



Attorneys at Law

**TOWN OF WINDHAM
COUNCIL WORKSHOP**

Presented by:

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Right-to-Know Law (officially called the “Freedom of Access Act,” 1 M.R.S.A. §§ 401-412)

I. Public Records (1 M.R.S.A. § 402)

- A. Defined – Any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained that is in possession or custody of a public official (1 M.R.S.A. § 402(3))
 - includes meeting minutes, notes, e-mails, tapes
- B. Exceptions – Records designated confidential by statute (e.g., ambulance and rescue records, general assistance, personnel records, poverty abatement applications), documents subject to a legal privilege such as the attorney-client privilege, collective bargaining negotiation materials, medical records, juvenile records, security plans or risk assessments, or personal contact information of public employees contained with records (1 M.R.S.A. § 402(3)) and certain information contained in communications between constituents and elected officials such as social security numbers, personal history, medical information, disciplinary action proceeding information and e-mail addresses
- C. Meeting Minutes – Not required, but must be open to public inspection if kept, and must keep a “record” of meeting if more than advisory body
- D. Requests for Public Records – Inspection and/or Copying (1 M.R.S.A. § 408)
 - (1) Records must be made available within a reasonable period of time for public inspection and copying
 - (2) No special form for request; request need not be in writing; government may ask for clarification
 - (3) Agency or official must acknowledge receipt of request “within 5 working days” and provide good faith estimate within a reasonable time of receiving request
 - (4) Agency or official can schedule time for inspection/copying during regular business hours and so that it will not delay or inconvenience regular business activities
 - (5) Government may charge a reasonable fee to cover copying, searching, or translation costs, but no more than \$15 an hour for staff time and can collect in advance if estimate over \$100
 - (6) Written notice of denial of a request must be given within 5 business days of request (1 M.R.S.A. § 408(A)(4)) or deemed denied
 - (7) No need to create or summarize records; no need to explain or answer questions about records; no need to honor “standing request” for information
 - (8) Refusal is appealable to Superior Court within 30 calendar days (M.R.S.A. § 409(1))
- E. Required Record Keeping
 - (1) Conditional approval or denial of an application or license (1 M.R.S.A. § 407(1))

- Note:* many other statutes and ordinances require written decisions
- (2) Local Government Record Retention Laws – 5 M.R.S.A. § 95-B
 - (3) Date, time and place of meeting; what members were in attendance and all motions and votes taken, including specifics of any roll call vote for all decision-making bodies
 - (4) Audio or video recording deemed acceptable

II. Public Proceedings

- A. Definition – transaction of any functions of any board, commission, committee, subcommittee, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision (1 M.R.S.A. § 402(2)(C))
 - includes site visits
 - applies to all administrative boards and committees, subcommittees
 - but makes clear in opening paragraph of law that “does not prohibit communications outside of public proceedings between members of a public body” unless used to defeat purposes of the law
- B. Open to public – Unless specifically exempted, all public proceedings must be open to public; okay to be tape recorded or filmed so long as it does not disrupt the proceedings (1 M.R.S.A. § 403)
- C. Public Meeting v. Public Hearing
- D. Can’t conduct meetings by e-mail
- E. Notice of meetings (1 M.R.S.A. § 406) – public notice required if the proceedings are a meeting of a body/agency consisting of three or more members involving conduct of public business
 - (1) No specific means required; must be “disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served”
 - (2) No specific time required; “ample time to allow public attendance” – one day has been held to be sufficient if appropriately communicated
 - (3) Emergency meetings are okay; provide notice to local media whenever practicable by same (or faster) means used to notify members of public body/agency
 - (4) *Note:* Charter, ordinance or statute may dictate more specific notice requirement
- F. Executive sessions (1 M.R.S.A. § 405)
 - (1) Permitted topics – Personnel issues
 - (a) if public discussion could be “reasonably expected” to either damage the person’s reputation or right to privacy
 - (b) person at issue has a right to attend
 - (c) person at issue may request that hearing be held in open session; administrative board must honor such a request
 - (d) any person who has brought charges or made allegations of misconduct against the person also has the right to be present
 - (2) Permitted topics – Issues related to the sale or acquisition of real property, but only if premature disclosure would hurt the governmental entity’s competitive or bargaining position

- (3) Permitted topics – Labor contracts and labor negotiations
- (4) Permitted topics – Meetings with legal counsel concerning pending or anticipated litigation, settlements or other legal rights and responsibilities
- (5) Permitted topics – Discussion of information in documents made, maintained or received by the administrative board where those documents are designated by statute as confidential
- (6) Permitted topics – Meetings with an entity conducting examinations for a municipality for licensing, permitting or employment purposes: may discuss contents of examination or review the examination with the person examined
- (7) Permitted topics – Consultation with CEO regarding any land use enforcement action pending in District Court if the CEO is prosecuting the matter for the municipality
- (8) Prohibited topic - budget

G. Procedures for Executive Session

- (1) Motion must state “precise nature of the business of the executive session”
- (2) Motion must include a statutory citation to the precise section that authorizes the executive session topic
- (3) An executive session on a labor contract must include in the motion the name of the parties (recommended for pending litigation too)
- (4) Motion requires a 3/5 vote of the members present and voting
- (5) Discussion limited to items identified in motion
- (6) No vote or other formal action is permitted in executive session
- (7) Public records do not include documents prepared for use during or notes made in proper executive session

H. Appeals/Violations

- (1) Private suit/appeal to Superior Court – possible attorney’s fees award
- (2) Claim of illegal executive session – governmental entity has the burden to show that session was for a proper purpose allowed under the statute
- (3) Illegal executive session – if any action was taken during the session, it is void
- (4) Willful violation – subject to \$500 penalty; suit must be brought by Attorney General or District Attorney
- (5) Attorney’s fees and expenses – Effective January 1, 2010, attorney’s fees and expenses are available to prevailing Plaintiffs if the denial of public records or conduct of an illegal executive session was taken in bad faith

I. Public Official Training

(see www.maine.gov/foaa/Training/index.shtml)

- (1) All officials elected after July 1, 2008 must complete the training within 120 days after the official takes the oath of office
- (2) Public Access Officer required

J. Public Access Ombudsman office created

CERTIFICATION OF COMPLETION OF
FREEDOM OF ACCESS TRAINING REQUIRED BY 1 M.R.S.A. § 412

I, _____, hereby certify that I have met the training
(Name of elected official)
requirements set forth in 1 M.R.S.A. § 412 on _____ by
(date of training)
completing the following training:

- A thorough review of all of the information made available on the
Frequently Asked Questions portion of the State Freedom of Access
website, www.maine.gov/foaa/faq.
- Another training course that includes this information, identified as follows:

(Title of Course)

(Name of Course Provider)

Dated this _____ day of _____, 200__.

Signature

Printed Name

Elected Office

Note: Training must be completed within 120 days after an elected official takes the oath of
office or, for elected officials serving in office on July 1, 2008, by November 1, 2008.