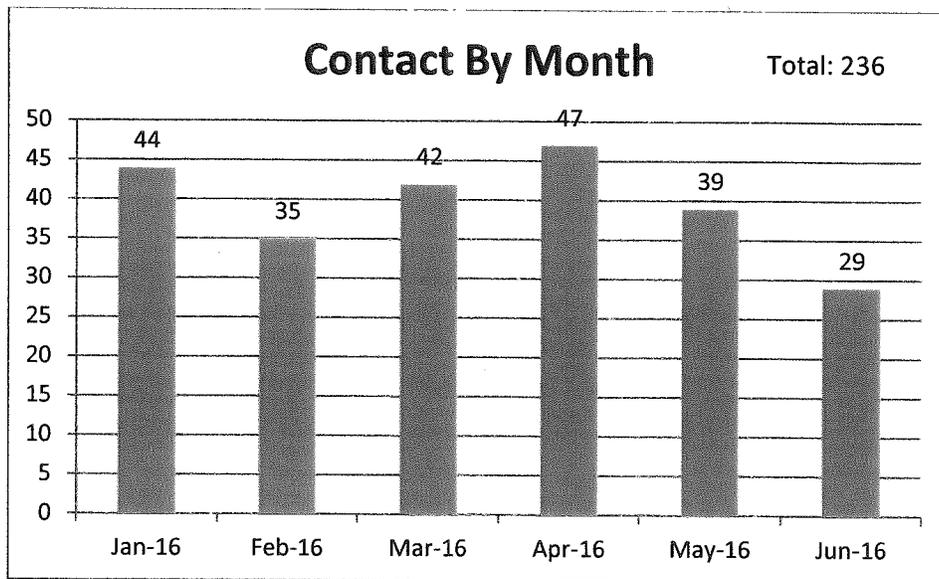


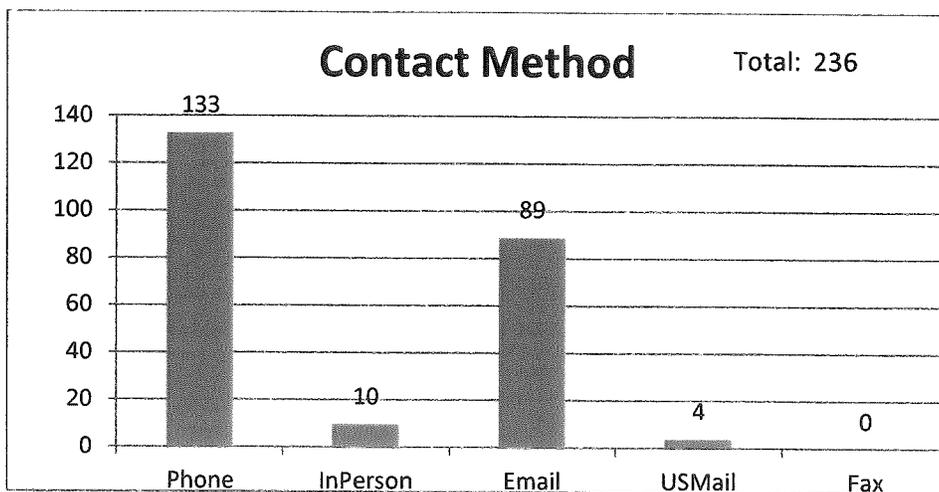
Public Access Ombudsman Mid-year Data Summary 2016

One of the functions of the ombudsman is to track data about Freedom of Access complaints and inquiries. This mid-year update provides a brief outline of the data for the first half of calendar year 2016.

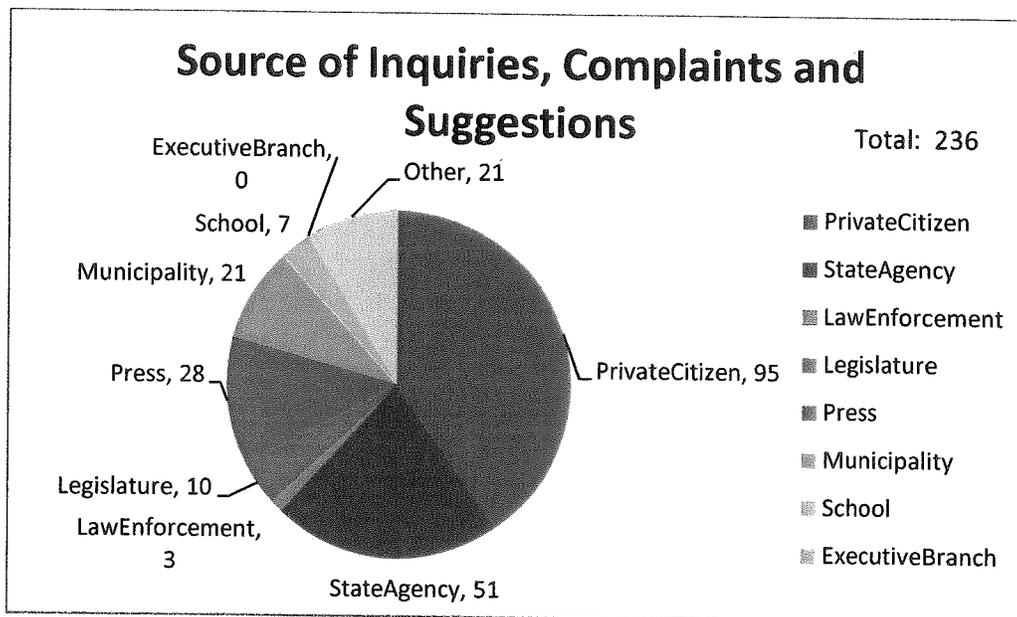
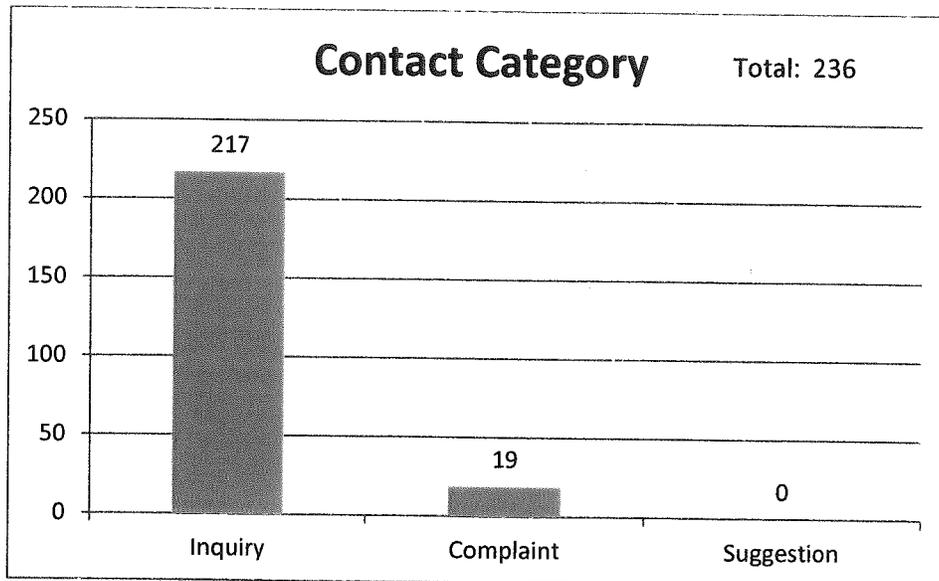
The total number of contacts through June 30th was 236. For comparison, the total yearly contacts were 303 for 2013, 370 for 2014 and 416 for 2015. The monthly totals for January through June are listed below. Although these numbers fluctuate throughout the months, based on the mid-year amount it is possible that the total yearly contacts for 2016 will exceed 2015 and continue the upward trend.

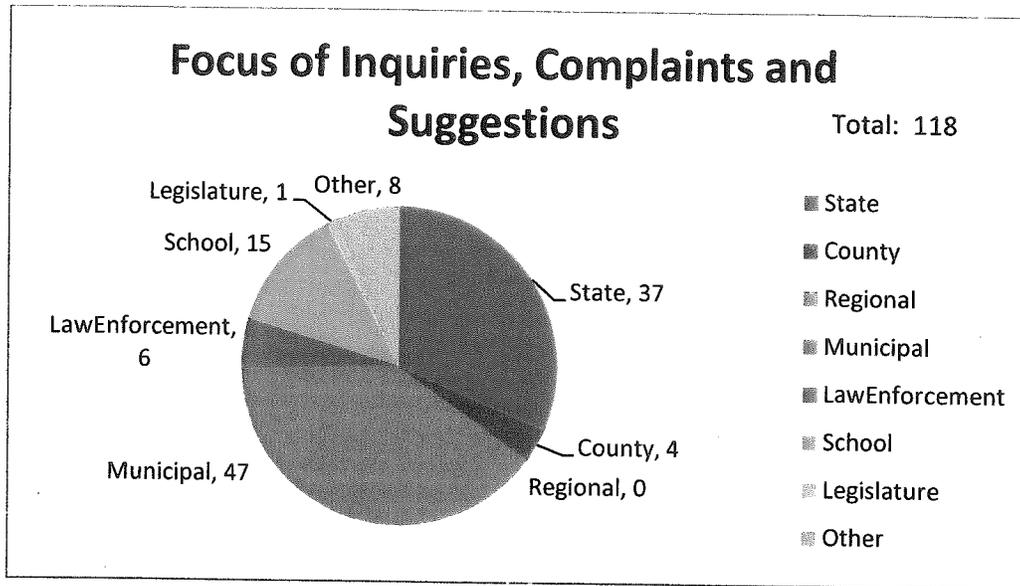


The telephone continues to be the primary method of contact with the ombudsman.



Inquiries continued to form most of the contacts. Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.





Consistent with the data from 2013, 2014 and 2015, the bulk of contacts were telephone inquiries from private citizens about public records held by municipal government agencies. The number of contacts from state agencies continues to climb and based on the mid-year data, 2016 could possibly eclipse the 2015 total of 96.

The most common questions about public records involved the basis for a denial and undue delay.

The most common questions about public meetings involved the use of executive session and what constitutes a meeting.

Agency FOAA Data Reporting for 2016

Pursuant to 5 M.R.S. § 200-I(2)(F) my annual FOAA Ombudsman report for 2016 will include data on the number of FOAA requests, average response time and the costs of processing FOAA requests for each of the executive branch State agencies.

<http://www.mainelegislature.org/legis/statutes/5/title5sec200-I.html>

F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests. [2013, c. 229, §2 (NEW).]

I would like to include the data for 2016 in my report to the Joint Standing Committee on Judiciary in January 2017.

Although the statute refers to “requests for information” and that could include a set of data much broader than FOAA requests, it seems clear from the context of this provision that the reporting should be limited to actual FOAA requests.

Also, “average” response time may be difficult to calculate. I suggest that response times be reported based on the set timeframes listed below.

The “costs” of processing requests could also include multiple criteria to assess the use of agency resources. As a baseline the data should include the amount billed as fees for FOAA requests. If you are able to calculate the actual hours spent responding to FOAA requests I will compile that data as well.

Please provide an excel spreadsheet with the following fields:

1. Number of FOAA requests received in 2015
2. Response time 0 – 5 days
3. Response time 6 – 30 days
4. Response time 31 – 60 days
5. Response time greater than 60 days
6. Amount of fees and costs for FOAA requests
7. Amount of agency hours spent responding to FOAA requests

Findings from 2015

A total of 969 FOAA requests were logged by the fourteen executive branch state agencies in 2015. There was a wide variation in totals between the agencies from six requests for Defense, Veterans & Emergency Management to 330 for the Department of Health and Human Services. Although 557 requests were responded to within five days, 37 took 60 days or more to fulfill. There can be a number of reasons for the length of response times including the scope and complexity of the request, earlier pending requests and the availability of employees to shift from operational duties to FOAA. This relatively small data set does not provide sufficient information to determine why some requests took longer than others.

Agencies reported a total of \$11,273 of fees charged for responding to FOAA requests. This indicator does not include hourly fees and costs that could have been charged and were waived. Several agencies did not report on this metric and the actual total would certainly be greater with complete data.

Agency staff hours spent responding to FOAA requests totaled 1,269 hours with several agencies not reporting this indicator. The Department of Health and Human Services had both the greatest number of requests (330) and number of hours spent on FOAA responses (404.45) while the Department of Defense, Veterans & Emergency Management had the least number of requests (6) and number of hours spent on FOAA responses (2) among all the agencies.

STATE AGENCY 2015 FOAA REPORTING

AGENCY	FOAA REQUESTS RECEIVED	RESPONSE TIME 0-5 DAYS	RESPONSE TIME 6-30 DAYS	RESPONSE TIME 31-60 DAYS	RESPONSE TIME >60 DAYS	FEES CHARGED	AGENCY HOURS TO RESPOND	PENDING 2015 REQUESTS
Administrative & Financial Services	98	36	35	9	4	0	110	14
Agriculture, Conservation & Forestry	48	10	24	6	3	\$1,645	135	5
Corrections	23	17	6	0	0	1	n/a	0
Defense, Veterans & Emergency Management	6	1	1	2	1	0	2	1
Economic & Community Development	6	1	2	0	3	\$ 345	19	0
Education	49	16	18	9	4	\$ 338	168.75	2
Environmental Protection	59	17	26	6	2	\$3,439	181	8
Health & Human Services	330	271	34	12	13	\$2,167	404.45	0
Inland Fisheries & Wildlife	35	6	9	6	3	\$2,153	160	12
Labor	8	6	1	0	2	\$ 185	12	0
Marine Resources	10	0	8	1	1	\$ 15	24	0
Professional & Financial Regulation	35	19	13	2	1	\$ 298	53	0
Public Safety	217	135	41	n/a	n/a	n/a	n/a	0
Transportation	45	22	22	1	0	687	n/a	0
TOTALS	969	557	240	54	37	\$11,273	1,269.25	42

Agency comments:

Labor: True staff costs exceed hourly FOAA reimbursement rate. Most staff involved were high-level management, plus usually AAG time for reviewing.

Marine Resources: The actual amount of time spent on providing individuals with information is much greater than hours spent responding to listed FOAA requests. Marine Resources processes hundreds of data requests that are not considered FOAA requests.

RESPONDING TO A FREEDOM OF ACCESS ACT (FOAA) REQUEST

Receipt

1. Is it a FOAA request, a request for information, or a request to answer questions?
 - *Agency dissemination of information as usual course of business, not all is FOAA*
 - *Distinguish request for records from questions*
 - *For hybrid requests that include questions and possibly a records request, clarify with requester, if possible, and summarize the history of these communications in the response.*
2. What is the date of receipt?

Date of receipt is date a “sufficient description” of the record is received by the agency or official at the office responsible for maintaining the record. (*Effective October 15, 2015*)

 - *Five day deadline; never let it sit on your desk*

FOAA database entry

How is the agency tracking and retaining FOAA requests?

Communication

1. Do agency management, the public access officer, or the press contact need to be consulted?
2. Who has custody of responsive records?

Acknowledgment

1. Acknowledge receipt of request within 5 working days of receipt of the request. [§ 408-A(3)]¹
2. Forward a request made to a department or office within an agency to the office or official who maintains the record “without willful delay.” (*Effective October 15, 2015*)
3. Notify the requester that the request was forwarded within the agency (*Effective October 15, 2015*)
4. A forwarded request must be acknowledged by the office to which it was forwarded within 5 working days of receipt of the request.

Clarify

1. Restate the language of the request in the acknowledgment to confirm scope and content.
2. Communicate with requester to narrow a broad request.

Estimate

1. Provide an estimate of time within which the agency will comply with request within a reasonable amount of time of receiving the request. [§ 408-A(3)]
FOAA requires a reasonable time frame for providing records. [§ 408-A]
Provide estimate of fees within a reasonable amount of time of receiving the request. [§ 408-A(3)]

¹ All citations are to M.R.S. Title 1.

Current with legislation through the 2016 Second Regular Session of the 127th Legislature.

- Seek confirmation from requester before proceeding with response for estimate greater than \$30.
2. Review any fee waiver request.

Notice of denial

1. Provide written notice to requester within 5 working days of receipt of the request if denying access to any public records. State the legal basis for the denial. [§ 408-A(4)]
2. If the identification of confidential records requires more time, provide an initial written notice within 5 working days of receipt of the request explaining that access to some public records may be denied after the review is complete. This notice may be combined with acknowledgement of receipt.
3. A supplemental denial or further explanation of the grounds for the denial may be provided depending on the circumstances.

Search

- *Due diligence: Can you demonstrate that you conducted a search reasonably calculated to uncover all relevant documents?*
1. Key custodians: Public access officer and/or assigned staff identify who may have responsive records.
 2. Repositories: Identify repositories associated with these custodians.
 - Email regardless of source or location
 - Personal network (home directories)
 - Local repositories (“My Documents” and other local collections)
 - Shared (non-custodian-based) repositories
 - Hardcopy documents
 3. Scope of the search: Develop a set of relevant filter criteria such as a keyword list, date range and file types.
 - In some circumstances, it may be necessary to agree with requester on the culling criteria.

Confidentiality review

Determine if any public records requested are confidential, privileged or otherwise protected from disclosure. [§ 402(3), 408-A]

1. Redact confidential or privileged material where reasonably possible rather than withholding entire public record.
2. If access is denied in whole or in part, provide written notice of denial and state reason for denial. [§ 408-A(4)]
3. Depending on the circumstances, including the types and numbers of records requested, written notice may take the form of a letter summarizing the reasons for denial of access or of a more formal privilege log.

Provide access

Schedule time to inspect records; provide paper copies; or provide access to an electronically stored record as either a printed document or in the medium it is stored at the discretion of the requester. [§ 408-A(5) &(7)]

Time and expense

1. Track staff time, actual costs and copying fees.
2. The invoice will account for the recorded costs and any fee waiver that has been granted.
3. Fees:
 - Reasonable copying fee [§ 408-A(8)(A)]
 - Actual cost of searching, retrieving & compiling (compiling includes reviewing & redacting confidential information) of \$15/hour after the first hour of staff time. [§ 408-A(8)(B)]
 - Determine actual cost to convert into form susceptible of visual or aural comprehension or into usable format. [§ 408-A(7)(A) & (8)(C)]
 - Actual mailing costs. [§ 408-A(8)(E)]
4. No charge for inspection unless public record cannot be inspected without being compiled or converted. [§ 408-A(1) & (8)(D)]
5. Fee notification if cost is greater than \$30.
 - If estimated total cost is greater than \$30, you must inform requester (preferably in writing) before proceeding. [§ 408-A(9)]
6. Fee notification if cost is greater than \$100.
 - If estimated total cost is greater than \$100, requester may be required to pay all or portion of estimated costs before search, retrieval, compiling, conversion & copying.
 - Payment in advance of search, retrieval, compiling, conversion & copying may be required if requester has previously failed to pay properly assessed fee in timely manner. [§ 408-A(9) & (10)]
7. Part or all of the fee may be waived if:
 - Requester is indigent, or
 - The agency determines release of public record requested to be in public interest because doing so is likely to contribute significantly to public understanding of operations or activities of government and is not primarily in commercial interest of requester.

Close the FOAA request

HOW TO CONDUCT A FOAA SEARCH FOR EMAIL

The Freedom of Access Act (FOAA) defines searching, retrieving, compiling, reviewing, redacting and converting as actions an agency or official may charge a requester in responding to a FOAA request. Of all of these activities, the search for records can be the most challenging. Especially with broad or vague FOAA requests for email, figuring out how to proceed with a search that will be complete but not pose an undue burden on the normal operations of staff or officials can be troublesome. A systematic approach that is reasonably calculated to uncover all relevant emails will save time and avoid haphazard results.

The FOAA search is one step in a five-part process that begins with the proper preservation of public records and ends with the timely delivery of a responsive but not confidential subset of documents. To be useful in practice, any protocol for responding to a request for emails should include instructions for the retention, search, assembly, review and production of the records.

Retain: Preserve the entire pool of emails subject to public records law

Email communications in the possession or custody of staff or appointed officials that concern the transaction of government business are public records and must be retained according to state retention schedules. Preservation of public records in a recordkeeping system sanctioned and maintained by the agency ensures control of the public email of both current and former employees and officials. Access to email is obviously hindered by the use of personal email accounts for public business.

Search: Collect raw subset of relevant emails

Clarifying the request with the requester to narrow the time frame, content area and possible staff or officials who may have communications will help make relevant emails easier to find.

Custodians are individuals who are likely to be in possession or custody of emails responsive to the FOAA request. Identification of custodians is crucial to targeting the location of potentially responsive records within the larger pool of emails that have been retained.

After the custodians have been named, their **repositories** containing potentially responsive records are identified. This includes all sources and formats of email and any attachments that may be stored on the local network mail server, in a remote mail server, in a web-based account such as Yahoo or Gmail, or in locally-saved Personal Storage (PST) or individual files.

Once the repositories have been identified, **filter criteria** such as the date range of the request and relevant keywords can be used to winnow out a subset of records that are responsive. The subset of records produced from this initial electronic search will include "hits" that are responsive but also some emails that are outside the request parameters. These raw search results are collected in a working file for the next step in the process.

Assemble: Process the selected emails to create a subset for review

A secondary search is conducted by the custodian to remove nonresponsive emails and duplicates. The review set of responsive emails can then be exported from the custodian to the person designated as the reviewer.

Review: Identify and redact confidential or privileged information

The review set of documents is checked for confidentiality and redactions or denials are marked as appropriate. The subset of responsive, non-confidential emails is prepared for production.

Access: Production of responsive, non-confidential subset of records

The production set of public records is exported or sent to the requester. If the scope of the first production set is too narrow, the criteria for an expanded search can be determined for a subsequent response.

An agency should retain separate files with the production set of public records as well as the confidential records with and without redactions.

How to Conduct a FOAA Search for Email Hands-on Workshop

This hands-on workshop is intended for agency public access officers (FOAA coordinators), as well as anyone else who coordinates or processes FOAA requests for email. It will be scheduled in an agency conference room that has wireless connection. If those outside the Augusta area would like to participate, we can set up a separate remote session via webinar. If you have a laptop computer, bring it. If you don't have a laptop, you'll be paired up with another attendee.

The session is scheduled for 90 minutes – 15 minute introduction, 30 minute demonstration, 30 minute practice, and 15 minute Q&A. Follow-on help is available at your agency on request.

Introduction – Brenda Kielty, Public Access Ombudsman (15 minutes)

- FOAA overview as related to email
- FOAA search 5-part process
 1. **Retain:** Preserve the entire pool of emails subject to public records law
 2. **Search:** Collect raw subset of relevant emails
 - Clarifying the request (timeframe, content area, possible staff/ officials)
 - Custodians who would have emails responsive to the FOAA request
 - Repositories (sources) of potentially responsive records (active mailbox, email archive files, attachments)
 - Filter (search) criteria to find a subset of responsive records
 3. **Assemble:** Process the selected emails to create a subset for review
 4. **Review:** Identify and redact confidential or privileged information
 5. **Access:** Production of responsive, non-confidential subset of records

Demonstration – Eric Stout, OIT Records Officer and e-discovery support (30 minutes)

1. **Retain:** How to find and “attach” email archive PST files – to ensure the search covers the requested timeframe (for prior years, you usually have to search email archive files).
2. **Search:** Current folder (inbox), all other mailbox folders, archive PST files (multiple years) using 2 search terms. Results of both search terms are put into a working folder.
3. **Assemble:** Gather emails from multiple people into a single folder, then “de-duplicate” (squeeze out true duplicates sent to multiple people or the result of multiple search terms).
4. **Review:** Redaction options, including using Adobe Acrobat Pro for electronic redaction.
5. **Access:** Options for producing relevant emails (printed paper, scanning to a PDF file, sending native Outlook messages, or using Adobe Acrobat Pro for totally electronic and redacted files).

Practice – all attendees (30 minutes)

- Each attendee (on their own laptop or sharing with another) will practice what was demonstrated (the 5 steps above).

Q&A (15 minutes)

- Questions about the 5-part process
- Questions about the mechanics of search and assembly of emails

Follow-on help is available at your agency on request.