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State of Maine Freedom of Access Act (FOAA)

As an appointed member to a board or committee you are a representative of the Town of Cape Elizabeth.

Elected officials and appointed board and committee members (advisory, ad hoc, quasi-judicial) must adhere to the State of Maine Freedom of Access Act statutes (FOAA).

1 M.R.S. §401 Declaration of Intent

"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.

This subchapter does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of this subchapter.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent."

The people's business must be transacted in public. Board/committee members may not discuss substantive issues before the board, deliberate, strategize, convince, sway or share information outside of a properly noticed meeting/workshop/forum etc.

What does FOAA cover?

➤ Public Records

Written, printed, graphic or electronic records that are in the possession or custody of an agency or official of State or political subdivisions. The records are received, prepared or contain information related to the transaction of public business.

➤ Public Proceedings

The transaction of any function affecting citizens by one of the covered bodies including subcommittees and task forces.

Public Records

1 M.R.S. §402 (3)

The law contains a broad definition of “public record.” There are exemptions to the law however they are construed narrowly due to public policy in favor of open government.

The length of time a record must be held, see Maine State Archives Rules for Disposition of Local Government Records.

With limited exceptions, public records are open.

- Examples of public records include agendas, minutes/notes (draft and final), reports, correspondence and other related board material.
- Public records also include electronic mail, text messages and other electronic communication.

Board members may be asked to produce public records, related to town business, in response to a FOAA request. All public records would be required to be provided no matter how the correspondence is transferred. For example, if town related business is transacted on a personal computer, using personal email or personal social media it is considered a public record.

Pause before hitting SEND - Remember anything in writing, unless protected by law, is available to the public upon request.

Notes should not be taken in executive session. Even though executive session is not public, if notes are taken they may have to be produced by appropriate order.

Where can a member of the public review board materials?

Board materials are available for inspection in the office of the staff person and most meeting materials are posted on the town’s website.

Is electronic mail, text messages and other electronic communications covered in FOAA?

Yes, if it relates to the transaction of town business, with only limited exceptions, whether it is sent from a personal email account or not or posted from a privately owned computer or not.

Is your social media account a public record?

Yes, if it relates to the transaction of town business whether it is posted from a privately owned computer or not.

Steps to minimize the risk of your social media account as a public record.

- Include a disclaimer that this is a personal account.
- Do not use your title as a board member.
- Do not solicit “friends” or use contacts gained through your duties as a board member.
- Do not reference your site at public meetings or in any official town documents.
- Do not use your site to gain or disseminate information about official town business.

How does a member of the public provide comment or correspondence to a board?

The person may contact the staff person in writing or by phone or email from the town's website. Emails are directed to the staff person to ensure that the record is forwarded to the board, available for public inspection, and that the record is retained as required by statute.

If I receive an email related to the board I serve on what should I do?

Forward the email to the staff person to make certain the email is shared with the full board, available for public inspection, and retained as required by statute.

If a member of the public asks about a matter pending before the board what should I do?

Advisory committees may share date, time, place, agenda and advise the person they may attend the meeting, provide comments and ask questions, watch the meeting on CETV (if applicable) review meeting materials, review/obtain copies of agendas and minutes. It is appropriate to provide information to help the public in obtaining information and keeping them informed.

Boards acting in a quasi-judicial manner should not be discussing matters pending before the board.

If I, as a member of the board, have questions regarding a matter before the board and would like additional information what should I do?

Requests for information are handled through the staff person and chairman. A request may be made at a meeting. If a request is made outside of the meeting the request will be announced at a meeting and the information will be shared with the full board. Note: Information requests by board members will need to be deemed within the purview of the board to collect. Requests of boards beyond their scope may be forwarded to the appropriate body.

Record Retention & Management

Written and electronic communications may create "public records" for the purposes of both access and retention. Access to public records is covered by FOAA and the retention (length of time a record must be kept) is covered by the Rules for Disposition of Local Government Records – Maine State Archives.

The public record (written and electronic) must be retained during your term on the board or commission.

Emails and written correspondence should be organized to make retaining and retrieving them easier.

Public records should be retained during your tenure on the board. To help in the ease of access, create an electronic file for emails received related to your board and files for hard copy correspondence. Sub-folders may be created by subject for ease of access.

Public Access Officer

1 M.R.S. §413 1 M.R.S. § 408-A (8) (A) 1 M.R.S. § 408-A

“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” with regard to requests for public records under this subchapter.

An acknowledgement of the request is required within 5 working days of the receipt of the request and a good faith, nonbinding estimate of how long it will take to comply within a reasonable time of receiving the request.

Fees may be applied including a reasonable fee for copying and time spent for searching for, retrieving, compiling or redacting confidential information from requested records at a rate of \$15.00 per hour after the first hour of staff time per request.

Public Proceedings

1 M.R.S. §402(2)

“Public proceedings” is defined as “the transactions of any functions affecting any or all citizens of the State by any of the following...

C. Any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision...”

“Transactions of any functions affecting any or all citizens of the State...” would not include communicating as to scheduling of meetings, transmitting agendas, minutes, reports or other information gathered by one member to the full board and distributed to board members.

1 M.R.S. §403 Meetings to be open to public; record of meetings

“Except as otherwise provided by statute or by section 405, all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.”

Public attendance is not limited to town residents.

Meetings, including workshops, forums etc. should be held in public buildings.

1 M.R.S. §406 Public Notice

“Public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons...” The reference to 3 or more is the number members of the board, not the number of attendees at the meeting.

The town requires the complete agenda in advance (7 days) of the meeting to give the public notice of the meeting and topics to be discussed.

Boards and committees may decide the need for “informal” sessions such as an orientation session for new members or additional review of a matter before the board. Whether the sessions are offered for the full board or any members wanting to attend or subcommittees they are still considered a meeting and must be properly noticed and held in a public building. The public must be permitted to attend.

Rights of the Public at Meetings

- The public may attend any public proceeding however they may not speak unless the body permits it
- The meeting may be recorded or broadcast but not in a way that interferes with the meeting
- Advance notice of when and where is required even for emergency meetings if practicable
- To challenge in Superior Court, the legality of final actions taken in executive session and have the court declare the action null and void

Each board and committee provides an opportunity for public comment at meetings.

Communications outside of public proceedings between members of a public body are not prohibited in FOAA unless those communications are used to defeat the purposes of this subsection.

Can a Board or Committee Meet Privately?

No, committees and subcommittees must conduct the people’s business in public with limited exceptions for executive session topics. Notice of meeting date, time and place must be given in advance. Members must be present to participate.

Can email or other electronic communications between two or more board members (e.g. text message, social media) be considered a meeting?

Yes, if two or more board members discuss or deliberate the transaction of any business affecting citizens.

When can email be used to communicate between board members?

If the email is limited to non-substantive matters including the scheduling of meetings, one-way dissemination of information or reports, developing agendas and scheduling meetings.

Can a discussion between two or more board members be considered a meeting?

Yes, the same as electronic communications. FOAA does not discriminate based on the medium or way public information is transferred. Communications used to defeat the purposes of FOAA are prohibited.

What should I do if an electronic communication between board members becomes a substantive discussion?

If the communication becomes a discussion please bring it to the attention of the staff person and chairman who will remind board members of the law, request the communication to stop and bring the topic to the full board at a properly noticed meeting.

What should I do if a discussion between board members becomes a substantive discussion?

If you find yourself in a discussion with another board member(s) and you begin to talk about substantive issues of a pending issue before the board, simply stop the line of discussion and bring the topic to the full board at a properly noticed meeting.

Penalties

- ❖ A willful, intentional, or knowing violation of FOAA is subject to a civil penalty of not more than \$500
- ❖ Class D crime to intentionally remove, alter or destroy public records
- ❖ Class E crime to violate the record retention law