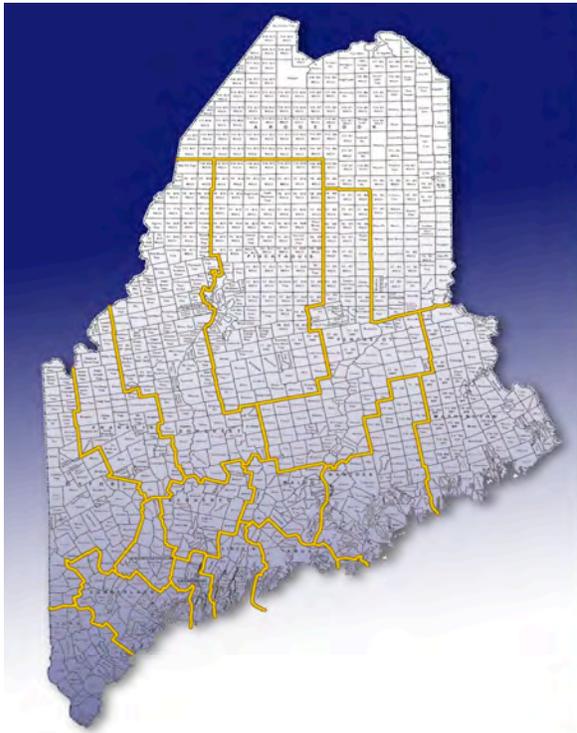




## Maine Freedom of Information Coalition

ENSURING THE RIGHT OF MAINE'S PEOPLE TO ACCESS GOVERNMENT RECORDS AND MEETINGS.

P.O. Box 232 • Augusta, ME 04332-0232 • [info@mfoic.org](mailto:info@mfoic.org)



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## Report on Public Records Follow-up Audit

Conducted May 3, 2006

*A project of the Maine Freedom of Information Coalition, Maine Press Association,  
Maine Association of Broadcasters and the Associated Press*

### Audit Partners

• Maine Freedom of Information Coalition • National Freedom of Information Coalition •  
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• Waterville Morning Sentinel • League of Women Voters of Maine •

# Maine Freedom of Information Coalition

*A message from the President*

Fundamental to democracy is freedom of speech, open meetings of government and access to public records. Mainers have a long history of open government with many towns still holding annual town meetings where open debate and discussion are the rule.

Mainers also recognized that with change and growth, the long traditions of openness needed protection in law and, in 1959, the Legislature enacted a strong freedom of access law. The law stated all meetings are open and all records are public, unless there is a specific exception.

Since then, lawmakers have passed over 500 exceptions to the law. In November of 2002, the Maine Freedom of Information Coalition conducted a statewide public records audit to find out how well government agencies complied with the law. The results were mixed.

The Legislature recognized the problems highlighted by the audit and established a study committee that recommended a more rigorous review of proposed exceptions and a systematic review of all existing exceptions. Lawmakers adopted those proposals in 2003 and, earlier this year, enacted legislation creating a permanent advisory committee on access issues.

This follow up audit was conducted in May and, while there has been some improvement, it indicates there are still compliance problems all across the state.

We hope you will take the time to read this report and join with us in urging further reforms that will guarantee that the democratic process in Maine is open and accessible.

*Mal Leary, President  
Maine Freedom of Information Coalition  
July 3, 2006*

# Maine Freedom of Information Coalition Report on Follow-up Public Records Audit

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## **Why conduct a follow-up public records audit in Maine?**

A public records audit is a test of government compliance with public access laws, otherwise known as sunshine laws or right-to-know laws. Auditors conduct unannounced visits to government offices and ask to view documents that are public under state statute or public under other ruling.

In 1978, the Maine Press Association conducted an audit specifically testing compliance of police and county sheriffs' departments. That audit, which found most police departments maintain "positive rapport" with members of the press, also found that Maine "lacks a uniform system for recording the activities of police officers on duty." Auditors found that each department set its own policy when it came to press access, and the MPA has since worked to force clarification of and adherence to freedom of information laws.

In 2002, the Maine Freedom of Information Coalition, along with a host of friends-of-FOI partners, conducted Maine's first statewide public records audit to test compliance to Maine's Freedom of Access Act in school districts, police departments and town offices. The results of that audit were mixed:

- 66.2 percent of police departments complied with requests to view daily police logs;
- 67.1 percent of school districts complied with requests to view superintendents' contracts; and
- 47 percent of town offices complied with requests to view expense reports of the highest elected official.

As a result of that audit, which showed compliance to the law was not as good as it could be, the Legislature updated and strengthened Maine's FOA. There has also been a real push in government statewide to educate elected and appointed officials and government employees on the requirements of government to grant public access to information, including a new state-hosted Web site on freedom of access (<http://www.maine.gov/foaa/>).

To test that educational effort, the Maine FOI Coalition conducted a follow-up audit to its 2002 test on May 3, 2006. The results of that follow-up audit are contained in this report.

## **Structure and mission of the Maine Freedom of Information Coalition**

The Maine Freedom of Information Coalition was incorporated in January 2001 as a nonprofit affiliation of media, public interest, academic, government and private organizations that share an interest in protecting access to public information. In cases where public access to government is being denied without cause, the Coalition works to open records and discourage closed-door meetings.

The Coalition believes that government best serves the public when it operates in the most open manner possible. Members strive to inform the public, to the fullest extent possible, about government actions. Government, in the sunshine, the Coalition believes, is the best guarantor of a strong democracy.

To that end, the Coalition works with government to educate elected and appointed officials about Maine's public information laws and works with the public to educate citizens on their right to government information and how to exercise that right.

The Coalition truly represents a cross-section of freedom of information interests. Its members are: the League of Women Voters of Maine, Natural Resources Council of Maine, Maine Press Association, Maine Librarians' Association, Maine Daily Newspaper Publishers Association, Society of Professional Journalists, Maine Association of Broadcasters, Maine Common Cause, Sportsman's Alliance of Maine, Maine Civil Liberties Union, Maine Trial Lawyers Association, land surveyors, freelance writers, environmentalists, attorneys and other private citizens.

What members have found is that when requests for access to public information are denied, it is usually because the office clerk or desk sergeant doesn't understand the law. The major reason the Coalition decided to launch a public records audit in 2002 and then follow up in 2006 is because its members fully believe that the lasting impact of these audits will be that public officials and citizens will become more familiar with the existence of access laws and will learn how to use them. The impact of knowing how the law works may make people more comfortable with public officials and may prompt greater involvement with government.

### **Overview of audit protocol and scope of project**

The May 2006 audit was modeled after several successful projects in other states, including Indiana, New Jersey, Connecticut, Missouri and California. (A complete list of public records audits done throughout the nation in recent years can be accessed at [www.citizenaccess.org](http://www.citizenaccess.org).)

The Maine FOIC adopted protocol used by the Newhouse School at Syracuse University. There, students conduct an access audit every spring as part of their coursework in communications law classes and the results are reported by local media.

As this follow-up public records audit was intended to collect data to prove or disprove whether recent educational efforts at the municipal level have increased ease of public access to government, the Maine FOIC attempted to collect a representative sample – about half the size of the original audit – in a

single day. With the help of 50 volunteers (17 press and 33 non-press volunteers), the Coalition scheduled visits to 89 town offices, 40 police departments and 44 school superintendents' offices for Wednesday, May 3, 2006.

Auditors were instructed to conduct their visits as early in the day as possible to give public officials time to respond to our requests, and auditors were also instructed to be ready to return to offices if documents were not immediately available but would be made available later in the day.

The Coalition selected ordinary documents that citizens might reasonably ask for anywhere in the state, documents that should be on file and easily accessible to public officials. The audit was not intended to gather information contained in those records as much as it was to simply gain access to public documents and gauge the cost for copying these records.

With the help of attorney Sigmund Schutz of Preti, Flaherty, the Coalition selected four records for on-site inspection. At town offices, auditors asked to view an accounting of all attorneys' fees paid in 2005 and tax liens (not discharged) in effect on May 3. At school departments, auditors asked to view a copy of each district's crisis response plan, required under Title 20-A, §1001. And, at police departments, auditors asked to view a copy of the department's pursuit policy, required under Title 25, §2803-B, sub-§1, paragraph F.

Each auditor was provided with an assignment packet that included a map, street address and office phone number of the office to be visited, a description of the document sought, audit protocol and a sample script (copies of the protocol and script are appended). Once the visit was made, auditors were asked to complete an evaluation form that detailed the location of the stop, the document sought, and the response to their request. (A copy of the evaluation form is appended.) The results recorded on those forms have been used to create the accompanying spreadsheet (in Excel format) detailing the response of public officials.

- Of the 114 police departments in Maine, the Coalition audited 40 departments, or 35 percent of all police departments.

- Of the 489 cities, towns, villages and unorganized townships in Maine, 89 were selected for auditing, or 18 percent of all municipal offices.

- Of the 177 school districts, school administrative districts, unions and consolidated school districts in Maine, 44 were selected for auditing, or 24 percent of all districts.

In addition to the on-site visits, a mailing was sent out in early May to 270 town offices (towns which had administrators or managers) with a written request for copies of the last three e-mail messages that the town administrator or city manager received before noon on Friday, May 5. Included with the request was a stamped, self-addressed envelope and \$1 in cash to pay for a photocopy. Of those requests, 166 towns, or 61.25 percent, provided the requested documentation.

## Maine Freedom of Access Law

The Freedom of Access law applies to the activities of: The Maine State Legislature and all of its committees and subcommittees; any board or commission of any state agency or authority, including the Boards of Trustees of the University of Maine, the Maine Vocational Technical Institute system, and the Maine Maritime Academy; and any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision.

When the law was enacted in 1959, well before other states adopted this kind of legislation, the Maine Legislature made it clear that the law was written to ensure that public business be conducted openly and the law was to be “liberally construed.”

### **Title 1, Maine Revised Statutes, Sections 401-410: Public Records and Proceedings**

#### *Sec. 401. Declaration of public policy; rules of construction*

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

People may view or obtain records of minutes or other documentation of public meetings required to be kept by law and any other record actually made (whether or not required), except the record of a lawful executive session.

A public record is defined as “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 to actual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, 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 public or governmental business.” There are a host of exceptions of the public records definition, but each exception is designated by statute. If not so designated, documents held by public officials are open to inspection.

There is no language in the law that requires public records to be in “final” form to be viewed, so draft documents fall under the definition of public records.

There is no language in the law defining when access to public documents is to be granted, which means people do not have to wait for access without good reason. Public officials certainly are permitted to consider requests and get legal advice on whether the request is proper, but generally courts have supported the concept that access is to be granted when asked. If not granted within five days, courts consider inaction to be a denial of access.

If someone is denied access to public records they should obtain a written denial of their request. That document must sufficiently explain the reason for denial and must be made within five working days of the request for access to a public document. If, after reviewing the written denial, a person feels the denial was based on insufficient grounds or contrary to Maine law, the denial may be appealed to any superior court in Maine.

Since the 2002 public records audit, the Legislature has updated Maine's FOAA to:

- Require all law enforcement agencies to adopt written freedom of information policies;
- Require all government bodies to state the precise statute under which a body votes to move into executive session;
- Restrict government bodies to charging "reasonable" fees for photocopies;
- Require government to provide access to public records within a "reasonable" period of time;
- Limit government fees to provide public documents to no charge for the first hour of staff time and capped at \$10 per hour for staff time thereafter;
- Require the Legislature to review each exception written into Maine's FOAA every 10 years to determine if the exceptions should be continued, modified or repealed; and
- Establish a permanent legislative Freedom of Information Advisory Commission to serve as a resource for ensuring compliance with the state's FOAA.

For more information about Maine's Freedom of Access Law, including the full text of the law, log on to <http://www.mfoic.org/law.htm> (for specific page or [www.mfoic.org](http://www.mfoic.org) for general site).

## **Response and compliance of municipal offices**

### **On-site visits**

The Coalition selected 89 of Maine's 489 town offices for on-site visits.

Of those audited, town office compliance to requests to view undischarged tax liens was the least successful. Only 53 of the 89 offices audited (59 percent) permitted access to those tax liens. Of those that permitted access, 23 percent required auditors to produce identification and 37 percent asked auditors why they wanted to see the information.

On Audit Day, William Shane, town manager in Cumberland, sent an e-mail message out on

the Maine Municipal Association listserv, with the subject line “AP Sting Operation – Freedom of Information,” alerting his peers in municipal government that:

*Late this afternoon a reporter from the Associated Press Office was in our Town Hall asking Clerks and Admin Staff for specific Town Documents:*

*Tax Liens – (nothing specific, very general)*

*Legal Budgets for last year*

*And Police Information.*

*Fortunately, my staff provided the information without incident and the gentlemen divulged his affiliation and thanked us for our cooperation.*

*Just a heads up!*

*Bill*

In the days following Shane’s message, town managers in Lamoine, Naples, Farmington, Bridgton, Windham, Gorham, Hampden, Union, Readfield, St. Agatha, Guilford, Mechanic Falls and others responded that they, too, received requests for e-mails of May 5.

Despite the knowledge that an audit was being conducted, when asked to view copies of attorney’s fees paid in 2005, only 65 percent of requests were honored. Of those, 26 percent of auditors were required to produce identification and 32 percent of auditors were required to state a reason for access to the information.

In most cases, though, the identification and intent for the information was asked out of curiosity and not a requirement for access.

Maine law allows access to public records to any “person.” It makes no requirement that a person identify themselves or state a reason for the request for access to public documents.

The Maine Municipal Association offers training in right-to-know laws regularly because municipal boards turn over so frequently. Training is offered at county-based elected officials workshops and there are sample policies available for towns to adopt. The association also has an FOI information packet that is mailed to all members (all towns are members of the association) and staff attorneys are available for legal advice by phone during normal business hours.

There is no requirement that municipal officials take the training, but it is recommended.

In most cases, auditors included comments about their visits on their evaluation forms. Below are samples of those comments:

• **Gray, access denied:** “Employee said I had to put my request (for attorney’s fees) in writing per FOAA.”

• **Eddington, access denied:** “Employees were rude when I asked for documents. They wanted to know why and made me feel like I should not request the info.”

• **Old Orchard Beach, access granted:** Auditor was charged \$12.50 to view requested records. The charge on the receipt was identified as “miscellaneous.”

• **Madison, access denied:** “Bookkeeper seemed a bit put out by the legal fee request.”

- **Scarborough, access granted:** “Seemed to be right on top of right-to-know with form and internal process. Friday, May 5, called to say records were ready. Picked up. No fee.”
- **Westbrook, access granted:** “Asked to identify only by name. I gave the office my personal e-mail address and asked that finance director would send me info upon return. The office agreed to do it.”
- **Carmel, access granted:** “The woman brought it (attorney’s fees) right up on her computer and printed it out without me even asking.”
- **New Sharon, access granted:** “(Asked for identification) but only AFTER providing the information. She asked “just out of curiosity, what do you need this for?” But it wasn’t antagonistic at all. Clerk sent me to the treasurer’s home to get the info.”
- **Hampden, access granted:** “Employee wasn’t sure if the information (on attorney’s fees) was open to the public. He asked Town Manager who offered all the info.”
- **Lewiston, access granted:** “When asked to identify myself, I responded with ‘do I need to provide that info’ and they answered ‘yes.’”
- **Cornish, access denied:** “Hiram clerk called to warn Cornish clerk while I was there, apparently suggested she should not produce liens.”
- **Frankfort, access denied:** “Clerk would not supply records (on tax liens) without being told why. In addition, made me uncomfortable with continuous questioning.”

## Mailed requests

MFOIC volunteers compiled a mailing to 270 municipal offices in Maine, selected because they have a town manager/town administrator form of government, asking for copies of “the last three e-mail messages that your town or city manager/administrator received before noon on Friday, May 5. Those emails should concern municipal business. There is no need to include attachments.”

The letter, which was mailed in early May with a request for return by May 17, contained a stamped self-addressed envelope and \$1 to pay for a photocopy, designed to invite compliance.

Of the 270 letters mailed, 166 generated responses (123 offices sent print copies of e-mails and 43 offices forwarded messages electronically), for a 61 percent compliance rate. The remaining town offices, or 39 percent of the sample, never responded to the request.

Denmark is counted as not complying with our request. The town’s response was that it deleted our e-mail request because it “doesn’t open any e-mails unless they know the sender.” The request was not submitted by e-mail, but by regular mail, so the town’s response is curious.

Machias did not comply with our request, noting that it deletes e-mails daily and could not access any e-mails of May 5.

As noted previously in this report, municipal clerks were aware of the audit on May 3 and shared information about whether they intended to comply with our requests.

In Mechanic Falls, Town Manager Dana Lee was eager to comply. In his posting on the MMA listserv, he wrote "Mechanic Falls received its request. We pocketed the buck, but sent her free passes to the Blackfly Festival."

In Bridgton, Town Manager Mitchell Berkowitz wrote: "We just received their letter, responded with three hard copies and a receipt for the Dollar. We decided to be consistent with all FOA's."

In Hampden, Town Manager Sue Lessard wrote: "They stopped by several times in Hampden – once for tax liens and legal fees and then later in the afternoon another person for birth/death records. The only difficulty that we ever have with these things is that the people that they use to ask for information don't know what they are asking for so it takes some time to figure out what they actually want."

What's interesting about Lessard's comments is that the MFOIC did not send auditors to ask for birth/death records. That request was made by a private individual and has no connection to this audit.

And, since this is clearly a peer-only listserv where comments fly freely, Guilford Town Manager Tom Goulette wrote: "Got my request this morning after a few days out of the office. Memory hasn't left me completely and I recognized the name. After digging through an old file, I find that this is the same person who sent a request on November 6, 2002 asking for a copy of my latest board of selectmen's minutes. The Right-to-know police aren't very original."

Guilford did comply with the request and submitted the e-mails electronically.

In Island Falls, Town Clerk Cheryl McNally declined to provide the e-mail messages, saying "appreciate what you are trying to do, but I am sorry to inform you that the emails I have are not information I care to copy."

And, in Mount Vernon, the town manager responded that: "We received 3 spam ads for sexual aids today. I got the only town related e-mail in the last 2 weeks. It asked for a sign for a private road."

According to the Maine State Archives and the Attorney General's Office, among other experts in public access and public records, e-mail is considered a public record just as if it were a printed record.

In its response to a nationwide survey conducted by the American Association Law Libraries on permanent public access, Maine's notes that state law does specifically cite that e-mail records are considered public.

*"The term 'public records' means 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..."*

*ME Rev. Stat. Ann. Tit. 1 section 402 (West Supp. 2001)*

*"Record means all documentary material, regardless of media or characteristics..."*

*Code ME. R. 29 255 10 (2000)*

In addition, the Office of the State Archivist has the authority, according to the state, "to promulgate rules for retention and destruction of state records. The archivist administers the records management program for the state" and, in early 2006, has specifically published rules regarding e-mail record access and retention.

In no case did a town decline to forward e-mails because they did not understand them to be public records, but the fact that 39 percent of all requests were ignored is a disturbing outcome.

A total of 270 town offices surveyed, 10 indicated they had no e-mail service. And, of all town offices, 112 returned the dollar.

## **Response and compliance of police departments**

The Coalition selected 40 of Maine's 114 police departments, or 35 percent, for on-site visits.

Of the three categories of offices audited, the compliance rate for police departments was the most successful.

Some 70 percent of all police departments complied with auditors' requests to view copies of the department's chase policy, which the state mandates all law enforcement agencies adopt regarding procedures. Of those, 30 percent of police departments requested auditors to identify themselves and 27 percent required a reason auditors wanted to view the document.

When compared to the 2002 audit, the compliance rate was higher and the number of auditors required to present ID or provide a reason they wanted the information was lower. We attribute that improvement to aggressive efforts by the state's law enforcement community to educate its workforce with regular training sessions and to the recent change in the law that now requires police departments to have freedom of information policies.

The most notable denial of access to the chase policy came from South Portland, a department looked to for its thorough FOI training and philosophy of public access.

In a letter to a MFOIC auditor, South Portland's counsel, Mary Kahl, wrote:

"The Freedom of Access Act exempts from the definition of 'public records' any records that have (been) designated confidential by statute. The Criminal History Records Information Act defines 'intelligence and investigate information' as 'information collected by criminal justice agencies in an effort to anticipate, prevent or monitor possible criminal activity.' Intelligence and investigative information is confidential if dissemination would interfere with law enforcement proceedings, would disclose investigative techniques and procedures or security plans and procedures not generally known by the general public, or would endanger the life or physical safety of any individual, including law enforcement personnel."

Further, she wrote, "Since the Police Department's pursuit policy meets all three of the above-stated criteria mandating confidentiality, it is not a 'public record' within the meaning of the Freedom of Access Act and is not accessible by the general public."

The Department of Public Safety's policy on pursuit is posted on its Web site, which runs contrary to South Portland's assertion that the document is confidential.

In Gardiner, Kennebunk, Mexico, Scarborough, Bridgton, Windham, Jay and Wilton, among other towns, auditors were required to produce identification in order to see the policy, which is not required under Maine law.

In a number of cases, auditors were denied access because officers were not in the office and clerks were unable to determine whether to provide the information.

As in 2002, a number of auditors complained on their evaluation forms that police were rude and abrupt, making them feel intimidated or threatened. In Mexico, the auditor said the officer taking his request “made me feel like I was breaking the law by asking.”

Below is a sampling of some of the auditors’ comments:

- **Gardiner, access denied:** Chief told the auditor he was uncomfortable giving information out, and that the department “felt the need to stay above public and not let the public know how the police would respond.”
- **Kennebunk, access denied:** Woman at window was rude and unhelpful.
- **Auburn, access granted:** “Asked why I was requesting, responded if that was required, repeated this twice until officer said no and gave a copy of the full policy at no charge.”
- **Brunswick, access granted:** “Commander explained the document, urged me to make a copy, and asked to call if I had any questions.”
- **Bucksport, access granted:** “No resistance. Charged a fee if document was to be taken with me.”
- **Cumberland, access granted:** “Police chief gave a copy and reviewed with me and asked if there were any other procedures I wanted to look at.”
- **Lisbon, access granted:** “Policy was dated March 19, 1996.”
- **Skowhegan, access granted:** “Very easy. Very polite.”
- **Wilton, access granted:** “Asked my name when he introduced himself. Chief showed me policy himself.”

## **Response and compliance of school districts**

The Coalition selected 44 of Maine’s 177 school districts, or 24 percent, for on-site visits.

Of those audited, 65 percent of all school districts complied with auditors’ requests to view copies of the districts crisis response plans, which Maine requires each school board annually to “approve a plan developed by the school unit administration working with local public safety, mental health and law enforcement officials to deal with crises and potential crisis situations involving violent acts by or against students in each school in the school administrative unit.” According to the Secretary of State, these crisis plans are not confidential.

Of those, 45 percent of districts requested auditors to identify themselves and 32 percent required a reason auditors wanted to view the document.

Compared to the audit in 2002, which requested access to superintendents' contracts, the school districts denied more requests and matched the rate requiring identification and reason for access.

Harry Pringle, an attorney with Drummond, Woodsum & MacMahon in Portland, the law firm that represents the Maine School Management Association, suggests that the poor performance is not a fair indication of a desire to provide public access, but more about school districts' determination to protect students.

SAD 72, which last year dealt with an armed gunman in one of its schools, was particularly hesitant about providing access. Transportation Supervisor David Powers said he was "very hesitant to give that information out to people without having a reason for why they want it with all that goes on in this world."

Had the auditor explained who he was, Powers said he would gladly have provided the requested information. "As a general rule, it's public record most of what we have is totally open to the public, but some of this stuff isn't to be shared without a good reason," he said.

Although he acknowledged part of these plans are public record, Pringle echoed Powers' concerns, saying that these district crisis response plans often have very specific information about which particular students are to be moved where in an emergency. There are also staff cell phone numbers responsible for evacuating students, and details about where students are supposed to be taken when evacuated.

In weighing student privacy and safety against the public's right to know, Pringle defends the districts' denials of access to great portions of these documents.

In all cases, auditors asked for photocopies of the title pages of these documents to demonstrate that districts were updating annually, but copies of the full crisis plans were not asked for. A number of superintendents did offer full copies to our auditors, though.

In Kennebunk, the auditor was told "the district-wide crisis plan is not yet in place and, even if it were, they don't want the public to know the specifics."

Auditors who visited Topsham, Scarborough, Rumford, Lewiston, Jay, Carmel, Brunswick, Bath, Yarmouth, Bridgton and Old Orchard Beach found office personnel helpful and had no problems accessing the plans. In Sullivan, the superintendent declined to photocopy the title page and, although he acknowledged that identification wasn't required to access public record, "he was requiring me to tell him in order to conduct further business," according to the auditor. In Gardiner and Gorham, auditors were permitted to view the plans, but were not permitted to make copies of the title page.

Many of the requests were denied outright because clerks and secretaries just did not know whether the document was a public record. And, because many of the superintendents were not in offices when auditors visited, denials were made because clerks and secretaries said they needed permission to release the documents, although several attorneys who reviewed results of the 2002 audit ruled that nothing in Maine's FOAA indicates that a public record may be withheld on the ground that a particular official is not present when disclosure is sought.

Below are some comments auditors noted on evaluation forms:

- **Biddeford, access denied:** Secretary needed to clear request with the superintendent, who was not available. Auditor is still waiting for a call back from the school district.
- **Ellsworth, access granted:** Auditor was asked to return when the secretary returned from lunch. When the auditor returned an hour later, the superintendent made a copy of the crisis team administrative procedure, but not the precise details of the response plan.
- **Kennebunk, access denied:** “Superintendent’s office staff was very nice, but the request was a ‘no go.’ They also asked if I was from another school district.”
- **Portland, access denied:** Asked for plan for high school but was told “they don’t normally give that out.”
- **Anson, access granted:** “Gave me copies and went beyond what I requested. No questions asked.”
- **Jay, access granted:** “They printed off the entire plan for me though I asked for photocopy of cover/title page.”
- **Topsham, access granted:** “Document appeared seven years old, but was assured the copies at each school were up-to-date.”

## **Response and compliance of state government**

As part of the 2006 audit, which is not information sought in the 2002 project, the Maine Freedom of Information Coalition sent letters to 19 cabinet-level state departments and agencies, asking for the name of their designated freedom of information officer and a copy of their departmental freedom of information policy. Letters were sent to the 15 state departments, as well as the Finance Authority of Maine, the Maine State Housing Authority, the State Planning Office, and the Workers Compensation Board.

Responses ranged from thorough and comprehensive to no response at all. Three departments – Defense, Veterans and Emergency Management; Labor; and Professional and Financial Regulation; and the Workers Compensation Board – did not reply to the request letter.

While state law does not require each agency to designate an FOI officer or adopt a policy, it does require each state or local government agency to "... establish and maintain an active, continuing program for the economical and efficient management of any records..." (5 MRSA 95), while the administrative rules of the State Archivist's Office require each agency to appoint a Records Officer.

Of the 15 replies received, 10 provided a name or list of names of FOA contacts. The Department of Education indicated that a staffer was responsible for tracking FOI/FOA requests.

Two agencies, Conservation and Economic & Community Development, indicated that they did not have their own policies for handling FOI/FOA requests, while six stated that their handling of requests

is "governed by applicable law." The Finance Authority of Maine provided a 19-page print-out of applicable state public-records and confidentiality laws.

Six agencies have developed their own specific policies concerning freedom of access. The Department of Corrections' policy makes reference to separate policies governing "Communication and Collaboration with Outside Agencies" and "Contact with News Media." It also prohibits the release of information pertaining to criminal investigations, litigation or facility security practices.

The Department of Education's one-page policy is more of a process, setting forth a requirement for logging all requests and a 5-day deadline for responses. The Department of Environmental Protection, in contrast, has adopted a nine-page Standard Operating Procedure (SOP) that applies "if a requester specifically states that their request is made pursuant to the Maine Freedom of Access Act." The SOP sets forth how FOA requests will be routed through the department, a search protocol for electronic files, a process for identifying confidential records, and a cost schedule for copying and staff time.

The letter to the Maine Department of Public Safety was answered by the staff attorney for the Maine State Police, one of nine agencies within the department, who provided a copy of MSP's Operations General Order concerning requests for information concerning accident reports, traffic summonses, criminal record histories and the like. No information was provided on FOI/FOA policies within the other DPS bureaus.

The policy of the Maine State Planning Office begins with a Statement of Purpose indicating that, "Individuals desiring to inspect or make copies of public records are to be provided every reasonable opportunity to do so." But the policy goes on to declare, "Requests for public records made under Maine's freedom of access law must be made in writing."

The Maine State Housing Authority's FOA policy is actually a "Fee Policy" consisting of three paragraphs setting forth the fees the agency will charge for photocopies (10 cents per page, but "MSHA does not routinely charge for a *de minimus* number of pages"), and \$10 per hour, after the first hour, for staff time to search, retrieve, review and redact, and compile documents.

Copying fees for other departments range from 5 cents per page for copies made by the requester, 10 cents per page if made by staff, charged by the State Planning Office, to 15 cents to 25 cents for the DEP, to the indeterminable "at the rate the Department is charged by the Bureau of Purchases" for copies made by the Department of Inland Fisheries and Wildlife. The reply letter from the Department of Public Safety indicated that 20 cents per page, or a total of 80 cents, should be remitted to the state because the letter included a four-page copy of the State Police policy.

Charges for staff time are generally \$10 per hour after the first hour, a rate that was fixed in statute by the FOAA revisions approved by the Legislature in 2004. But the Department of Inland Fisheries and Wildlife's "Administrative Policy Regarding Access to Information" states that staff time will be billed at "one and one-half the hourly rate of the individual performing the service."

State agency FOA contacts are available at <http://www.maine.gov/foaa/contactlist/index.htm>.

## Conclusion and Recommendations

In 2002, the Maine Freedom of Information Coalition concluded, that “Maine’s Freedom of Access law does not require people to present identification to have access to public documents. It does not require people to state a reason for their request. It does not require people to identify their employer. It does not require people to fill out forms to view documents. The reality is, though, especially in this time of heightened security awareness, many public officials do require people to justify access to public information contrary to the intent of the public access law.”

That sentiment was reinforced during the follow-up audit as police officers and school superintendents were found to be resistant to releasing details about mandated policies in the interest of preserving public safety and student privacy.

As Pringle pointed out on Audit Day, the documents being requested could be – in a criminal mind – connected.

If a person refusing to disclose his name or the reason he is requesting access to a school crisis response plan insists on getting access, school officials would automatically become suspicious that he might mean students harm. And, if that same person were then to visit the police department in that same town and request access to the police department’s pursuit policy, that person might be able to determine how fast police might be able to respond to an attack on a school and how they might attempt to pursue and restrain an attacker.

We accept his point, even though it seems a stretch.

We are encouraged by improvements made in FOI law and in what appears to be good strides regarding public access in police departments. In 2002, police departments in Auburn, Biddeford, Fairfield, Freeport, Jay and Yarmouth denied public access to documents. In 2006, each department complied with auditors’ requests.

And, as we concluded in 2002, we continue to acknowledge the situations where auditors were denied access to documents because offices were closed is just part of small town life and not a clear violation, unless hours of operation are not clearly posted and observed. Offices that denied access to public documents because supervisors were unable to grant permission are in violation of the law and should consider additional training of office staff, especially since the Maine Municipal Association, the Maine School Management Association and the Maine Chiefs of Police Association – of which most of these offices are members – provide training and sample policies as part of membership benefits.

Maine law has been updated since the 2002 audit to limit photocopy fees to “reasonable” costs, and most offices have adopted what could be considerable reasonable costs since then, including 15 cents per page in Livermore and 25 cents per page in Minot. However, the \$12.50 charged by Old Orchard Beach to view documents is in direct violation of the law.

And, again, as in 2002, we examined the success rate of auditors’ requests based on gender.

In 2002, the gender of auditors was evenly split, but women were more successful in obtaining information. Considering all requests, men were successful about 64 percent of time and about 97 percent

of women succeeded in obtaining access to records. This time, the success rate between men and women was about equal, with women successful 64 percent of the time and, men, 65 percent.

## **Recommendations**

The Coalition, which intends to continue sorting through the audit results in the coming months, makes the following immediate recommendations:

- The Maine Municipal Association, Maine School Management Association and the Maine Chiefs of Police Association must continue in their efforts to provide training and ensure that members abide by Maine's Freedom of Access Act;
- If they have not already done so, administrators in municipal offices and school districts should consider adopting written policies for office staff to properly respond to citizen requests for information, and regularly review those policies with new employees, including attention to non-hostile customer service. This is a recommendation made strongly because there is ample proof that police departments, which are now required to do this, have greatly improved public access to information statewide; and
- It is clear that state government agencies have differing policies on fees and processing FOI requests and, now that the state has launched its FOI tips site, departments ought to align themselves so that cost and access is equal across state government.

Questions concerning the results or procedures of the survey can be directed to either Irwin Gratz (for the mailed FOI requests, email to: [irwin@mpbc.org](mailto:irwin@mpbc.org)) or to Judy Meyer (for the FOI requests made in person, email to: [jmeyer@sunjournal.com](mailto:jmeyer@sunjournal.com)). Public comments concerning the MFOIC Audit are encouraged and can be posted online at our web site: <http://www.mfoic.org/cgi-bin/ultimatebb.cgi>

If you would like to support the efforts of the Maine Freedom of Information Coalition, please consider becoming a member. Learn more by visiting this web page: <http://www.mfoic.org/join.htm>.

## **Appendix**

(A) Protocol

(B) Sample Script

(C) Evaluation Form

(D) Letter asking for e-mail messages of May 5, 2006

(E) Numeric summary of audit results for 2006

(F) Numeric summary of audit results from 2002 (for comparison purposes)

(G) Spreadsheet of e-mail request responses

(H) Spreadsheet of on-site audit responses