

MAINE COMMUNITY COLLEGE SYSTEM

GENERAL ADMINISTRATION

Section 204.1

SUBJECT: FREEDOM OF ACCESS ACT COMPLIANCE

PURPOSE: To provide guidance for complying with the Freedom of Access Act

To guide the colleges and System Office in complying with requests under the Freedom of Access Act, the MCCS adopts the attached guidance.

REFERENCES: 1 M.R.S.A. §401 et seq.; MCCS Policy 204

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Maine Community College System
Understanding and Complying with
Maine’s Freedom of Access Act (FOAA)

Table of Contents

	<u>Page</u>
I. Overview	1
A. What does the Freedom of Access Act require?	1
B. Why does Maine have this law?	1
C. How does FOAA apply to the MCCS?	1
D. Who should handle FOAA requests for the college?	1
E. What if the college is not sure whether to grant or deny access?	2
F. How is FOAA enforced?	2
G. What are the penalties for violating FOAA?	2
H. Is the FOAA the same as the Freedom of Information Act (FOIA)?	2
II. Access to Public Records	2
A. The Basics	2
1. What is a “public record?”	2
2. Are e-mails “public records?”	3
3. Is a record not “public” if it is only a draft?	3
4. What does FOAA require a college to do when it receives a request for records?	3
5. Does FOAA require a college to allow inspection, make copies, or both?	3
6. Does FOAA require the college to mail the requested copies?	3
7. Is a FOAA request the only means for someone to access college records?	3
B. Rules Relating to the Request	4
1. Does the requestor have to be a citizen of Maine or have a certain position or affiliation in order to make a request?	4
2. Is there a form that must be used to make a FOAA request?	4
3. Does the request have to be in writing?	4
4. How specific must the request be?	4

	<u>Page</u>
5. Can the college ask why the person wants a certain record?	4
6. Is the college required to create, summarize or put information in a format that does not already exist?	4
7. Is the college required to translate a record?	5
8. Is the college required to honor a “standing request” for information, such as a request that certain reports be sent automatically each month?	5
C. Rules Relating to Time Limits	5
1. How long does the college have to decide whether to grant or deny access to a requested record?	5
2. If the college is going to provide access, how long does the college have to make the records available?	5
3. Can the college schedule the time for the records to be inspected?	5
D. Rules Governing Denials	5
1. For what reasons can the college deny a request?	5
2. Does a denial have to be in writing?	6
3. Does the college have to state a reason for denying access?	6
4. Can the college grant access to some of the requested information, but deny access to other information that is requested?	6
5. What if a document contains both public and non-public information?	6
E. Records that are <u>Not</u> Public	6
1. Employee information	6
2. Student information	7
3. College information	7

	<u>Page</u>
F. Reimbursing the college for its costs in searching, copying, mailing and/or translating records	8
1. Can a college charge for public records?	8
2. What must a college do to obtain payment?	8
3. Can the college require payment in advance?	8
4. What if the person says they cannot afford the charges?	8
III. Access to Public Meetings	8
A. The Basics	8
1. What is a “public proceeding?”	8
2. Who in the MCCS <u>is</u> covered by this definition?	9
3. Who in the MCCS is <u>not</u> covered by this definition?	9
4. Can the college allow public access to meetings by groups not covered by FOAA?	9
5. What if the college does in fact have a “board, commission or advisory organization” that is in fact “established, authorized or organized by law, resolve or executive order?”	9
B. Rules Regarding the Request	10
1. What does FOAA require for “public proceedings?”	10
2. Does the requestor have to be a citizen of Maine or have a certain position or affiliation in order to attend a public proceeding?	10
3. Can the college ask why the person wants to attend the proceeding?	10
C. Obligation Before a Public Proceeding is Held	10
1. What kind of notice of public proceedings does FOAA require?	10
D. Obligations During a Public Proceeding	10
1. Can a person record a public proceeding?	10
2. What rules can be imposed on persons who want to record a public proceeding?	10

	<u>Page</u>
3. Do members of the public have a right to speak at public meetings under FOAA?	10
4. Is the covered entity required to keep running minutes or a record of a public proceeding?	11
5. Is the covered entity required to make the record or minutes of a public proceeding available to the public?	11
E. The “Executive Session” Exception to “Public Proceedings”	11
1. What is an “executive session?”	11
2. How does an executive session occur?	11
3. Can the entity consider in executive session matters not identified in the motion?	12
4. Is there a limit on the matters that can be discussed in executive session?	12
5. Can an entity vote or take formal action while in executive session?	12

Maine Community College System

Understanding and Complying with Maine’s Freedom of Access Act (FOAA)

I. Overview

A. What does the Freedom of Access Act require?

FOAA requires public entities to allow inspection and/or copying of certain defined “records” (i.e., documents and data), and to allow notice of, and attendance at, certain defined “proceedings” (i.e., meetings). [1 MRSA §401-§410](#). The law does not require public access to every document and/or meeting. On the contrary, state and federal law make many transactions confidential.

B. Why does Maine have this law?

On the one hand, FOAA guarantees some public access because transparency and open decision-making are fundamental principles of democratic government and because these principles are essential to ensuring continued trust and confidence in government. On the other hand, FOAA limits the scope of public access in order to protect legitimate governmental interests and privacy rights of individual citizens. [1 MRSA §401](#).

C. How does FOAA apply to the MCCS?

As regards “public records,” FOAA applies to certain records maintained by “public officials” which includes employees of the MCCS. [1 M.R.S.A. §402](#). Such records, as discussed in more detail below, do not include records designated confidential by statute (e.g., [FERPA](#)); working papers, interoffice and intra-office memoranda used by or prepared for faculty and administrative committees of the MCCS ([1 M.R.S.A. §402\(3\)\(E\)](#)); and certain employee personnel records ([MCCS Policy Manual, section 406\(C\)](#)).

As regards “public proceedings,” FOAA applies to the MCCS Board of Trustees and its committees and subcommittees. [1 M.R.S.A. §402\(2\)\(B\)](#). FOAA does not apply to the “proceedings” of the colleges, their committees or sub-committees, or their foundations.

D. Who should handle FOAA requests for the college?

FOAA requests should be overseen by an employee who understands which records are accessible and which are not in order to ensure that public information is properly disclosed and non-public information is properly kept confidential.

E. What if the college is not sure whether to grant or deny access?

Seek guidance from the MCCS General Counsel. FOAA is to be construed in favor of access, but there are many exceptions to FOAA that protect important privacy interests of the colleges and their employees. It is better to seek advice than to guess wrong.

F. How is FOAA enforced?

If a college denies access to a requested record or meeting, the person making the request may file a complaint, or ask the Office of the Attorney General or the local District Attorney to file a complaint on that person's behalf, in Superior Court. [1 MRSA §409](#).

G. What are the penalties for violating FOAA?

A wrongful denial can jeopardize the good reputation of a college. Moreover, depending upon the type and nature of the violation, a college can be ordered to make the requested information available; ordered to permit attendance and recording of a given meeting; have a prior decision nullified; and/or be ordered to pay a fine of approximately \$500. [1 MRSA §409](#) and [1 MRSA §410](#).

H. Is the FOAA the same as the Freedom of Information Act (FOIA)?

No, although the two names are commonly used interchangeably. FOAA is the name of the state law that applies to our colleges, and FOIA is the name of the federal law that does not, generally speaking, apply to our colleges. FOIA provides for public access to federal agencies and, although in some instances it can have an effect on a state agency's duty to disclose, our colleges' primary concern is compliance with FOAA.

II. Access to Public Records

A. The Basics

1. What is a "public record?"

FOAA defines in [1 M.R.S.A. §402\(3\)](#) a "public record" as:

- a. "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension;"
- b. "in the possession or custody of an employee;"

- c. “received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business;” and
- d. is not otherwise deemed by law to be confidential or exempt. For examples of such exemptions, see *Section II(E)* below.

2. Are e-mails “public records?”

Yes, provided they meet the above definition.

3. Is a record not “public” if it is only a draft?

No; FOAA does not exempt “drafts” from public access.

4. What does FOAA require a college to do when it receives a request for records?

The college shall acknowledge receipt of the request within a reasonable period of time. [1 MRSA §408.](#)

5. Does FOAA require a college to allow inspection, make copies, or both?

FOAA grants the right to both inspect and copy. [1 MRSA §408.](#)

6. Does FOAA require the college to mail the requested copies?

Yes. FOAA provides that “the agency or official shall mail the copy upon request” but may charge an appropriate fee to cover the cost of the copying itself as well as the cost of the mailing. [1 M.R.S.A. §408-A\(2\)\(B\).](#) See Section II, subsection F below for more information on reimbursement and cost protocols.

7. Is a FOAA request the only means for someone to access college records?

No, but it is the primary means for the “public” to get certain records. For example, students may get their “education records” through a “FERPA” (Family Education Rights and Privacy Act) request under [20 USC §1232g](#); employees may get their personnel files through a request under [26 MRSA §631](#); grantors and contractors may get records under a provision of their grant or contract with the college; and other records may be disclosed pursuant to a valid subpoena or litigation discovery request.

B. Rules Relating to the Request

- 1. Does the requestor have to be a citizen of Maine or have a certain position or affiliation in order to make a request?**

No. FOAA provides that “every person” -- regardless of where they live (in or out of Maine) and regardless of their relation to the college -- has a right to see certain information. [1 M.R.S.A. §408\(1\)](#).

- 2. Is there a form that must be used to make a FOAA request?**

No; there are no required forms.

- 3. Does the request have to be in writing?**

No. However, it is both permissible and often advisable to ask individuals to submit their requests in writing in order to maintain a record of when the request was received and what records were specifically requested.

- 4. How specific must the request be?**

FOAA does not require that the request specify the exact information sought, but it is advantageous for both the requestor and the college to do so. Narrow searches take less of the college’s time and are more likely to give the requestor what he or she is seeking. It is lawful for the college to request clarification concerning which record(s) are being requested. The college cannot, however, deny a request because it is too broad. [1 MRSA §408](#).

- 5. Can the college ask why the person wants a certain record?**

Yes, but the person is not required to provide a reason, and the college cannot deny an individual’s request based solely upon either the individual’s refusal to provide a reason or upon the reason itself.

- 6. Is the college required to create, summarize or put information in a format that does not already exist?**

No. The college is not required to prepare reports, summaries or compilations not in existence on the date of the request. Likewise, a college is not required to produce a record in an alternate format if the record can be made available for public inspection and copying in the format in which it exists. Nonetheless, if it is not very burdensome in a particular case to produce data in a new form data that meets the request, it is, as a matter of public service, advisable to do so.

7. Is the college required to translate a record?

Only if the translation is required as a reasonable accommodation under disabilities law (for example, translating a record from visual text to Braille).

8. Is the college required to honor a “standing request” for information, such as a request that certain reports be sent automatically each month?

No. The college is required to make available 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.

C. Rules Relating to Time Limits

1. How long does the college have to decide whether to grant or deny access to a requested record?

The college must determine “within 5 working days” after receiving a request whether the college will comply. [1 M.R.S.A. §408-A\(3\)](#). “Working days” do not include Saturdays, Sundays or legal holidays. The reply to the original request must include a good-faith estimate of any fees that will be associated with copying or otherwise providing the record. [1 M.R.S.A. §408-A\(3\)](#).

2. If the college is going to provide access, how long does the college have to make the records available?

The records must be made available “within a reasonable period of time” after the request is received. [1 M.R.S.A. §408\(1\)](#). In practice, this typically means approximately 10 working days.

3. Can the college schedule the time for the records to be inspected?

Yes. The college can schedule the time for inspection of the records during the college’s “regular business hours,” and at a time that will not “delay or inconvenience the regular activities” of the college. [1 M.R.S.A. §408-A\(5\)](#).

D. Rules Governing Denials

1. For what reasons can the college deny a request?

The college may only deny access to the requested information if the information is excluded from disclosure by FOAA or another law (see section II(E) below).

2. Does a denial have to be in writing?

Yes. If a request is denied in whole or in part, the denial must be made in writing within 5 working days of the date that the request is received. [1 M.R.S.A. §408-A\(4\)](#). [1 M.R.S.A. § 409\(1\)](#).

3. Does the college have to state a reason for denying access?

Yes; the college must provide the reason for its denial in writing. [1 M.R.S.A. §408-A\(4\)](#). [1 M.R.S.A. §409\(1\)](#).

4. Can the college grant access to some of the requested information, but deny access to other information that is requested?

Yes.

5. What if a document contains both public and non-public information?

The document should be disclosed with the non-public information redacted -- that is, covered with White-Out or a black marker -- so it cannot be detected.

E. Records that are Not Public

As noted above, not every college record is subject to public access. On the contrary, both state and federal law designate many of a college's records as confidential and, therefore, not subject to public disclosure under FOAA. [1 M.R.S.A. §402\(3\)\(A\)-\(P\)](#). For example, a college should not permit inspection or provide copies under FOAA of records containing the following information:

1. Employee information

Most, but not all, information about employees is not public. For example, the fact that one is employed by the college, and the facts regarding the employee's current position and salary are not confidential, but all of the following are:

- a. Employee personnel files as defined by [MCCS Policy, Section 406\(C\)](#);
- b. Personal contact information of public employees, such as "home address, home telephone number, home facsimile number, home e-mail address and personal cellular telephone number and personal pager number" under [1 M.R.S.A. §402 \(3\)\(A\)-\(O\)](#);
- c. State Employee Assistance Program information under [5 MRSA §957\(5\)](#);
- d. Maine State Retirement System information under [5 MRSA §17057](#); and

- e. Records, working papers, interoffice and intra-office memoranda used by or prepared for faculty and administrative committees of the MCCS and its colleges under [1 M.R.S.A. §402\(3\)\(E\)](#).

Note that the job applications of persons who have become finalists may be subject to disclosure under [MCCS Policy Manual, Section 405](#). For the content and authorized process of such disclosures, see that Policy.

2. Student information

- a. Student “education records” as defined by the Family Education Rights and Privacy Act, [20 USC §1232g](#) and [34 CFR Part 99](#), and [20-A MRSA §6001](#);
- b. Student immunization records under [20-A MRSA §6357\(1\)](#); and
- c. Student financial aid information under a variety of laws.

3. College information

- a. Records “describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for conduct that is designed to cause serious bodily injury or substantial risk of bodily injury to multiple persons, substantial damage to multiple structures ... or substantial physical damage sufficient to disrupt the normal functioning of a critical infrastructure” under [1 M.R.S.A. §402\(3\)\(L\)](#);
- b. Material relating to negotiations, proposals and analyses “prepared for and used specifically and exclusively” for collective bargaining under [1 M.R.S.A. §402\(3\)\(D\)](#);
- c. Materials related to the “development of positions on legislation” under [1 M.R.S.A. §402\(3\)\(G\)](#);
- d. Materials related to “insurance or insurance-like protection or services” under [1 M.R.S.A. §402\(3\)\(G\)](#);
- e. Records or information describing the “architecture, design, access authentication, encryption or security of information technology infrastructure and systems” under [1 M.R.S.A. §402\(3\)\(M\)](#);
- f. Public improvement construction pre-bid qualification and proposal evaluations managed by the Bureau of General Services under [5 MRSA §1743\(5\)](#) and [§1747\(3\)](#);
- g. Documents subject to a recognized legal privilege such as the attorney-client privilege under [1 M.R.S.A. §402\(3\)\(B\)](#); and

- h. Various workers' compensation insurance, unemployment compensation and Maine Human Rights Act claims information.

F. Reimbursing the college for its costs in searching, copying, mailing and/or translating records

1. Can a college charge for public records?

Yes. A college can assess the following charges:

- a. "a reasonable fee to cover the cost of copying," [1 M.R.S.A. §408-A\(8\)](#);
- b. \$15 per hour after the first hour of staff time per request for the time spent searching for, retrieving and compiling the requested records, [1 M.R.S.A. §408-A\(8\)\(B\)](#);
- c. the actual cost of translation where translation of a record is necessary, [1 M.R.S.A. §408-A\(8\)\(C\)](#); and
- d. actual mailing costs. [1 M.R.S.A. §408-A\(8\)\(E\)](#).

2. What must a college do to obtain payment?

If a college intends to seek reimbursement, the college must first prepare an estimate of the time and cost required to complete a request. If the estimate is greater than \$30, then the college must notify the requester before proceeding. [1 M.R.S.A. §408-A\(9\)](#).

3. Can the college require payment in advance?

Yes, but only if the estimated cost exceeds \$100, or if the requester has previously failed to pay a fee properly assessed under FOAA. [1 M.R.S.A. §408-A\(10\)](#).

4. What if the person says they cannot afford the charges?

The college can, but is not required to, waive some or all of a fee. FOAA suggest that waiver is appropriate if the requester is "indigent," or if the release would "contribute significantly" to public understanding of the operations or activities of the college, and if the requestor's "primary interest" in the records is "non-commercial." [1 M.R.S.A §408-A\(11\)\(B\) & \(C\)](#).

III. Access to Public Meetings

A. The Basics

1. What is a "public proceeding?"

A “public proceeding” means “the transactions of any functions affecting any or all citizens of the State” by a “board, commission or advisory organization” that is “established, authorized or organized by law, resolve or executive order.” [1 M.R.S.A. §402.](#)

2. Who in the MCCS is covered by this definition?

FOAA applies to meetings of the MCCS Board of Trustees and its committees and subcommittees. [1 M.R.S.A. §402\(2\)\(B\).](#)

3. Who in the MCCS is not covered by this definition?

FOAA does not cover meetings within the colleges. Even if their work involves “the transactions of any functions affecting any or all citizens of the State,” the colleges are not a “board, commission or advisory organization” that is “established, authorized or organized by law, resolve or executive order.” They exist simply by internal, voluntary act and are not, therefore, covered by the law. As a result, meetings by the following are not subject to FOAA:

- a. college committees and sub-committees;
- b. college departments;
- c. faculty senate;
- d. student senate;
- e. student clubs;
- f. college management teams;
- g. college foundations; and/or
- h. college alumni organizations.

4. Can the college allow public access to meetings by groups not covered by FOAA?

Yes, but the group should not discuss in that public meeting non-public information identified in Section II(E) above.

5. What if the college does in fact have a “board, commission or advisory organization” that is in fact “established, authorized or organized by law, resolve or executive order?”

Then that group’s meetings would be subject to the following rules under FOAA.

B. Rules Regarding the Request

1. What does FOAA require for “public proceedings?”

FOAA requires all “public proceedings to be open to the public” and that “any person must be permitted to attend.” [1 M.R.S.A. §403](#).

2. Does the requestor have to be a citizen of Maine or have a certain position or affiliation in order to attend a public proceeding?

No. Again, FOAA provides that “every person” -- regardless of where they live (in or out of Maine) and regardless of their relation to the college -- has a right to attend a public proceeding. [1 M.R.S.A. §408\(1\)](#).

3. Can the college ask why the person wants to attend the proceeding?

Yes, but the person is not required to provide their reason for attending, and the college cannot deny an individual’s request based solely upon either the individual’s refusal to provide a reason or upon the reason itself.

C. Obligation Before a Public Proceeding is Held

1. What kind of notice of public proceedings does FOAA require?

Public notice must be given for all public proceedings if the proceedings are a meeting of 3 or more persons of the covered entity. The notice must be given “in ample time to allow public attendance” and must be “disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served” by the entity. [1 M.R.S.A. §406](#).

D. Obligations during a Public Proceeding

1. Can a person record a public proceeding?

Yes. FOAA allows individuals to make, with their own materials or equipment, a “written, taped or filmed record” of a public proceeding, or to “broadcast the proceedings live.” [1 M.R.S.A. §404](#).

2. What rules can be imposed on persons who want to record a public proceeding?

The entity can make reasonable rules or regulations to preserve the “orderly conduct” of its proceedings so long as such rules or regulations “do not defeat the purpose” of FOAA. [1 M.R.S.A. §404](#).

3. Do members of the public have a right to speak at public meetings under FOAA?

No. FOAA does not require that an opportunity for public participation be provided at open meetings, although many public entities choose to permit public participation. An entity can also adopt rules to ensure meetings are “conducted in a fair and orderly manner” (e.g., time limits for each speaker).

4. Is the covered entity required to keep running minutes or a record of a public proceeding?

No, but FOAA does require a written record of every decision that involves the conditional approval or denial of an application, license, certificate or permit, and every decision that involves the dismissal or refusal to renew the contract of any public official, employee or appointee, as well as the date, time, and location of the proceeding, a list of those present at the proceeding, and a record of all votes taken at the proceeding. [1 M.R.S.A. §407\(1\) and \(2\)](#).

If the public proceeding is an “adjudicatory proceeding” as defined in the Maine Administrative Procedure Act, the covered entity is required to compile a record that complies with statutory specifications, including a recording in a form susceptible of transcription. [5 M.R.S.A. §8002 \(1\)](#) and [§9059](#).

5. Is the covered entity required to make the record or minutes of a public proceeding available to the public?

Yes. Any legally required record or minutes of a public proceeding must be made promptly and later available for public inspection. [1 M.R.S.A. §403](#) and [§407](#); [5 M.R.S.A. §9059\(3\)](#).

E. The “Executive Session” Exception to “Public Proceedings”

An important exception to the public proceedings provision of FOAA covers the “executive sessions” of a covered entity.

1. What is an “executive session”?

An executive session is a closed meeting of a covered entity, held to discuss certain limited subjects.

2. How does an executive session occur?

A member of the entity must make a motion to go into executive session. That motion must indicate the precise nature of the business of the executive session, and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. The entity must then pass the motion by at least 3/5th of the members present and voting in a publicly recorded vote. [1 M.R.S.A. §405\(1\)-\(5\)](#).

3. Can the entity consider in executive session matters not identified in the motion?

No. No matters other than those identified in the motion may be considered in that particular executive session. [1 M.R.S.A. §405\(1\)-\(5\)](#).

4. Is there a limit on the matters that can be discussed in executive session?

Yes. The subjects are restricted to those listed in [1 M.R.S.A. §405](#) and they include, for example, discussions regarding the:

- a. Suspension or expulsion of a student;
- b. Employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an employee(s), or the investigation or hearing of charges or complaints against such employee(s) (but excluding discussion of budget proposal(s));
- c. Acquisition, use or disposition of public property;
- d. Consultations between the entity and its attorney concerning the entity's legal rights and responsibilities or pending litigation;
- e. Discussion of labor contracts, proposals and/or meetings between the entity and its negotiators; and
- f. Discussion of other matters that are by law otherwise confidential.

5. Can an entity vote or take formal action while in executive session?

No. An entity cannot give final approval to a rule, resolution, regulation, contract, appointment or other official actions in executive sessions. [1 M.R.S.A. §405\(2\) and \(6\)](#).