



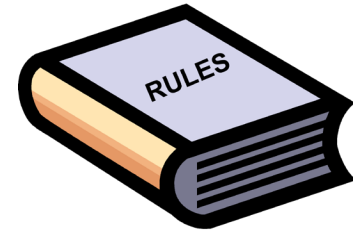
Municipal Law for Clerks

Chapter 3

Access to Public Records & Proceedings



Resources



- Municipal Clerk's Manual, revised in 2013
- Maine Municipal Association Legal Staff
- Maine Revised Statutes (MRSA)
- Public Access Ombudsman, Office of the Attorney General
- Local Government Records Disposition Schedule
- MTCCA Records Management Class
- Clerk mentors



Public Record Defined

- A public record is defined as virtually any piece of information that is in the possession or custody of an agency or public official and has been received or prepared for use in connection with the transaction of public or governmental business, or contains information relating to the transaction of governmental business, with certain exceptions.



Public Records Exceptions

- Only those records that have been specifically excepted by law may be withheld from the public:
 - Records that have been designated as confidential by statute
 - Records that would be within the scope of privilege against discovery or used as evidence recognized by the courts if the records were sought in the course of a court proceeding
 - Material prepared for and used specifically in preparation for negotiations in collective bargaining situations



Application of Confidentiality Exceptions



- It can be difficult to determine whether a record can be released or whether it is confidential.
 - Not releasing a public record can result in a violation of the Right to Know Law
 - Releasing a confidential record can result in personal liability



Public Proceeding Defined

- Any meeting of any board, commission, agency or authority of any municipality, school district, or any other regional or other political or administrative subdivision at which the transaction of any function affecting any of all citizens of the state is conducted.
- Generally, any municipally authorized board or committee consisting of 3 or more persons.
- This applies not only to regularly scheduled meetings, but also to work sessions, workshops, strategy meetings and other informal meetings, even if no decisions will be made.



Access vs Participation



- The law gives the right for the public to attend a public proceeding, but does not provide a right to participate in the meeting.
- Other than public hearings, the body conducting a public proceeding retains the right to control when and how much public participation is allowed, if at all.



FOIA/FOAA/Right-to-Know

- Go to:
<http://legislature.maine.gov/legis/statutes/1/title1ch13.pdf> to print out the most recent version of statutes relating to public records and proceedings



1 MRSA 402.3

Public Record Defined



- 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, that is in the possession or custody of an agency...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, with exceptions.



1 MRSA 403.1

Meetings Open to the Public

- Except as otherwise provided by statute, or by Section 405 regarding Executive Sessions, all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.



1 MRSA 403.2

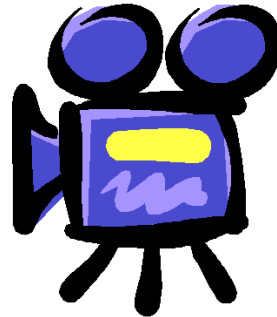
Record of Public Proceedings

- A record of each public proceeding for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and must be open to public inspection. At a minimum, the record must include:
 - The date, time and place of the public proceeding
 - The members of the body holding the public proceeding recorded as either present or absent
 - All motions and votes taken, by individual member, if there is a roll call



1 MRSA 404

Recorded or Live Broadcasts Authorized



- All persons shall be entitled to attend public proceedings and to make written, taped or filmed records of the proceedings, or to live broadcast the same, provided that the writing, taping, filming or broadcasting does not interfere with the orderly conduct of proceedings.
- The body or governing agency may make reasonable rules and regulations governing these activities, so long as these rules do not defeat the purpose of the statute



1 MRSA 405

Executive Sessions



- An executive session may not be used to defeat the purposes of the FOAA statutes
- An ordinance, order, rule, resolution, regulation, contract, appointment or other official action may not be finally approved at an executive session
- An executive session may be called only by a public, recorded vote of 3/5 of the members, present and voting
- The motion to go into executive session must indicate the precise nature of the business and include a citation of one or more sources of statutory authority that permits an executive session for that business
- Matters not contained in the motion may not be considered in that executive session
- Deliberation on only limited matters may be conducted during executive session



1 MRSA 406(6)

- Permitted deliberations during executive session:
 - Personnel matters
 - Suspension or expulsion of a public school student
 - Acquisition of real property or economic development
 - Labor negotiations
 - Consultations with legal counsel
 - Discussion of confidential records
 - Discussion of examination results
 - Consultation with code enforcement officer on pending enforcement matter in District Court



MMA's Cheat Sheet

Executive Session Motion Citations – A Quick Guide

As MMA Legal Services explained in the May and December 2004 *Maine Townsman Legal Notes*, effective July 30, 2004, every motion to go into executive session must “include a citation of one or more sources of statutory authority or other authority that permits as executive session for that business.” 1 M.R.S.A. § 405(4). This is in addition to the longstanding requirement that the motion “indicate the precise nature of the business of the executive session.”

The December 2004 Legal Note contains a sample motion to go into executive session to discuss a personnel matter. (“I move that the board go into executive session pursuant to 1 M.R.S.A. § 405(6)(A) to discuss the appointment of a new town manager.” This motion identifies both the subject matter of the discussion and the statute that authorizes it to be discussed in executive session. It is specific enough to enable the public (and the board) to determine that the executive session is lawful, without revealing so much that the purpose of the executive session is compromised.) However, what citation do you use if your board or commission needs to go into executive session for any other reason? See below for a quick guide to statutory citations to help you properly move to go into executive session.

Reason for Executive Session	Statutory Citation
Personnel Matters	1 M.R.S.A. § 405(6)(A)
Suspension or expulsion of a public school student	1 M.R.S.A. § 405(6)(B)
Acquisition of real property or economic development	1 M.R.S.A. § 405(6)(C)
Labor negotiations	1 M.R.S.A. § 405(6)(D)
Consultations with legal counsel	1 M.R.S.A. § 405(6)(E)
Discussion of confidential records	1 M.R.S.A. § 405(6)(F)

(However, this section of the Freedom of Access Act at present does not also reference each of the State laws that make these records confidential, and this reference should be added to make the citation complete. Legislative staff is supposed to prepare a bill for the Legislature to enact that will list all of these records that are made confidential by statute, but until such an amendment is passed, consult your municipal attorney or MMA Legal Services for the legal citation to the statute that makes a particular record confidential.)

Discussion of examination results	1 M.R.S.A. § 405(6)(G)
Consultation with code enforcement officer on pending enforcement matter in District Court	1 M.R.S.A. § 405(6)(H)



1 MRSA 406

Public Notice

- Public notice shall be given for all public proceedings, if these proceedings are a meeting of a body consisting of 3 or more persons. The notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public.
- In the event of an emergency meeting, local media shall be notified of the meeting, whenever practical, to include the time and place by the same or faster means used to notify the members of the agency conducting the public meeting.

IMPORTANT NOTICE



1 MRSA 407

Decisions



- Every agency shall make a written record of every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit, including the reasons for the decision and make findings of fact on the basis for the decision. A written record or copy shall be kept and made available to any interested member of the public.
- Every agency shall make a written record of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee. The decision shall set forth in the record the reasons for its decision and make findings of fact, in writing, sufficient to apprise the individual concerned and any interested member of the public of the basis for the decision. A written record or copy shall be kept and made available to any interested member of the public.



1 MRSA 408-A

Public Records Available for Inspection and Copying

1. A person may inspect any public record during reasonable office hours, with no fee charged.
2. A person may copy a public record in the office of the agency during reasonable office hours or may request that the agency provide a copy. A fee may be charged.
3. The agency shall acknowledge receipt of a record request within 5 working days of receiving the request, and may request clarification of the request, which extends the date received to be the date clarification is received. Within a reasonable period of time after receiving the request, the agency shall provide a good faith estimate of the time in which the agency will comply with the request.
4. If an agency refuses permission to inspect or copy a record, the agency shall provide written notice of the denial, stating the reason for the denial, within 5 working days of receiving the request.



1 408-A

Public Records Available for Inspection and Copying

5. Inspection and copying of a public record may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency. If the agency does not have regular office hours, the name and telephone number of a contact person authorized to provide access must be posted in a conspicuous public place and at the office of the agency, if one exists.
6. An agency is not required to create a record that does not exist.
7. An agency of a public record shall provide access to an electronically stored public record either as a printed document or in the medium in which the record is stored, at the requester's option, except that access is not required if the agency does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.



1 408-A

Public Records Available for Inspection and Copying

8. The agency may charge a reasonable fee to cover the costs of copying records, to cover the actual cost of searching for, retrieving, compiling and redacting the requested records of not more than \$15 per hour after the first hour of staff time, to convert a public record into usable format, and mailing costs.

9. The agency shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimated cost is more than \$30, the agency shall notify the requestor before proceeding.

10. The agency may require the requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the records if the estimated total cost exceeds \$100, or the requester has previously failed to pay a fee for a previous record request.

11. The agency may waive all or part of the fee if the requester is indigent, or if it is considered the release of the public record to be in the public interest so as to contribute significantly to public understanding of the activities of the government.



1 MRSA 409

Appeals



1. Any person aggrieved by a denial to inspect or copy a record may appeal the denial within 30 calendar days of the written notice of denial to the Superior Court within the State or in the county where the person resides or the agency has its principal office. The agency shall file a statement of position explaining the basis for denial within 14 calendar days of service of the appeal.
2. If an agency approved an ordinance, order, rule, resolution, regulation, contract appointment or other official action in an executive session, this action is illegal and the officials responsible are subject to penalty. A court may rule the action to be null and void.
3. Legal proceedings authorized in this section are not exclusive of any other civil remedy provided by law.
4. The court may award reasonable attorney's fees and litigation expenses to a prevailing plaintiff who appealed the denial, if the court determines that the refusal was done in bad faith.



1 MRSA 410 Violations

- For every willful violation, the local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 be adjudged.



1 MRSA 413

Public Access Officer

- Each agency, municipality or school administrative unit shall designate an existing employee as its public access officer to serve as the contact person with regard to requests for public records.



Test your knowledge

- The definition of a public record
- Exceptions to public records
- The definition of a public proceeding
- Where to find the current FOIA statute
- Executive Sessions
- Access to public records



Thank You



- You have reached the end of Module 3 of Municipal Law for Clerks.
- For specific questions on any topic in this module, please contact the legal department at Maine Municipal Association, your town's attorney, or a clerk mentor.
- Please print this final page as proof of completion of this module.
- You may submit this final page to MMA along with the other ten modules' completion pages to obtain a certificate to be used for certification points.

