

2014

Public Access Ombudsman Annual Report, 2013

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STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL

Janet T. Mills, Attorney General



PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT

2013

Brenda L. Kielty, Esq., Ombudsman

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SUMMARY

Maine's Freedom of Access Act (FOAA) recognizes that government must be accountable to the people and provides a statutory right of access to public meetings and public records. While the principles of open government, transparent deliberations and access to public information are fundamental to FOAA, these interests must be balanced with the need for government to maintain the confidentiality of information to protect personal privacy, security and other legitimate interests.

In 2007 the Legislature created the public access ombudsman position within the Office of the Attorney General. The statute authorized the ombudsman to educate the public and government officials about the requirements of the State's freedom of access law, provide dispute resolution services, answer inquiries and make recommendations for improvements to the law. In 2012 the Legislature funded a full-time ombudsman position.

The ombudsman performs an unusual role in government. Although the ombudsman receives complaints from the public, the ombudsman's job is not to be either an advocate for the complainant or a defender of the government. An ombudsman is an impartial intermediary who provides information, who informally resolves disputes and who determines whether an agency or a requester has acted in accordance with the law. The ombudsman encourages full compliance with the spirit and the letter of the law.

In the first full year of service, the ombudsman continued building on the foundation established in 2012 by:

- Handling inquiries about FOAA from the public, press, attorneys and governmental agencies
- Providing informal dispute resolution services to requesters and agencies
- Engaging in outreach to state and national requester, agency, and legal FOAA communities
- Delivering agency-specific FOAA training sessions and maintaining online FOAA training resources
- Reviewing and reporting on FOAA issues for the Right to Know Advisory Committee
- Recommending improvements to State agency FOAA administration pursuant to legislative directive

Meeting the demand for FOAA assistance is the central activity of the ombudsman. In 2013 a total of 303 contacts were logged from FOAA requesters and agencies seeking assistance with everything from filing requests to dealing with difficult requesters.

The bulk of the contacts were telephone inquiries from private citizens regarding access to public records held by municipal government agencies.

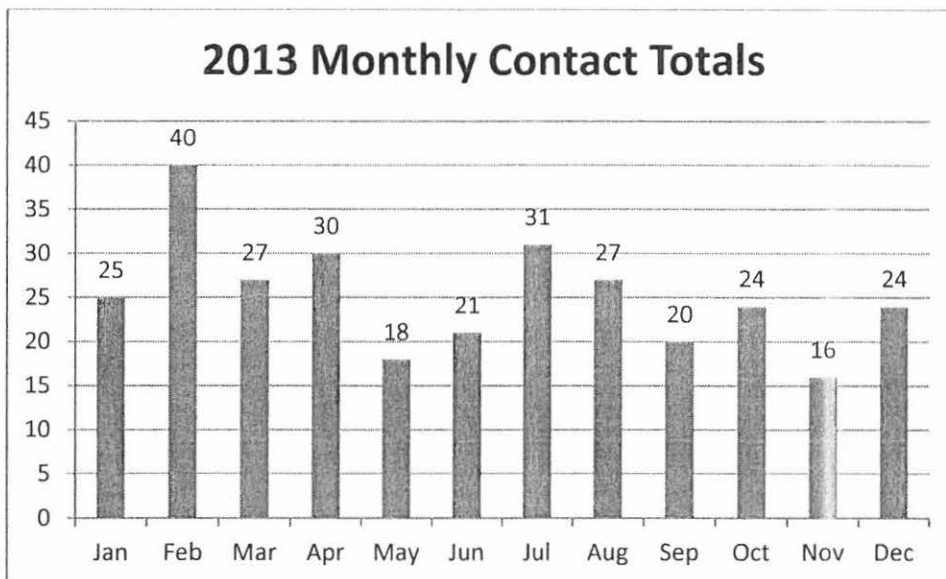
Brenda L. Kielty, Public Access Ombudsman

ANSWERING INQUIRIES & RESOLVING DISPUTES

“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S. § 200-I(2)(A) and (B).

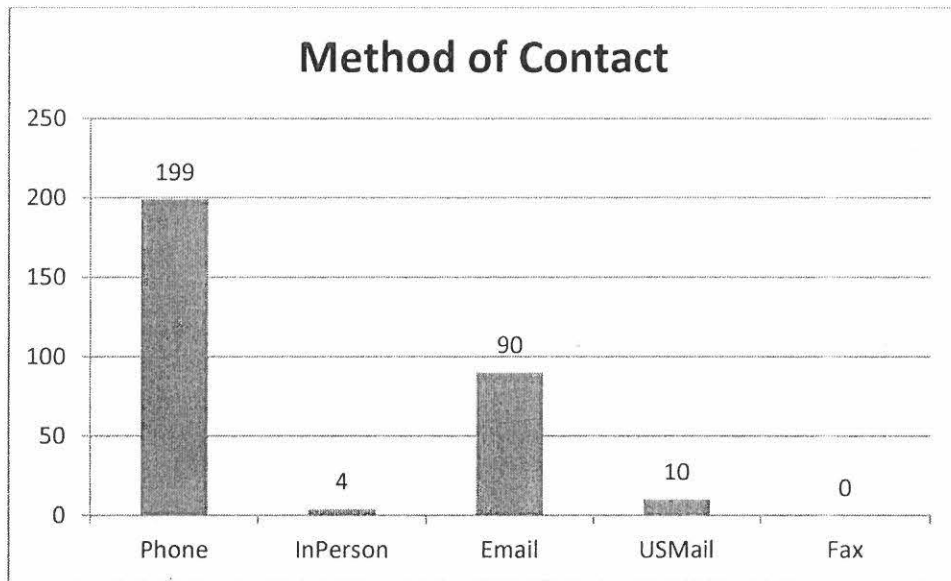
2013 Contacts with the Ombudsman

In 2013 the ombudsman logged 303 inquiries, complaints and suggestions. Requests for help ranged from questions about how to file a FOAA request to more difficult inquiries regarding situations in which the FOAA issues were only part of a larger dispute or where some fact-finding was necessary before appropriate advice could be given.



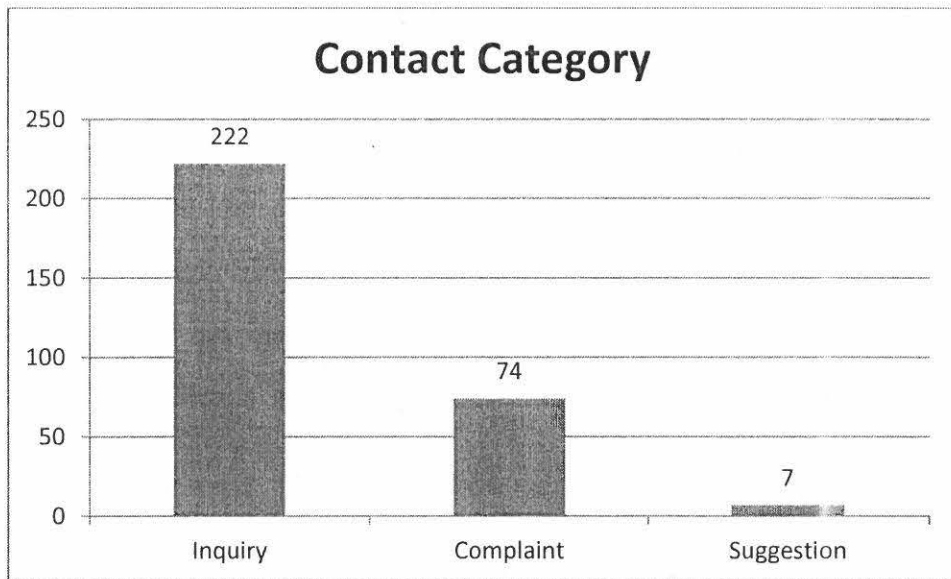
Method of Contact

The bulk of initial contact was by telephone (199) followed by email (90), U.S. Mail (10) and in-person (4).



Contacts Included Inquiries, Complaints and Suggestions

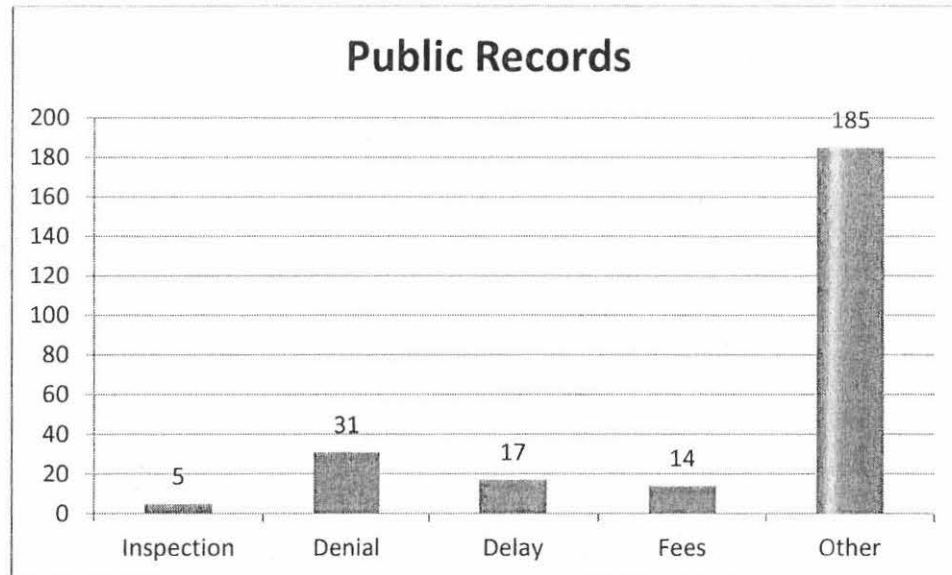
The 303 contacts included general inquiries (222), complaints (74) and suggestions (7).



Contacts Concerning Public Records

Of the contacts about public records (252), the most common questions concerned:

- Basis for a denial
- Reasonable response times and delay
- Fees
- Confidentiality exceptions
- Inspection of electronic records



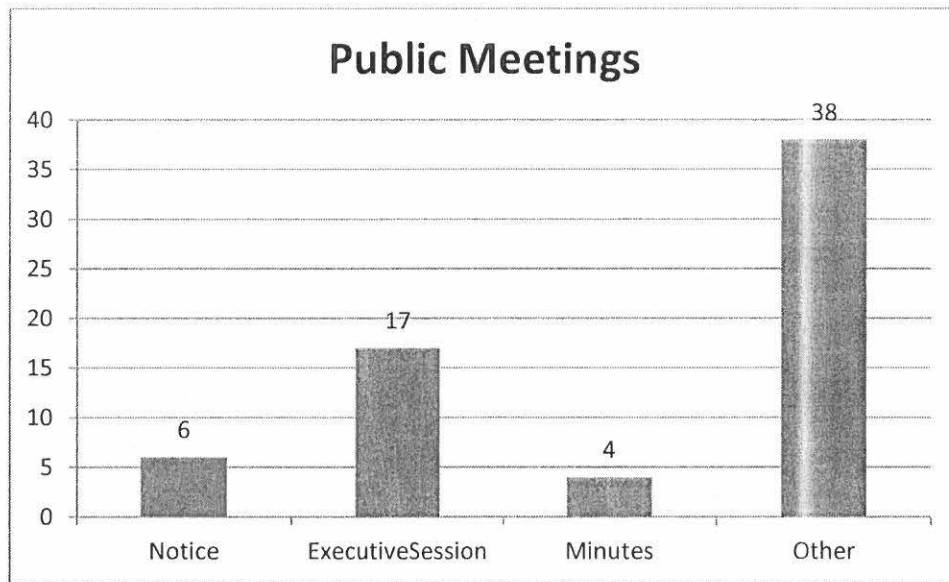
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The "Other" category includes the following kinds of questions:

- Retention and destruction of records
- Confidentiality of specific documents prior to a FOAA request being made
- Access to records normally part of discovery
- General information on making a FOAA request
- Mandatory FOAA training for officials
- Whether an entity is subject to FOAA
- Asking for a document rather than asking for the answer to a question
- Legislation and case law
- Asking for an agency to compile data or create a document
- Abuse of FOAA by requesters
- Due diligence of an agency in searching for records

Contacts Concerning Public Meetings

Of the contacts concerning public meetings (65), most questions concerned:

- Use of executive session
- Notice

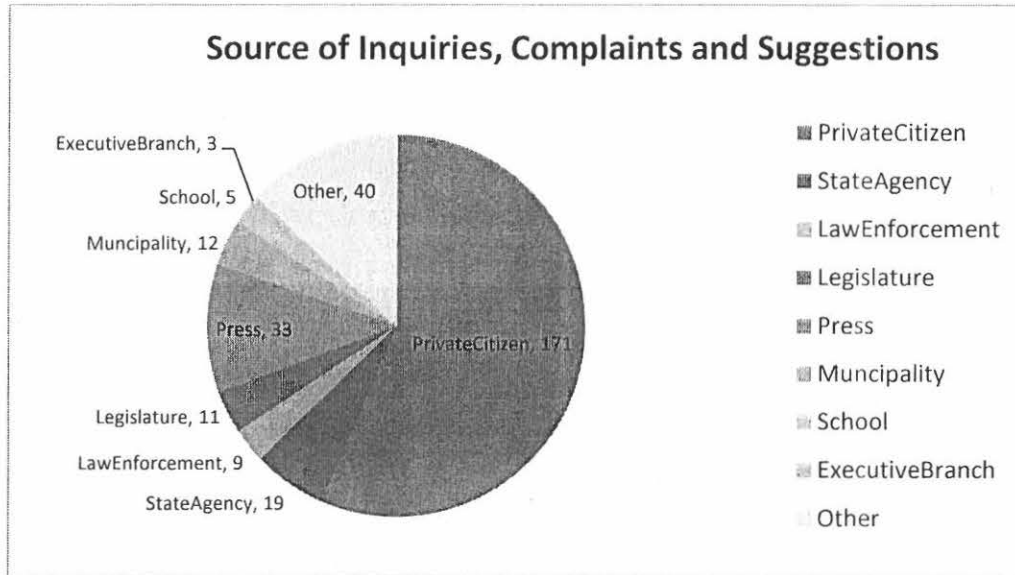


All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The "Other" category includes the following kinds of questions:

- Online communication during public meetings
- Public comment period during public meetings
- Remote participation
- What entities are subject to FOAA
- What constitutes a meeting

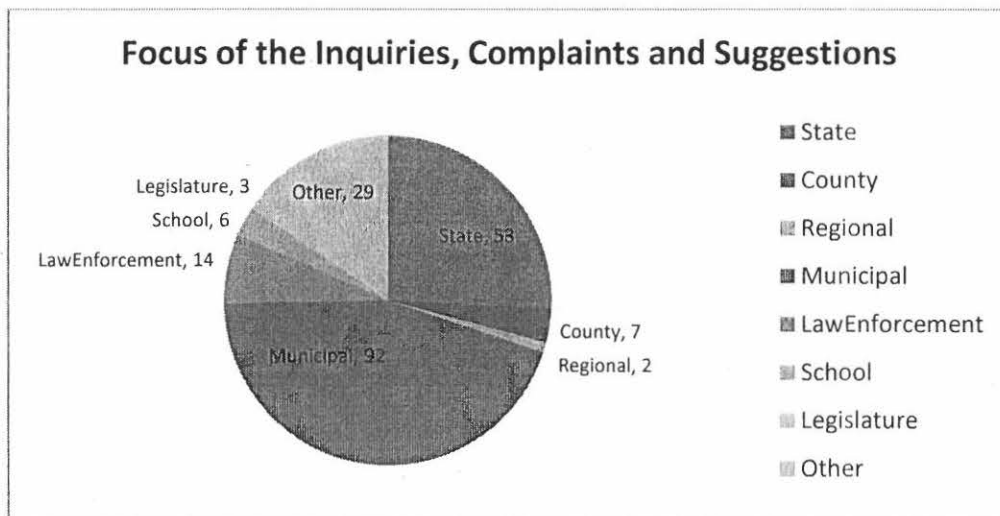
Source of Inquiries, Complaints and Suggestions

Of the 303 inquiries, complaints and suggestions, 171 came from private citizens, 19 from state agencies, 9 from law enforcement agencies, 11 from the Legislature, 33 from others including attorneys and commercial requesters.



Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (92) and state agencies (53). The remainder concerned law enforcement agencies (14), county agencies (7), school administrative units (6), the Legislature (3) and regional agencies (2). Others (29) concerned individual requesters, commercial requesters and various quasi-municipal and public entities.



Outcomes Reached as Result of Contact with Ombudsman

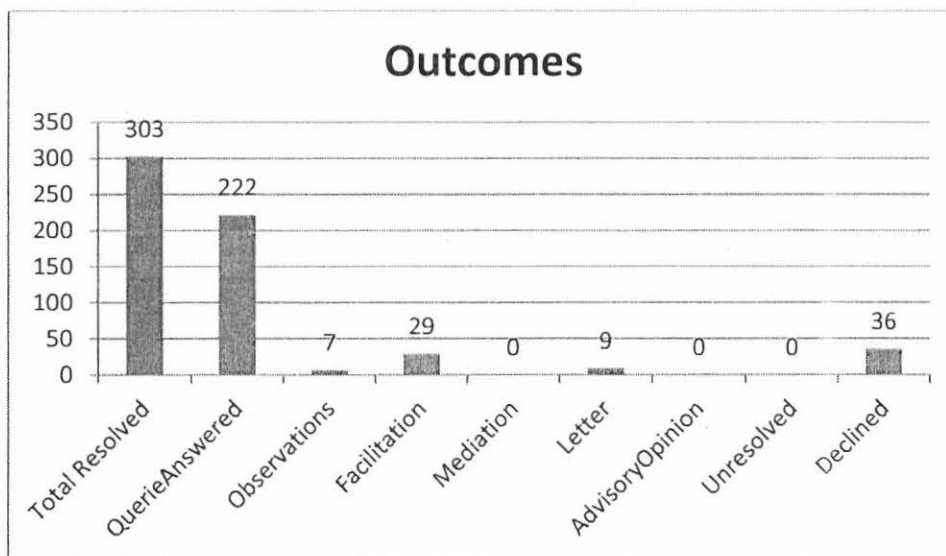
A contact may be logged as “resolved” for the following reasons:

- Complaint was deemed unsubstantiated
- Informal discussions or facilitation resulted in an agreement on how to proceed
- Agency offered an acceptable remedy
- Complaint was withdrawn
- Complainant failed to produce requested information
- Ombudsman determined there was other good cause not to proceed

A contact may be logged as “declined” if the subject of the dispute was outside the scope of authority of the ombudsman or related to a matter that was the subject of an administrative or judicial proceeding. In 2013 a total of 36 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 303 contacts included 222 answers to inquiries, 7 suggestions from citizens for improvements to the law, 29 facilitated resolutions, and 9 letters addressing cases of substantial controversy.

The ombudsman did not issue any advisory opinions in 2013.



OUTREACH & TRAINING

The ombudsman provided on-site FOAA trainings and presentations to a variety of state and local entities including the following:

- Maine 126th Legislature
- Office of the Attorney General
- Secretary of State Bureau of Motor Vehicles
- Inland Fisheries & Wildlife
- Maine School Management Association
- Maine Municipal Association ROMA Attorneys
- University of Maine School of Law
- Oklahoma Sunshine Conference

The State FOAA website, [Your Right to Know: Maine's Freedom of Access Act](#) provides contact information for the ombudsman and links to a variety of resources including a Frequently Asked Questions page that serves as a self-administered training for public officials. The ombudsman updates and maintains the website to reflect changes in the law.

RECOMMENDATIONS

The ombudsman is in a unique position to suggest improvements to the FOAA process and is mandated by statute to make recommendations concerning ways to improve public access to public records and proceedings.

Agency Tracking of FOAA Requests

FOAA was amended in 2012 to require each state agency, county, municipality, school administrative unit and regional or other political subdivision to designate an employee to serve as the contact person and resource for freedom of access questions and compliance. The ombudsman recommended that the public access officers implement comprehensive data collection to track FOAA requests and responses.

Standardized reporting by agencies would generate the consistent, high-quality data needed to conduct state-wide assessments of how FOAA is being administered and provide useful benchmarks in assessing Maine's progress as to open government objectives.

Legislation enacted in 2013 requires state agency public access officers to provide annual FOAA tracking data to the ombudsman. The compilation of this data will be reported for the first time in 2014.

Coordinated Access to Public Records of State Agencies

Pursuant to Public Law 2013, chapter 229, An Act Regarding Coordinated Access to Public Records of State Agencies, the ombudsman reviewed the current systems in executive branch state agencies for receiving and responding to requests for public records and the feasibility of a centralized, government-wide FOAA administration system. This report was presented to the Joint Standing Committee on Judiciary.

The Governor's Office committed to administratively implementing provisions considered by the Judiciary Committee, including placing easily identified links to the contact information for public access officers on agency websites and developing a standardized link from the agency websites to the state FOAA website as a resource for the public.

§ 200-I. Public Access Division; Public Access Ombudsman

1. Public Access Division; Public Access Ombudsman. There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13¹. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.

2. Duties. The ombudsman shall:

- A.** Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;
- B.** Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;
- C.** Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;
- D.** Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;
- E.** Make recommendations concerning ways to improve public access to public records and proceedings; and
- F.** Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests.

3. Assistance. The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

5. Report. The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A.** The total number of inquiries and complaints received;
- B.** The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;
- C.** The number of complaints received concerning respectively public records and public meetings;
- D.** The number of complaints received concerning respectively:
 - (1)** State agencies;
 - (2)** County agencies;
 - (3)** Regional agencies;
 - (4)** Municipal agencies;
 - (5)** School administrative units; and
 - (6)** Other public entities;
- E.** The number of inquiries and complaints that were resolved;
- F.** The total number of written advisory opinions issued and pending; and
- G.** Recommendations concerning ways to improve public access to public records and proceedings.

6. Repealed. Laws 2009, c. 240, § 7, eff. June 2, 2009.

Credits

2007, c. 603, § 1; 2009, c. 240, § 7, eff. June 2, 2009; 2013, c. 229, §§ 1, 2, eff. Oct. 9, 2013.

Footnotes

1

1 M.R.S.A. § 401 et seq.

5 M. R. S. A. § 200-I, ME ST T. 5 § 200-I

Current with legislation through the 2013 Second Regular Session of the 126th Legislature. The Second Regular Session convened January 8, 2014 and adjourned May 2, 2014. The general effective date is August 1, 2014.