

New Freedom of Access Act Laws 127th Maine Legislature – First Regular Session

Three bills enacted this session amend the responsive time frames and appeal procedures in the Freedom of Access Act and create a judicial remedy for unduly burdensome requests. The general effective date for non-emergency laws passed in this session is **October 15, 2015**.

Remedy for Unduly Burdensome and Oppressive Requests

LD 1086 – An Act To Implement the Recommendations of the Right To Know Advisory Committee To Create a Remedy for Unduly Burdensome and Oppressive Requests
P.L. 2015 ch. 248

This Act establishes a remedy for those limited situations where a State or local agency is faced with a FOAA request so extensive that it creates an undue burden on the agency. Using the rules of court as a model, this Act provides a parallel to the discovery procedures that allow parties in litigation to seek a protective order limiting their obligations to produce documents on a showing of undue burden or oppression.

Upon a showing of good cause, the court can establish the terms of production and limit or deny the request. If the court finds that the agency or official has not demonstrated good cause, the court shall set a date for production of the responsive records.

File action in Superior Court within 30 days of request
Notice to requester 10 days before filing
Document terms of request, good faith estimate and efforts to clarify or modify

<http://legislature.maine.gov/legis/bills/getDoc.asp?id=49792>

Sec. 1. 1 MRSA §408-A, sub-§4, as amended by PL 2013, c. 350, §2, is further 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, 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 if 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.

Sec. 2. 1 MRSA §408-A, sub-§4-A is enacted to read:

4-A. Action for protection. A body, 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 30 days of receipt of the request.

A. The following information must be included in the complaint if available or provided to the parties and filed with the court no more than 14 days from the filing of the complaint or such other period as the court may order:

(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;

(3) A description of the efforts made by the body, 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; and

(4) Proof that the body, agency or official has submitted a notice of intent to file an action under this subsection to the party requesting the records, dated at least 10 days prior to filing the complaint for an order of protection under this subsection.

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated with an action under this subsection.

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

Deadlines and Appeals

LD 1087 – An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Response Deadlines and Appeals
P.L. 2015, ch. 249

This Act allows agencies to provide a preliminary denial prior to a complete review of records and makes technical changes to the appeal process. Under current Freedom of Access law, an agency or official has 5 working days after receiving a request to issue a written denial. This Act allows an agency to respond within the 5 working day time frame by explaining that some or all of the responsive records are likely to be denied once they are located and reviewed.

Agency or official has 5 working days after receipt of request to deny or state that some or all responsive records may be denied upon review

An appeal can be brought in the Superior Court where either the requester or agency is located, rather than anywhere in the State, which conforms to the APA appeal provision. When an appeal is filed, the agency is required to file a statement of position explaining the basis of its action, as is the case with other appeals of final agency actions, rather than a formal answer (as in civil litigation.) The court is not required to have a “trial de novo,” a concept that has confused everyone because the court is reviewing agency action. Instead, the reviewing court has the

discretion to require testimony and other evidence in considering the merits of an appeal, should that be needed. (This is how the courts have actually handled these appeals.)

<http://legislature.maine.gov/legis/bills/getDoc.asp?id=49775>

Sec. 1. 1 MRSA §408-A, sub-§4, as amended by PL 2013, c. 350, §2, is further 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, within 5 working days of the receipt of the request for inspection or copying, 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, or the expectation that the request will be denied in full or in part following a review.~~ 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, as repealed and replaced by PL 2013, c. 350, §3, 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 ~~as a trial de novo for the county where the person resides or the agency has its principal office.~~ 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 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.

Receipt of a Request for Public Records

LD 1085 – An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Receipt of a Request for Public Records
P.L. 2015, ch. 317

This Act attempts to clarify the responsive time frames already in the law by defining when a request for public records is received by an agency and requiring that an agency with offices in different locations forward a request that is made to an office within that agency that does not maintain the records.

The date a request for public records has been made is the date a “sufficient description” of the record is received by the agency or official at the office that maintains the record. A request for records that are maintained by the agency but not maintained by the office of the agency that received the request must be forwarded to the appropriate office or official within the agency “without willful delay.” The requester must be notified that the request has been forwarded. The forwarded request must be acknowledged by the office to which it was forwarded within 5 working days of receipt.

Date of receipt when “sufficient description” of record received

Request made to department or office within agency must be forwarded to appropriate office or official “without willful delay”

Requester notified that request was forwarded

Request acknowledged by office to which it was forwarded

<http://legislature.maine.gov/legis/bills/getDoc.asp?id=49910>

Sec. 1. 1 MRSA §408-A, sub-§3, as amended by PL 2013, c. 350, §1, is further amended to read:

3. Acknowledgment; clarification; time estimate; cost estimate. The 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 may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is maintained by that agency but is not maintained by the office that received the request shall forward the request to the office of the agency or official that maintains the record, without willful delay, and shall notify the requester that the request has been forwarded and that the office to which the request has been forwarded will acknowledge receipt within 5 working days of receiving the request.

Sec. 2. 1 MRSA §413, sub-§1, as enacted by PL 2011, c. 662, §8, 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 the receipt of the request by the office responsible for maintaining the public record requested 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.