Reminder

Mr. Weaver,

Following up on your response of January 31, 2017 (below), can you please update us on the status of responding to this FOAA request.

Thank you,  
Jean

**Jean A. Charron**  
Legal Assistant to David B. Van Slyke and Sigmund D. Schutz  
**PretiFlaherty**

**From:** Weaver, Robert [<mailto:Robert.Weaver@maine.gov>]  
**Sent:** Tuesday, January 31, 2017 9:08 PM  
**To:** Schutz, Sigmund D.  
**Subject:** Acknowledgment of FOAA Requests

This message was sent securely using ZixCorp.

Attorney Schutz:

The Department of Administrative and Financial Services (DAFS) acknowledges your requests for information received by the Department on or about January 25, 2017. The Department will provide to you records responsive to your requests unless the documents are protected from disclosure under applicable law, including but not limited to the Maine Freedom of Access Act. Once we complete our review of all of the requested material, DAFS will provide you with an estimate of the time necessary to complete the process of responding to your request. We may also require the payment of costs as authorized by law.

Please accept this acknowledgement for all of the requests filed with the Department on January 25, 2017.

Thank you,

Robert Weaver  
Director of Governmental and Legislative Affairs  
Department of Administrative and Financial Services  
(207) 624-7397

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This message was secured by [ZixCorp](#)<sup>(R)</sup>.