

**FREQUENTLY ASKED
FREEDOM OF ACCESS ACT (“FOAA”) QUESTIONS**
(updated through First Special Session of 130th Legislature)
City of South Portland
Updated as of October 13, 2021

QUESTION	ANSWER
PUBLIC RECORDS	
Does a municipality have to comply with a federal Freedom of Information Act request?	<ul style="list-style-type: none"> ●No. The Freedom of Information Act only applies to federal government agencies and officials. The applicable Maine statute is the Freedom of Access Act, also known as the “Right-to-Know” law.
Does a municipal department or official have to respond to a request for public records that such department or official does not maintain?	<ul style="list-style-type: none"> ●Yes. A 2015 statutory amendment requires that the department or official forward the request to the department or official that maintains the record, “without willful delay,” and notify the requester that the request has been forwarded and that the office to which the request was forwarded will acknowledge receipt within <u>5 working days</u> of the other office’s receipt of the request. 1 M.R.S. § 408-A(3).
Does a municipality have to acknowledge receipt of a FOAA request?	<ul style="list-style-type: none"> ●Yes. The law requires that the acknowledgement be within <u>5 working days</u> of the municipality’s receipt of the request. 1 M.R.S. §§ 408-A(3), 413(1).
Does a municipality have to produce the requested documents within 5 working days?	<ul style="list-style-type: none"> ●No, but if the municipality is going to refuse permission to inspect or copy records, the municipality must 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 <u>5 working days</u> of receipt of the request. 1 M.R.S. § 408-A(4). ●Compiling records by staff and the making of them available for inspection and copying to the requester may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public records requested. 1 M.R.S. § 408-A(5).

PUBLIC RECORDS (cont.)	
Does a municipality have to provide the requester with an estimate of the research/compilation and copy charges before proceeding?	<ul style="list-style-type: none"> ● If the (non-binding) estimate of the total cost (research/compilation time plus copy charges) will exceed \$30, the municipality must inform the requester <u>before</u> proceeding. If the estimate of the total cost is more than \$100, the municipality may require prepayment. 1 M.R.S. § 408-A(9).
Does a municipality have to create records that do not exist?	<ul style="list-style-type: none"> ● No; repeat, no. 1 M.R.S. § 408-A(6).
Does a municipality have to answer written questions requesting information?	<ul style="list-style-type: none"> ● No, but if public records exist that answer the questions, the municipality should follow the procedures for making the responsive records available for inspection and copying. <i>See</i> 1 M.R.S. § 408-A, first sentence. ● Note that there may be a local Communications Policy that applies.
Does a municipality have to honor a “standing request” for public records, such as a request that certain reports be sent to a requester automatically each month?	<ul style="list-style-type: none"> ● No. A municipality is required to make available for inspection and copying (subject to any applicable exemptions) only those public records that exist on the date of the request. Persons seeking to inspect or obtain copies of public records on a continuing basis are required to make a new request for any additional records sought after the date of the original request.
Does a municipality have to provide the personal contact information of municipal employees or appointed officials?	<ul style="list-style-type: none"> ● No; indeed, the personal contact information (<i>i.e.</i>, home address, home telephone number, home facsimile number, home e-mail address and personal cellular telephone number and personal pager number) of municipal employees and appointed officials it is not a “public record” and <u>must</u> be treated as confidential except when that information is public pursuant to other law. The personal contact information of elected officials <i>is</i> a public record. 1 M.R.S. § 402(3)(O).
Does a municipality have to respond to a request that it deems to be burdensome and oppressive?	<ul style="list-style-type: none"> ● No, but pursuant to a 2015 statutory amendment, only if the procedures set forth in 1 M.R.S. § 408-A(4-A) are followed, which involves filing a lawsuit requesting an order of protection in Superior Court for the county where the request for records was made within 30 days of receipt of the request. 1 M.R.S. § 408-A(4-A). <u>Practice pointer:</u> Best not to try to complete the specific, legally required procedural steps without first consulting with legal counsel.

PUBLIC RECORDS (cont.)

<p>How much can a municipality charge for copies and can a municipality charge for staff time spent retrieving records?</p>	<ul style="list-style-type: none"> ● Copy fees must be “reasonable.” 1 M.R.S. § 408-A(8)(A). A 2021 amendment defines this as no more than 10¢ per page for a standard 8 ½" by 11" black and white copy of a record. A per-page copy fee may not be charged for records provided electronically. ● A municipality may charge a fee that covers the costs of staff research/compilation time (\$25 per hour after 2 hours of staff time per request; first 2 hours are free). 1 M.R.S. § 408-A(8)(B). ● See below regarding pre-payment/estimates.
<p>Can a municipality require prepayment?</p>	<ul style="list-style-type: none"> ● Yes, if the estimated total cost exceeds \$100 <u>or</u> the requester has previously failed to pay a properly assessed fee under FOAA in a timely manner <u>or before the public record is provided to the requester</u> [2017 amendment]. 1 M.R.S. § 408-A(8)(F) & (10).
<p>Does an administrative board, committee or subcommittee have to keep minutes?</p>	<ul style="list-style-type: none"> ● Under FOAA, some sort of <u>record</u> of every public meeting <u>must</u> be made within a reasonable period of time after the meeting and must include: (1) the date, time and place of the public meeting; (2) the members of the body holding the public meeting recorded as either present or absent; and (3) all motions and votes taken, by individual member, if there is a roll call. 1 M.R.S. § 403(2). ● An audio, video or other electronic recording of a public meeting satisfies the requirements of the law. 1 M.R.S. § 403(3). Any recording is subject to record retention requirements. ● An advisory body that makes recommendations but that has no decision-making authority is exempt from this record of public meeting requirement, but is not otherwise exempt. 1 M.R.S. § 403(6). ● In South Portland, written minutes and an audio or video recording are required for every administrative board, committee or subcommittee meeting.
<p>How long does an aggrieved requester have to go to court?</p>	<ul style="list-style-type: none"> ● A requester has 30 calendar days to file suit in Superior Court. The municipality only has 14 calendar days of service of the appeal to respond to the court filing with a statement of position explaining the basis for its denial. Pursuant to a 2015 statutory amendment, the court will review the matter and take testimony and other evidence as determined necessary (there is no longer a trial <i>de novo</i>). 1 M.R.S. § 409.

PUBLIC MEETINGS	
Can e-mail or other electronic communications turn into a meeting?	<ul style="list-style-type: none"> • Yes, administrative board business must be conducted at a public meeting with public notice of the meeting; communications by telephone, e-mail, blog or otherwise that turn into a dialogue with other board members about substantive board matters violates the law.
Are e-mail, text messages and other electronic communications covered under FOAA?	<ul style="list-style-type: none"> • If it relates to City business, it is a “public record” with only limited exceptions. • Even if created, received, transmitted or maintained by a public official on privately owned equipment and communication devices, it still qualifies as a “public record.” • Before you push the “send” button, ask yourself whether you want the e-mail to be printed on the front page of the local newspaper. • Consider a disclaimer advising the public not to expect privacy.
Can a citizen tape record or videotape a public meeting?	<ul style="list-style-type: none"> • Yes, so long as the recording does not unreasonably interfere with the orderly conduct of the meeting. 1 M.R.S. § 404.
Can a board member participate in a meeting remotely by telephone, Zoom or other remote means?	<ul style="list-style-type: none"> • Only if the board has adopted (after notice and a public hearing) a written policy on the same that complies with 1 M.R.S. § 403-B. <i>See</i> P.L. 2021, ch. 290.
Is a joint executive session of the municipal officers and an appointed board in order to consult with legal counsel permissible?	<ul style="list-style-type: none"> • Yes; a Maine Supreme Court decision upheld a joint Selectmen/Planning Board executive session to discuss the potential ramifications of a moratorium ordinance with legal counsel. <i>Hughes Bros., Inc. v. Town of Eddington</i>, 2016 ME 13, 130 A.3d 978. Legal counsel must be present.
GENERAL	
Who is required to complete FOAA training? When?	<p>Municipal officials who must complete training include municipal officers, clerks, treasurers, <u>managers or administrators</u>, <u>code enforcement officers</u>, assessors and <u>deputies for those positions</u>; <u>planning board members</u> and budget committee members; public access officers. It must be completed no later than the 120th day after the date the official assumes the person’s duties as an official or the person is designated as a public access officer. (Underlined officials are new per a 2021 amendment, <i>see</i> P.L. 2021, ch. 313.)</p>