

NEW ENGLAND FIRST AMENDMENT INSTITUTE

Navigating Maine Open Records Laws

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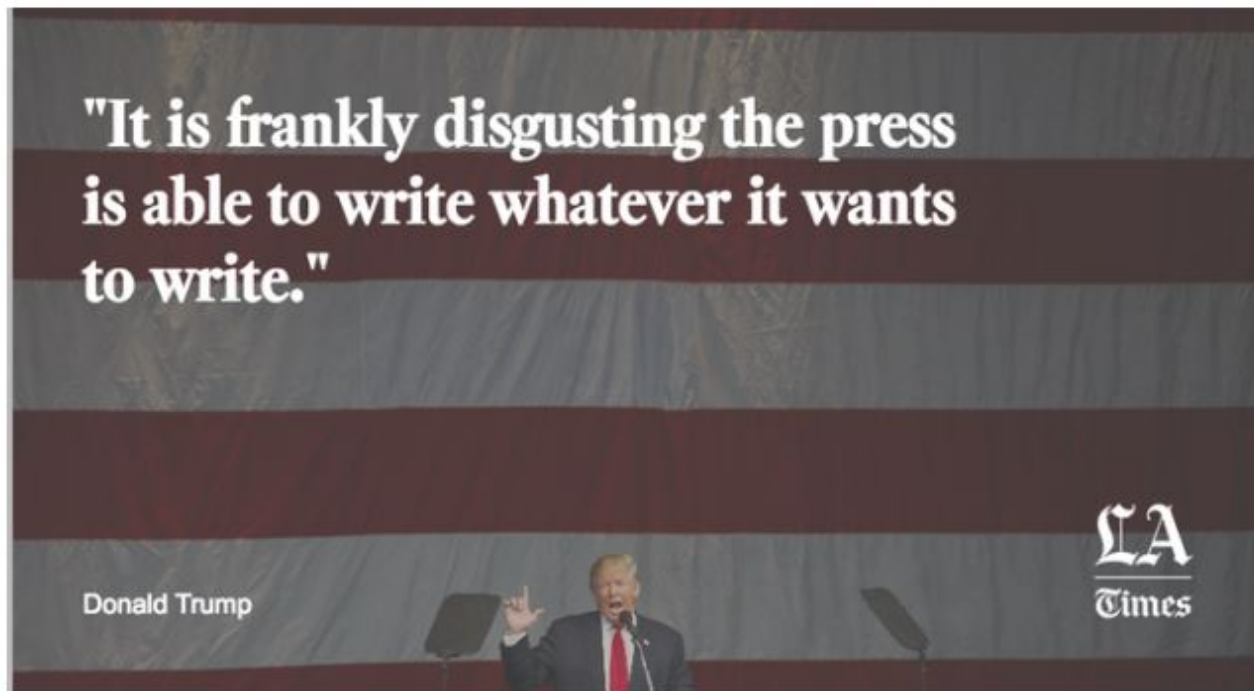
Los Angeles Times

@latimes



Trump intensifies threats against freedom of the press lat.ms/2kJGDz4
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Purpose?



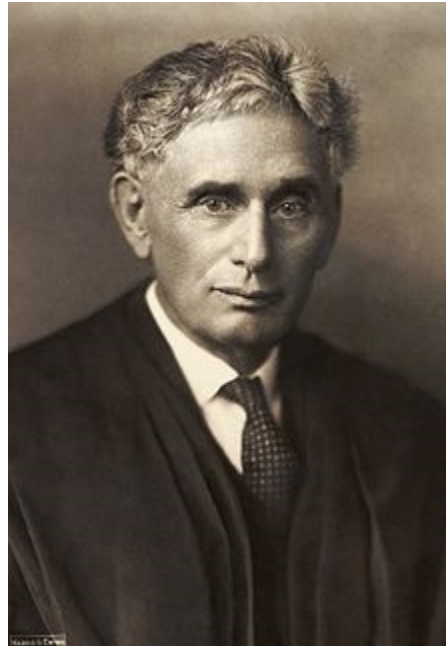
James Madison - “A popular government without popular information, or a means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both.”

Purpose?



John Adams - “Liberty cannot be preserved without a general knowledge among the people; who have a right and a desire to know but besides this, they have a right to that most dreaded and envied kind of knowledge, **I mean of the characters and conduct of their rulers.**”

Purpose?



Louis Brandeis - “Sunshine is the best disinfectant; electric light the best policeman.”

Purpose?



U.S. Court of Appeals Judge Damon Keith (2002 ruling) – “Democracies die behind closed doors.”

Purpose?

“An educated citizenry is a vital requisite for our survival as a free people.”

Thomas Jefferson

“If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”

George Washington

“Let the people know the truth, and the country will be safe.”

Abraham Lincoln

“The very word 'secrecy' is repugnant in a free and open society.”

John F. Kennedy

Maine Legislature's Statement of Purpose

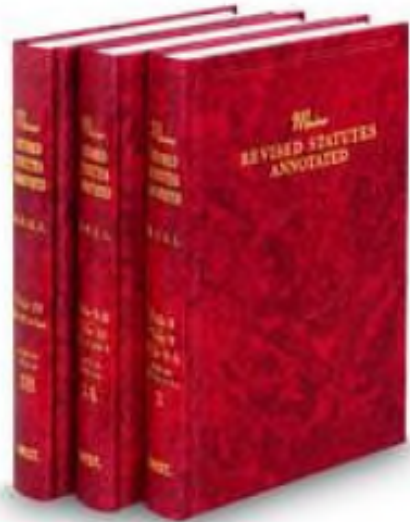
The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. . . .

. . . It is further 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.

Source: 1 M.R.S. § 401

State vs. Federal:

- Maine law applies to Maine records
- Federal law applies to federal records



Scope of Maine Freedom of Access Law

- All state legislative, executive, and administrative bodies
- All county, local and government bodies
- Quasi-governmental and hybrid bodies
- Does not apply to courts. Judicial records are controlled by the judiciary.

Access To Records: To Be or Not to Be (a Public Record)

- Presumption: Yes.
- Unless there is a specific exception, every record in the possession, custody or control of government related to the transaction of public or governmental business is a public record.
- Examples: Property Records, Police Logs, Contracts, Accident Reports, Budgets, Bids on Public Contracts, Salaries, Expense Reports, Calendars, You Name It.

Access to Records: Format

- Paper and Printed Matter
- Drafts
- E-mail
- Voice Mail
- Instant Messages
- Electronic Data
- “any document created or stored on a State Government computer is a public record”

Source: 5 M.R.S. § 1976

Access to Public Records: How to Get It

- Any person may inspect and copy any public record.
- The request may be orally or in writing.
- Need not state the reason for the request.
- May use public records for any purpose.

Access to Records: Exemptions



- Criminal and Civil Investigations
- Some Personnel Information
- 9-1-1 Audio Recordings
- Labor Negotiation Working Papers
- Medical Records
- Tax Records
- Student Records
- Legislative working Papers
- Business Trade Secrets

Access to Public Records: Cost

- Inspection is Free
- Copying at a reasonable fee to cover the cost of copying
- Staff time limited to \$15 per hour after the first hour
- Estimates
- Advance payment if cost is over \$100
- An excessive fee is a denial



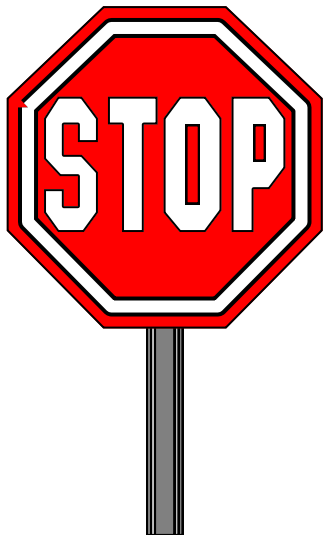
Access to Public Records: Time

- Denial = 5 working days
- Access = “reasonable period of time after making a request to inspect and copy”



FOAA Statute of Limitations

- Agency decides to permit inspection and copying and in fact promptly does so: Nothing to appeal.
- Agency refuses to permit inspection and copying and issues a written denial: 30 days to appeal.
- What if a body or agency sits on its hands or signals that it will in fact comply but time passes and no access is in fact allowed?.



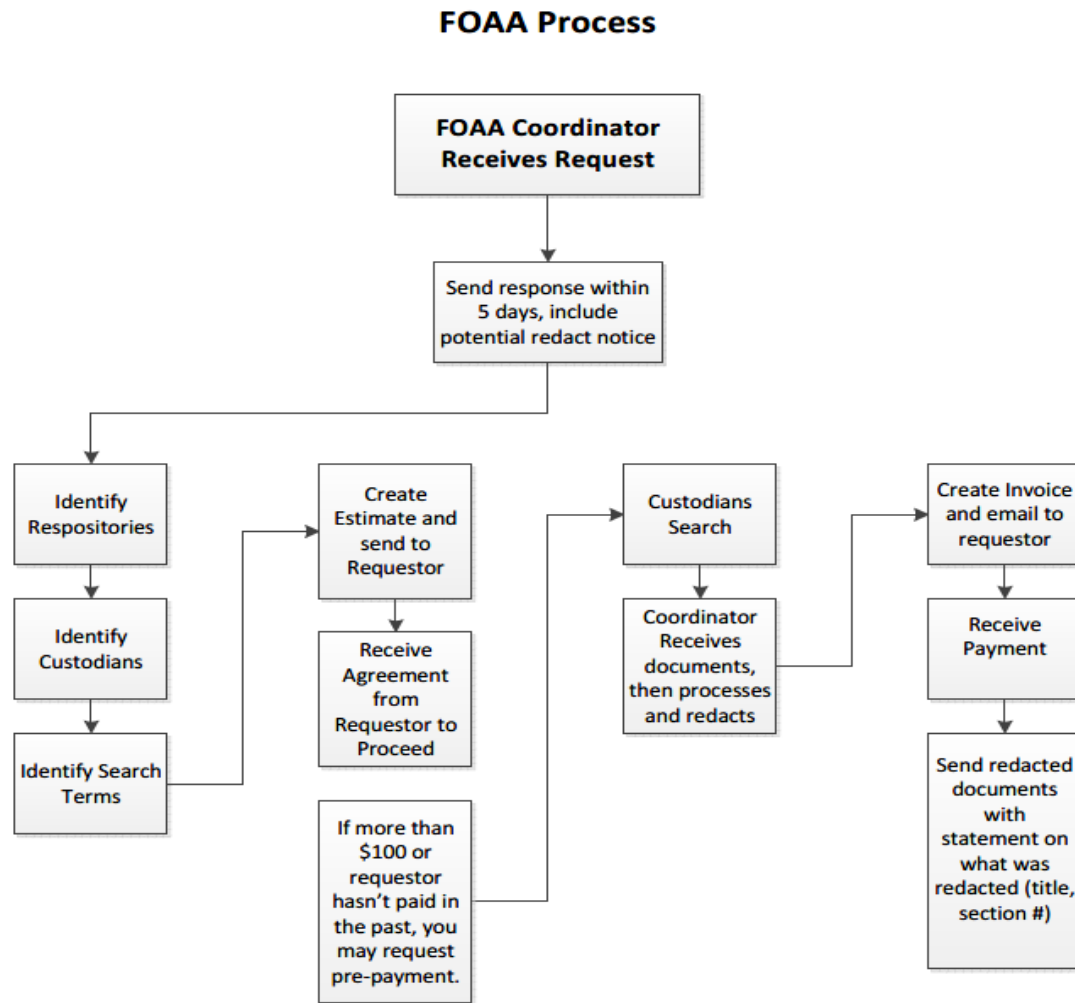
- “in the event of a failure to act” review may be sought “within six months after expiration of the time in which action should reasonably have occurred.” M.R.Civ.P. 80(B)(b)
- “If the review sought is from an agency's failure or refusal to act, the petition for review shall be filed within 6 months of the expiration of the time within which the action should reasonably have occurred.” 5 M.R.S. § 11002

FOAA Statute of Limitations

- The Work Around -- Ask Again.

If the first request has grown stale — untimely — ask for the same records again. “A party seeking disclosure is free to request the information more than once.” *Guy Gannett Pub. Co. v. Maine Dep't of Public Safety*, 555 A.2d 474, 476 (Me. 1989).

FOAA Process



Source: Department of Inland Fisheries and Wildlife FOAA Policy

Tips & Tricks

- Make an informal request?
 - FOAA may be seen as adversarial
- Create a FOAA Template

Informal Requests that are Not FOAA Requests. The public often requests information from the department without making a formal request. Department staff may grant informal or routine requests from the public to examine files or records without the prior approval of the FOAA Officer, providing the requestor has received the permission of a responsible person in the bureau, division or program.

Source: Maine Department of Agriculture FOAA Guidelines (Dec. 10, 2014)

Tips & Tricks

- Be Specific
 - What do you want?
 - Who has it?
 - Where is it kept?
 - Who created it?
 - Cite statute requiring agency to maintain record

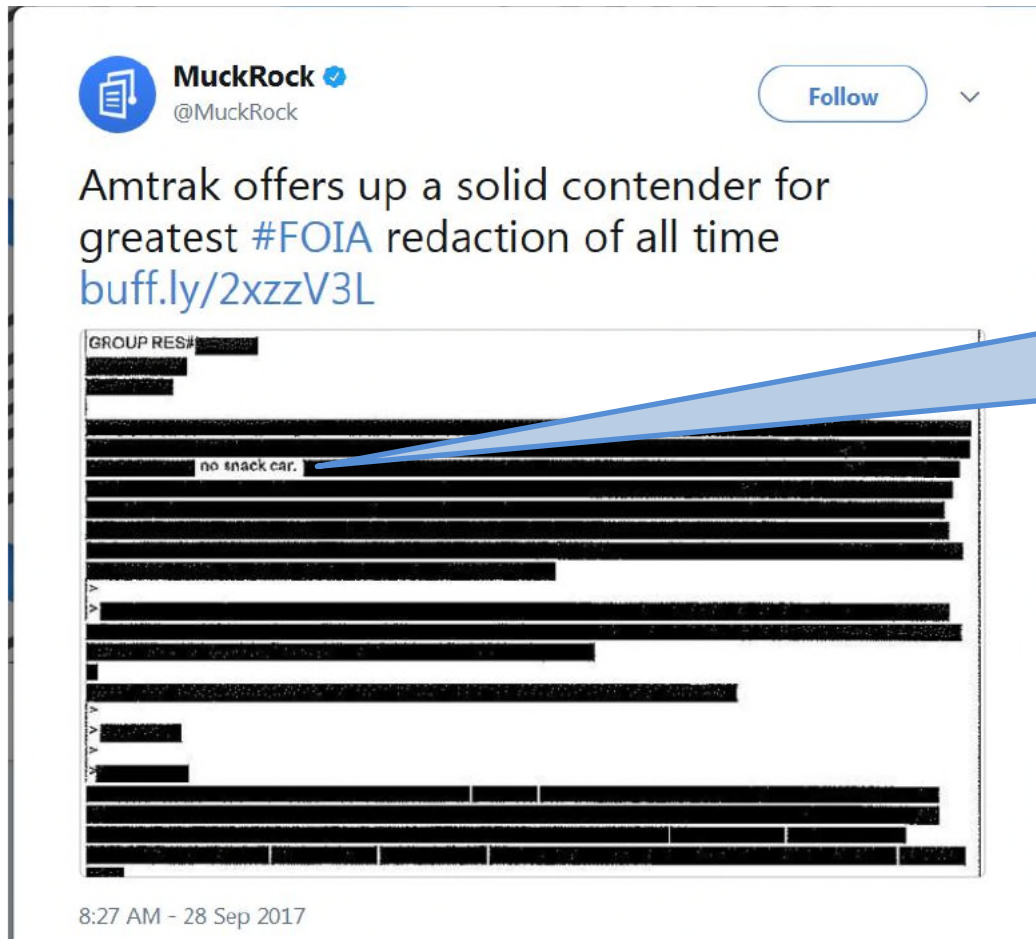
Tips & Tricks

- Be Persistent
 - Follow-up, Follow-up again (repeat)
 - “Show me where it says that”
 - Negotiate scope, cost, method of delivery

Tips & Tricks

- Keep a Paper Trail
 - Get it in writing
 - Keep your correspondence & notes
 - Show persistence, patience & understanding

Tips & Tricks



no snack car.

Tips & Tricks

- Elevate the Issue
 - Supervisor
 - Public records officer
 - Attorney
 - Ombudsman
 - AG's Office
 - Public official

Tips & Tricks

- If Mom says “No,” ask Dad.
 - Check with another government agency or official?
 - State v. federal
 - local v. State

Tips & Tricks

Get a Privacy Waiver (or ask the Victim / Next of Kin to Make the Request)

10. I hereby knowingly, and fully, and with consultation with my attorneys, waive my right to privacy individually and as the representative of the estate of Stephen McKenney, to the cruiser all video cams referenced in the court's order and audios recordings and request the Attorney General to comply with the newspaper's request for those materials which in turn have agreed to turn over copies of the materials to me or my attorneys, Daniel G. Lilley Law Offices, P.A.

FOAA Success Stories:

Maine CDC: Locations of Communicable Disease Outbreaks

October 2, 2015

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Re: *Portland Press Herald v. Maine Department of Health & Human Services*
Cumberland County Superior Court, Docket No. CV-15-323

Dear Mr. Schutz:

* * *

DHHS has informed me that the following three schools reported varicella outbreaks to Maine CDC during the 2014-15 school year: Central High School in Corinth (5 varicella cases reported to Maine CDC); Lisbon Community School in Lisbon (5 varicella cases reported to Maine CDC); and SeaCoast Waldorf School in Eliot (9 varicella cases reported to Maine CDC). The childcare facility that reported a varicella outbreak to Maine CDC during the 2014-15 school year is The Children's Center at 721 Stevens Avenue in Portland (4 varicella cases reported to Maine CDC).

FOAA Success Stories:

9-1-1 Transcripts

Dispatch2: Okay, Vicky. Um, my officers are on their way. Did he say how he wants to harm himself?

Female: Um, yea.

Dispatch2: What did he say?

Female: Gun, shoot.

(Police radio traffic in background.)

Dispatch2: You said he wants to shoot himself?

Female: Yea.

Dispatch2: Does he have a gun on him?

Female: Yea. No, not on him.

FOAA Success Stories:

State Report on Prisoner Suicide at County Jail

The fact that it is about county government and mentions county officers and employees by name does not turn the report into a protected personnel document. The report examines the operation of a public institution which should be the subject of public knowledge and concern, but about which the vast majority of law abiding citizens have no knowledge. By and large, the public has the right to know how institutions supported by its tax dollars are being operated, particularly if the institutions serve those whose freedoms have been taken away through our judicial process.

FOAA Success Stories:

Jury Selection in a Criminal Case

In re Maine Today Media, Inc.	)	
	)	
Petitioner/Appellant	)	
_____	)	
	)	
State of Maine	)	ORDER
	)	
Prosecution	)	
v.	)	
	)	
Mark W. Strong, Sr.	)	
	)	
Defendant	)	

The Court has received an expedited interlocutory appeal from the Superior Court's denial of the motion of Maine Today Media, Inc. to intervene in the above-captioned criminal matter, related to the public's access to jury selection proceedings. The Court also has pending before it a petition from Maine Today in the nature of a request for mandamus or prohibition. To allow the Court to consider the pending matters, the jury selection process is hereby STAYED pending further order of this Court, anticipated to issue today.

Access to Public Records: Resources

- Reporters Committee for Freedom of the Press
 - Open Government Guide:
 - <http://www.rcfp.org/open-government-guide>
- Maine Office of the Attorney General
 - Your Right to Know: The Freedom of Access Act
 - <http://www.maine.gov/foaa/index.htm>
- Maine Freedom of Information Coalition
- Right to Know Advisory Committee
 - <http://www.maine.gov/legis/opla/righttoknow.htm>
- Preti Flaherty FOAA Policy Resource
 - <http://www.preti.com/freedom-of-information/maine-foaa-policy-resource/>
- Federal: FOIA.gov & US Dept. of Justice

Questions?



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