

Handbook on Indiana's Public Access Laws

OFFICE OF THE PUBLIC ACCESS COUNSELOR

Table of Contents

LETTER FROM THE ATTORNEY GENERAL AND PUBLIC ACCESS COUNSELOR.....	4
SECTION ONE: OVERVIEW OF THE INDIANA OPEN DOOR LAW	5
COMMONLY ASKED QUESTIONS ABOUT THE OPEN DOOR LAW	5
Who has access to government meetings?	5
What government meetings are open to the public?.....	5
What is a public agency?	5
Are there certain agencies that would normally qualify as “public agencies” pursuant to the ODL, but are exempt?	6
Is it possible for a non-for-profit corporation to be required to comply with the ODL?.....	6
What is a governing body?	6
What is a meeting?	6
What is not a meeting?	7
Can a member of a governing body attend a meeting electronically?	8
What is official action?	8
What is a serial meeting?	8
What if the need for a public meeting is uncertain?	8
Are email exchanges considered meetings?	8
What is significant about executive sessions?.....	9
When must a public agency give notice of an executive session?.....	9
When can a governing body take final action on an item which is the subject of an executive session? .	10
A PUBLIC AGENCY’S RESPONSIBILITIES UNDER THE OPEN DOOR LAW	10
When can I see a copy of the meeting agenda so I will know the order of proceedings?.....	10
Suppose I am unable to attend an open meeting and want to find out what happened. What can I do? ...	10
Must a governing body keep minutes of its meetings?	10
What if errors occur in the minutes of an open meeting?	10
How will I know if an open meeting has been scheduled?	10
What if a meeting is necessary to deal with an emergency?	11
What special notice requirements apply for the media?	11
May a governing body vote by secret ballot?.....	11
In what manner should a vote be taken?.....	11
Does the ODL require that a governing body deliberate in an open meeting before a vote is taken?	11
May I bring a video camera or tape recorder to an open proceeding to record a meeting?.....	11
Do I have the right to speak at an open meeting?.....	12
May a meeting be set at any time?	12
Where can meetings be held?.....	12
Must a public agency adjourn its meetings?	12
REMEDIES FOR VIOLATIONS OF THE ODL	12
What can I do when I think a governing body violated the ODL?	12
What remedies are available if the ODL has been violated?.....	12
Are there time limits on filing a legal action?	12
Who pays my legal fees if my action is successful or if I lose?	13
Can a public employee or official be fined for violating the ODL?	13
CONCLUSION	13

SECTION TWO: THE OPEN DOOR LAW AND LEGAL COMMENTARY	13
Purpose	13
Definitions	13
Public Agency Defined; Certain Providers Exempted.....	15
Open Meetings; Secret Ballot Votes.....	16
Serial Meetings	16
Electronic Meetings of Political Subdivisions	17
Electronic Meetings of State Agencies	17
Posting of Agenda; Memoranda of Meetings; Public Inspection of Minutes.....	19
Public Notice of Meetings	19
Executive Sessions	21
Collective Bargaining Meetings; Applicable Requirements.....	23
Violations; Remedies; Limitations; Costs and Fees	24
Civil Penalties.....	25
Accessibility to People with Disabilities.....	26
SECTION THREE: OVERVIEW OF THE ACCESS TO PUBLIC RECORDS ACT	27
COMMONLY ASKED QUESTIONS ABOUT THE ACCESS TO PUBLIC RECORDS ACT	27
Who may access public records?.....	27
What kinds of documents may be accessed?	27
What records may not be accessed?	28
May I request information in the form of a list?.....	29
When can public records be accessed?	30
How can public records be accessed?.....	30
What is enhanced access to public records?.....	30
What are the public agency's responsibilities when I submit a request?	30
May a public agency deny a request?	30
What if a public agency denies my request?	31
May a public agency charge a fee for inspecting and copying public records?	31
What happens if confidential records are disclosed or if there is a failure to protect the public records from destruction?.....	31
CONCLUSION	32
SECTION FOUR: THE ACCESS TO PUBLIC RECORDS ACT AND LEGAL COMMENTARY	32
Public Policy; Construction; Burden of Proof of Non Disclosure	32
Definitions	33
Public Agency Defined; Certain Providers Exempted.....	36
Right to Inspect and Copy Agency Records.....	36
Enhanced Access to Public Records; State Agencies	38
Enhanced Access to Public Records; Public Agencies.....	39
Records Exempted from Disclosure Requirements; Time Limitations; Destruction of Records	39
Job Title or Job Descriptions of Law Enforcement Officers	45
Investigatory Records; Records Relating to Criminal Intelligence Information, Public Safety, Court Actions	45
Records Relating to Negotiations By the Indiana Economic Development Corporation	47
Records of the Indiana Finance Authority.....	47
Records of the Office of Tourism Development.....	47
Records of the Ports of Indiana	47
Information Relating to Arrest or Summons; Jailed Persons; Agency Records; Inspection and Copying	47
Requests for Law Enforcement Recordings.....	48
Inspection and Copying of Law Enforcement Recordings.....	48
Retention of Recordings.....	50

Sealing of Certain Information by Court; Hearing; Notice	50
Partially Disclosable Records; Computer or Microfilm Record Systems; Fees	51
Confidentiality of Public Records	51
Protection Against Loss, Alteration, Destruction, and Unauthorized Enhanced Access	51
Fees; Copies	52
Enhanced Access Fund; Establishment by Ordinance; Purpose	53
Electronic Map Generation Fund; Establishment by Ordinance; Purpose.....	53
Denial of Disclosure; Action to Compel Disclosure; Intervenors; Burden of Proof; Attorney's Fees	53
Civil Penalties.....	55
Confidential Information; Unauthorised Disclosure or Failure to Protect; Offense; Discipline.....	56
SECTION FIVE: OVERVIEW OF THE OFFICE OF THE PUBLIC ACCESS COUNSELOR;	
FORMAL COMPLAINTS.....	57
FREQUENTLY ASKED QUESTIONS.....	57
What is the role of the Public Access Counselor?.....	57
Who may utilize the services of the office?	57
What is the process for filing a formal complaint?.....	57
Must I file a formal complaint to obtain assistance?	58
Is the public access counselor a finder of fact?	58
What is the significance of filing a formal complaint or seeking an informal opinion from the counselor?	58
How do I contact the counselor?	59
SECTION SIX: OFFICE OF THE PUBLIC ACCESS COUNSELOR AND FORMAL COMPLAINT	
ACT AND LEGAL COMMENTARY	59
Public Access Counselor	59
Education Fund.....	60
Formal Complaints to the Public Access Counselor.....	61
APPENDICES	63
APPENDIX A: PUBLIC ACCESS COUNSELOR ADMINISTRATIVE RULE	63
APPENDIX B: CHECKLIST FOR PUBLIC AGENCIES	64
APPENDIX C: SAMPLE PUBLIC RECORDS REQUEST LETTER.....	65
APPENDIX D: SAMPLE NOTICES	66
APPENDIX E: OTHER HELPFUL STATUTES	67
APPENDIX F: HOW TO FILE A FORMAL COMPLAINT	68
APPENDIX G: RESPONDING TO A FORMAL COMPLAINT	68
APPENDIX F: PUBLIC ACCESS COUNSELOR CONTACT INFORMATION	68

LETTER FROM THE PUBLIC ACCESS COUNSELOR AND ATTORNEY GENERAL

The Office of Public Access Counselor and the Office of the Indiana Attorney General are pleased to provide you with a copy of this "Handbook on Indiana's Public Access Laws." This Handbook is the first step in understanding the government's responsibility to foster transparency, trust and accountability for its official actions. You may access a digital version of this handbook at http://www.in.gov/pac/files/pac_handbook.pdf.

The content of this publication primarily addresses the Indiana Open Door Law, which governs meetings of governing bodies; and the Access to Public Records Act, which sets forth the foundation for access to public records. These laws apply to both state and local public agencies. Additionally, you will find relevant case law, commentary, frequently asked questions and forms designed to easily and efficiently navigate access to government information. This handbook includes updates to the laws through the 2016 session of the Indiana General Assembly.

It is our sincere hope that this handbook is a helpful resource for the public, the media and public officials in identifying the roles and responsibilities that come with public meetings and government records. The goal of the Office of the Public Access Counselor is to be as approachable and accessible as possible. Therefore Please feel free to contact the PAC Office using the contact information provided on the back cover of this handbook if you have any questions or problems related to the public access statutes.

Sincerely,



Luke H. Britt
Indiana Public Access Counselor



Curtis T. Hill, Jr.
Indiana Attorney General

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SECTION ONE: OVERVIEW OF THE INDIANA OPEN DOOR LAW

INTRODUCTION

The Open Door Law (“ODL”)(Ind. Code 5-14-1.5), originally passed by the Indiana General Assembly in 1977 and most recently amended in 2016, was enacted to permit the public access to meetings held by public agencies. When the public has an opportunity to attend and observe meetings, the public may witness government in action and more fully participate in the governmental process. The ODL will serve these purposes if the public understands the provisions of this statute. This guide sets forth the basic elements of the ODL and provides answers to commonly asked questions. To obtain answers to more specific questions, please consult the provisions of the Indiana Code set forth in Section Two of this guide.

COMMONLY ASKED QUESTIONS ABOUT THE OPEN DOOR LAW

The following are commonly asked questions about the ODL. It is important to note the answers are not the final authority on a particular issue, as the facts will vary from situation to situation. Indeed, laws and court interpretations of the law are ever changing. It is important to remember the answers to these questions are only guidelines, may only apply to specific situations, and are subject to change.

Who has access to government meetings?

The ODL allows all members of the public access to certain meetings. There is no requirement for a person to be a citizen of the jurisdiction or a constituent of the governing body to be permitted access to a meeting.

What government meetings are open to the public?

Generally, all meetings of the governing bodies of public agencies must be open at all times so members of the public may observe and record them. Although this general rule may appear to be straightforward and easy to apply, it contains

several words and phrases which are given a specific meaning by the ODL. Additionally, several types of meetings are not required to be open to the public. To detail the full range of meetings which must be accessible to the public, certain phrases must be defined.

What is a public agency?

The term “public agency” is defined very broadly by the ODL and encompasses many meanings, which are set forth at I.C. §5-14-1.5-2(a). According to this provision, a public agency means the following, among others:

- Any board, commission, department, agency, authority, or other entity which exercises a portion of the executive, administrative, or legislative power of the state.
- Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.
- Any entity subject to a budget review by the department of local government finance or the governing body of a county, city, town, township, or school corporation.
- Any entity subject to an audit by the state board of accounts by statute, rule, or regulation.
- Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.
- Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except for medical staffs or the committees of any such staff.
- The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.
- The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the

commission.

Example 1: A school building corporation organized solely to finance school corporations (I.C. 20-47-2 or I.C. 20-47-3) is a public agency subject to the ODL.

Are there certain agencies that would normally qualify as "public agencies" pursuant to the ODL, but are exempt?

Yes, for the purposes of the ODL, a "public agency" does not mean a provider of goods, services, or other benefits that meets all of the requirements under I.C. 5-14-1.5-2.1. These exempt agencies are commonly referred to as "fee for services" groups. It is important to note however, that in order to qualify for the exception the entity must not be required to be audited by the State Board of Account by statute, rule, or regulation.

Is it possible for a non-for-profit corporation to be required to comply with the ODL?

An entity organized as a non-for-profit corporation that derives at least 50% and more than \$200,000 in public funds shall be subject to audit by the State Board of Accounts. See I.C. 5-11-1-9(b). If an entity is subject to audit by the State Board of Accounts pursuant to statute, rule, or regulation, then the entity is considered to be a public agency pursuant to the ODL. See I.C. 5-14-1.5-2(a)(3)(B). If it is unclear whether an entity is subject to audit, agencies and individuals are encouraged to contact the State Board of Accounts for clarification.

What is a governing body?

The phrase "governing body" is defined at I.C. §5-14-1.5-2(b). A governing body is two or more individuals who are one of the following:

- A public agency that is a board, commission, authority, council, committee, body, or other entity which takes official action on public business.
- The board, commission, council, or other body of a public agency that takes official action upon public business.

- Any committee directly appointed by the governing body or its presiding officer to which authority to take official action upon public business has been delegated, except for agents appointed by a governing body to conduct collective bargaining on behalf of the governing body.

In each of these definitions, an entity must take official action on public business to be considered a governing body.

Example 1: Staff members of the state department of transportation meet to discuss new requirements under federal highway laws. A representative of a local engineering company wants to sit in on the meeting but is refused admittance. This meeting is not subject to the requirements of the ODL because staff members of a government agency do not constitute a "governing body" responsible for taking official action on public business.

Example 2: Employees of the state department of health conduct a meeting. The employees conducting the meeting are not members of the state board of health or any advisory committee directly appointed by that Board. The meeting is not subject to the requirements of the ODL.

Example 3: A curriculum committee, appointed by a school superintendent, who is to report its findings to the school board, is not subject to the ODL because the superintendent is not the presiding officer of the school board. The same committee appointed by the school board president, however, would be subject to the ODL. I.C. § 5-14-1.5-2(b).

Example 4: The mayor, public works director and council president meet to discuss financial matters. These individuals, although public officials, do not make up a governing body. The meeting would not be covered by the ODL.

What is a meeting?

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon business. I.C. § 5-14-1.5-2(c).

Example 1: A majority of a city's police commissioners gather to discuss previously interviewed job candidates prior to a formal vote on the matter. This qualifies as a "meeting" under the ODL.

Example 2: Prior to a public meeting, a majority of members of a city zoning appeals board held a private session with the board's attorney. Board members questioned the attorney about legal matters related to a construction project that was the subject of a public session. The private session constituted a meeting and violated the ODL.

Example 3: A private foundation whose charge is the betterment of education holds a forum to release its most recent report regarding the quality of education within a particular school corporation. Four of seven school board members from the subject city want to attend to hear the presentation. This is a "meeting" of the school board if the members decide as a group to attend because the four members constitute a "governing body" that is taking "official action" (receiving information) on "public business" (the school corporation). If each of the school board members receives an invitation and independently makes a determination about whether to attend, it may not be a meeting.

What is not a meeting?

The ODL lists seven types of gatherings not considered "meetings." A meeting does not include the following:

- Any social or chance gathering not intended to avoid the requirements of the ODL;
- Any on-site inspection of a project or program;
- Traveling to and attending meetings of organizations devoted to the betterment of government;
- A caucus;
- A gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;
- An orientation of members of the governing

body on their role and responsibilities as public officials, but not for any other official action; or

- A gathering for the sole purpose of administering an oath of office to an individual.

Example 1: Before a tax measure is voted upon in the General Assembly, members of the majority party meet to discuss the party's position. The meeting is not subject to the ODL. A political caucus is not transformed into a meeting subject to public scrutiny under the ODL merely because persons attending such caucuses happen to constitute a majority of a governing body.

Example 2: A drainage committee decides to meet one evening in a troubled area to obtain a first-hand look at the problem. This is not a meeting and is not subject to the law as long as the committee does no more than *inspect* the problem.

Example 3: A park board decides to make an onsite inspection of its new lake, but it does not give public notice of its meeting. While at the lake, the board members decide to appropriate funds for a boat dock. The on-site inspection has become a meeting and is subject to the requirements of the ODL.

Example 4: A majority of the town board travels to a meeting together and reaches agreement on the outcome of various issues. The board members claim this was not a meeting because they were traveling to and from a national meeting of town boards. The actions of the board during their travel violated the ODL because the members took official action on public business and did not simply travel to and from the meeting.

Example 5: A local cafe is a popular spot for morning coffee, and several members of a town board are among the regulars. Frequently, the conversation turns to matters of local concern on the agenda for the next board meeting. The group discusses the issues and often decides "what should be done." This discussion violates the ODL if the board members constitute a majority of the governing body. By deciding issues before the meeting, the board members have deprived

the public of the opportunity to hear the debate leading to a decision.

Example 6: A county council and board of commissioners gather to discuss the potential of an international company relocating to the county. This is not a meeting so long as there is no conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources.

Example 7: After the election of new school board members, the school corporation holds a gathering of the board members for an orientation of the board on their roles and responsibilities. During the orientation, the board members set and discuss the agenda for the next meeting. This is a meeting subject to the requirements of the ODL because the board took official action beyond just receiving an orientation on their roles and responsibilities.

In all instances, governing bodies are encouraged to be mindful of the mere appearance of impropriety.

Can a member of a governing body attend a meeting electronically?

A member of a governing body of a public agency of a political subdivision (other than a governing body of an airport authority or a department of aviation) who is not physically present at a meeting of the governing body, but who communicates electronically, may not participate in any final action or be considered present unless expressly authorized by state statute. See I.C. 5-14-1.5-3.5.

A member of a governing body of a charter school, a public agency of the state, or an airport authority or department of aviation may participate in a meeting electronically, participate in final action, and be considered present if the governing body complies with the requirements of I.C. 5-14-1.5-3.6.

What is official action?

“Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. § 5-14-1.5-2(d). In order to be considered a

meeting pursuant to the ODL, a governing body must take “official action.”

Example 1: A city council schedules a meeting to set hiring and firing guidelines for city employees. The meeting involves official action since policy is being established.

Example 2: A zoning board hears a presentation from an architectural firm regarding the designation of historic preservation areas. No proposals are made nor are votes taken. Yet, the board does take official action because the board is receiving information on public business.

What is a serial meeting?

A serial meeting is a series of small meetings held by a governing body in an attempt to avoid the requirements of the ODL. To address this, the General Assembly amended the ODL in 2007 to prohibit a serial meeting. By definition the serial meeting law can only be violated by governing bodies of six or more individuals. A serial meeting occurs when members of a governing body participate in a series of at least two meetings and all of the following conditions are met:

- One gathering is attended by at least three members but less than a quorum;
- The other gatherings include at least two members of the governing body;
- The sum of different members participating at least equals a quorum;
- The gatherings concern the same subject matter and are held within a period of seven days; and
- The gatherings are held to take official action on public business.

For purposes of the serial meeting section, a member of the governing body attends by being present in person or by telephonic or other electronic means, excluding email.

What if the need for a public meeting is uncertain?

All doubts under the ODL must be resolved in favor of requiring a public meeting, and all exceptions to the rule requiring open meetings must be interpreted narrowly.

Are email exchanges considered meetings?

Whether an email exchange is considered a meeting is largely dependent upon the nature and intent of the communication. If the governing body is trying to communicate simultaneously and expecting an immediate call-and-response type dialogue for the purpose of taking official action on business, the exchange constitutes a meeting.

What is significant about executive sessions?

Executive sessions are significant because the ODL permits governing bodies to meet privately under certain circumstances. "Executive session" is defined in I.C. § 5-14-1.5-2(f) and means a meeting from which the public is excluded, except that the governing body may admit those persons necessary to carry out its purpose. The ODL sets out the specific matters about which a public agency can hold an executive session. These include instances like government strategy discussions with respect to collective bargaining and litigation, interviews of prospective employees, job performance evaluations, and the purchase or lease of property by the public agency. For a complete listing, see Section Two of this guide.

A goal of a government unit is to schedule executive sessions sparingly. They should not be held regularly, nor should they be a standing meeting on a governing body's schedule. A governing body should hold only a handful of them a year, if at all. These sessions are heavily scrutinized by the Public Access Counselor.

Example 1: A local public works board meets in executive session before considering a tax proposal because there have been rumors the measure may be challenged on constitutional grounds. Unless litigation is actually pending or threatened in writing, this is a violation of the ODL.

Example 2: A local school board meets in executive session to discuss alleged sexual harassment of a fellow employee by a teacher in the district. The board calls the teacher in to the executive session to discuss the complaint. This is a permissible executive session, so long as the board limits its action to discussion of the

complaint and does not take any final disciplinary action against the teacher.

Example 3: A town board meets in executive session with its attorney and the attorney for a person who has filed a civil rights action against the town. The purpose of the meeting is to discuss settlement of the lawsuit. This violates the ODL because the meeting includes adversaries.

Example 4: A local public works board meets in executive session to open bids for a sewer project. Unless authorized by federal or state statute, or the bids are classified as confidential by statute, the executive session would violate the ODL.

Example 5: The governing body of a state agency meets in executive session to discuss records containing trade secrets. Under the Access to Public Records Act, which is addressed in Sections 3 and 4 of this guide, such records are exempt from public inspection. This discussion is appropriate for an executive session.

Example 6: The town council meets in executive session to discuss an employee who has already been terminated. The town council may not meet in executive session pursuant to I.C. 5-14-1.5-6.1(b)(6)(B) to discuss the employee as a determination has already been made on the individual's status as an employee.

When must a public agency give notice of an executive session?

Public notice of an executive session must be given 48 hours in advance of every session, excluding Saturdays, Sundays and legal holidays, and must state the time, date, location, and subject matter by reference to the specific statutory exception and language of the exception under which an executive session may be held.

Example: A commission posts notice indicating it will meet in executive session to discuss "personnel matters authorized under the Open Door Law." Unless the specific statutory exception is identified and the language of the exception is provided, this is a violation. There are executive session instances which allow executive sessions for specific types of personnel matters (e.g. a job performance evaluation), but

there is no instance allowing a meeting to discuss "personnel matters."

When can a governing body take final action on an item which is the subject of an executive session?

Final action (i.e. a vote) must be taken at a meeting open to the public.

Example: A board meets in executive session to review an individual's job performance. At the next regular board meeting, the presiding officer announces the board has voted to terminate the employee. This is a violation of I.C. § 5-14-1.5-6.1(c). The board's vote, or final action, was not taken at an open meeting. The board can make decisions in the executive session but cannot take final action in executive session.

A PUBLIC AGENCY'S RESPONSIBILITIES UNDER THE OPEN DOOR LAW

The ODL requires public agencies to schedule and conduct meetings in a fashion that enhances the public's access to and understanding of governmental meetings. The following questions explore these requirements.

When can I see a copy of the meeting agenda so I will know the order of proceedings?

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the governing body must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. In addition, the public agency must describe each agenda item specifically during a meeting and may not refer solely to an agenda item by number. The ODL does not prohibit a public agency from changing or adding to its agenda during the meeting.

Example: The clerk posts the agenda outside the meeting room one hour prior to the meeting. This is not a violation of the ODL because the agenda was posted prior to the meeting. Unlike the meeting notice, the agenda is not required to be posted 48 hours prior to the meeting.

Example: The presiding officer of a meeting announces the next vote by saying, "Now we will vote on Item 2, the purchase of property at 200 Main Street." This was not a violation because the

reference was not to the item number *alone*.

Must a governing body keep minutes of its meetings?

There is no requirement in the ODL for a public agency to keep minutes of its meeting. Minutes of a meeting, if any, are to be open for public inspection and copying. A public agency may not deny access to minutes of a meeting simply because they are still in "draft" form or have not yet been approved. Such records are disclosable public records under the APRA. See Sections 3 and 4 of this handbook. See below for requirements on what must be documented and retained by a public agency.

Suppose I am unable to attend an open meeting and want to find out what happened. What can I do?

You can obtain a copy of the meeting memoranda. The ODL requires the following memoranda to be kept:

- date, time, and place of the meeting;
- the members of the governing body recorded as either present or absent;
- the general substance of all matters proposed, discussed, or decided; and
- a record of all votes taken, by individual members, if there is a roll call.

The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings.

What if errors occur in the minutes of an open meeting?

The governing body may correct minutes of its meetings and make corrections to the record where errors have occurred in properly recording the minutes. Modifications and amendments may be made to entries of minutes.

How will I know if an open meeting has been scheduled?

The ODL requires public notice of date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting at least 48 hours prior to the meeting, excluding

Saturdays, Sundays, and legal holidays. A public agency must post a notice of meetings at the principal office of the agency, and if no such office exists, at the place where the meeting is to be held. See Section 2 of this handbook, regarding I.C. § 5-14-1.5-5. State agencies are also required to provide electronic access to meeting notices on the Internet. There may also be other statutes governing notices of particular meetings. See Appendices D and E for sample meeting notices.

Example: A board posts a notice that indicates a public meeting will be held “after the executive session.” This is not proper notice because it does not provide the time the meeting is scheduled to begin.

What if a meeting is necessary to deal with an emergency?

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the public agency's jurisdiction, the 48-hour notice requirement does not apply. The definition of an emergency should be narrowly construed. Examples include tornados, snowstorms, and other unforeseeable natural disasters. Pursuant to the statute, for an emergency to exist, it must threaten to compromise the integrity of operations of the government for the present or foreseeable future. A hindrance or inconvenience does not rise to that level. The definition of an emergency would not include foreseeable events.

News media which requested notice of meetings in accordance with I.C. § 5-14-1.5-5(b)(2) must be given the same notice as members of the governing body. The public must be provided notice by the posting of the notice outside the principal office of the public agency.

What special notice requirements apply for the media?

For governing bodies holding regularly scheduled meetings, notice need only be given once each year to all news media which have made a timely request in accordance with I.C. § 5-14-1.5-5(b)(2). Notices for executive sessions and additional open meetings must be delivered

48 hours before a meeting to news media which properly requested such notices.

May a governing body vote by secret ballot?

During a meeting of the governing body of a public agency, the governing body cannot vote by secret ballot.

Example: A commission votes by written ballot, which may be signed, initialed or left unsigned at the individual's discretion. This is a secret ballot and thus a violation of the ODL.

In what manner should a vote be taken?

The ODL does not require votes to be taken in any particular manner, so long as a secret ballot is not utilized.

Does the ODL require that a governing body deliberate in an open meeting before a vote is taken?

The ODL does not require a governing body to deliberate prior to a vote being taken. Again, public agencies are reminded of the appearance of closed-door meetings and are strongly encouraged to avoid these misperceptions if possible.

Example: At a meeting of all three members of the board of county commissioners, one commissioner suggests John Doe would make a good county bridge superintendent. The other two commissioners agree, and the staff is directed to inform Mr. Doe he is the new bridge superintendent. No formal motion is made and seconded, and no roll call vote is taken. The appointment is valid because the ODL does not require the commissioners to take a formal vote.

May I bring a video camera or tape recorder to an open proceeding to record a meeting?

A person has the right under the ODL to be present at a public meeting, other than an executive session, and to record the meeting by videotape, shorthand, or any other method of recording, subject to reasonable restrictions as to equipment and use that may be imposed by the governing body. Rules and regulations prohibiting the use of cameras, tape recorders or other recognized means of recording a meeting

are void.

Do I have the right to speak at an open meeting?

The ODL does not guarantee the right to speak at public meetings. Although an individual has the right to attend and observe all public proceedings, no specific statutory authority allows an individual to appear before and address a governing body. A governing body may choose to provide an opportunity for comments or discussion at any time or may allow a limited number of comments or limited amount of time for comments on matters under consideration. During certain meetings, a provision for public comment may be required by statute or local ordinance.

May a meeting be set at any time?

The ODL does not define any particular time for a meeting as inappropriate. However, a public agency may not delay the start of a meeting to the extent the delay frustrates the public's right to attend and observe the agency's proceedings.

Example 1: A city council wants to transmit a proposed expenditure to the department of local government finance for its approval before the calendar year expires. Because of this, the council also wants to schedule a third reading of an appropriation as promptly as possible following the second reading. The city schedules a city council meeting for 11:00p.m. The city has not violated the Open Door Law.

Example 2: A town board gives notice of an executive session for 4:30 p.m., with a public meeting to follow at 5:00 p.m. The board does most of its work in executive session and convenes the public meeting four hours late, at 9:00 p.m. This is contrary to the ODL because the delay may have frustrated the public's right to attend, observe and record the public meeting.

Where can meetings be held?

Meetings can be held anywhere accessible to the public. The ODL does prohibit a public agency from holding a meeting at a location inaccessible to an individual with a disability. A public agency should also ensure no other

barriers to access exist, such as locked outside doors at a meeting site. A public agency should also endeavor to hold meetings in a location that can accommodate all members of the public who wish to attend, especially if an anticipated audience may exceed capacity.

Example: The state natural resources commission wants to hold its meetings at a state park. This would be permissible only if those attending the meeting are not required to pay the park entrance fee.

Must a public agency adjourn its meetings?

The ODL does not require a public agency to formally adjourn its meetings. This does not relieve the public agency its requirement to post notice of its meetings 48 hours in advance as prescribed by I.C. § 5-14-1.5-5(a).

REMEDIES FOR VIOLATIONS OF THE ODL

What can I do when I think a governing body violated the ODL?

Any person may contact the Public Access Counselor to file a formal complaint or request an informal opinion. See Sections 5 and 6 of this handbook for more details. In addition, an action may be filed by any person in a court of competent jurisdiction against the governing body which allegedly violated the ODL. The plaintiff need not allege or prove special damage different from that suffered by the public at large.

What remedies are available if the ODL has been violated?

The counselor may provide informal or formal advice, but that advice is not binding on public agencies. Judicial remedies available include obtaining a declaratory judgment; enjoining continued, threatened, or future violations of the ODL; declaring a policy, decision, or final action void; or, the imposition of a civil penalty.

Are there time limits on filing a legal action?

There are time limits only on filing actions under the ODL to declare any policy, decision, or final action of a governing body void or to enter an injunction that would invalidate the public agency's policy, decision or final action, on the basis that these acts violated the law. The action must be commenced either prior to the time the

governing agency delivers any warrants, notes, bonds, or final actions that the legal action seeks to enjoin or declare void, or the action must be commenced within thirty days of either the date the act or failure to act complained of occurred or the date the plaintiff knew or should have known the act or failure to act complained of had occurred.

Who pays my legal fees if my action is successful or if I lose?

In any action filed under the ODL, a court must award reasonable attorney's fees, court costs, and other reasonable litigation expenses to the complainant if the person who filed the action prevails and that person sought the advice of the Counselor prior to filing the court action. If the public agency prevails and the court finds the legal action frivolous and vexatious, these fees, costs and expenses may be assessed against the person who filed the legal action.

Can a public employee or official be fined for violating the ODL?

A civil penalty may be imposed by the court against an individual who is an officer or manager of a public agency, who with the specific intent to violate the ODL fails to perform a duty as required by the law. See I.C. 5-14-1.5-7.5.

CONCLUSION

This guide is published to help public officials and individuals understand and apply Indiana's Open Door Law. Examples and explanations used in this guide are meant to be illustrative of the law's provisions, and they can in no way address every conceivable factual situation. When confronted with a question of interpretation, the law should be liberally construed in favor of openness.

SECTION TWO: THE OPEN DOOR LAW AND LEGAL COMMENTARY

This section contains the text of the Open Door Law, Ind. Code § 5-14-1.5-1 *et seq.*, which is current as of the close of the 2016 session of the Indiana General Assembly. After the sections which have been interpreted by Indiana courts, the Office of the Attorney General, or the Office of the Public Access Counselor, legal

commentary has been provided. The commentaries are included merely to provide the reader with practical guidance on how the law has been interpreted and are not intended to be a substitute for specific legal advice.

I.C. § 5-14-1.5-1 PURPOSE

In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy. (*As added by Acts 1977, P.L. 57, § 1; Amended by P.L. 67-1987, § 1.*)

COMMENTARY

It is the court's duty when construing the provisions of the Open Door Law to do so in a manner that is consistent with its declared policy and to give effect to the intention of the General Assembly. Common Council of the City of Peru v. Peru Daily Tribune, 440 N.E.2d 726 (Ind. Ct. App. 1982).

Public meetings should be held in a location that can accommodate all members of the public who wish to attend. When the public agency is aware in advance that the meeting location will likely be insufficient to hold all attendees, the agency should attempt a change of venue to satisfy the spirit of the Open Door Law. Opinion of the Public Access Counselor 13-FC-285.

I.C. § 5-14-1.5-2 DEFINITIONS

For the purposes of this chapter:

(a) "Public agency", except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.

(2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a

limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

(3) Any entity which is subject to either:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.

(7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

(b) "Governing body" means two (2) or more individuals who are:

(1) a public agency that:

(A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and

(B) takes official action on public business;

(2) the board, commission, council, or other body of a public agency which takes official action upon public business.

(3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for the purposes of this chapter.

(c) "Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. It does not include any of the following:

(1) any social or chance gathering not intended

to avoid this chapter;

(2) any on-site inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action.

(7) a gathering for the sole purpose of administering an oath of office to an individual.

(8) Collective bargaining discussions that the governing body of a school corporation engages in directly with bargaining adversaries. This subdivision only applies to a governing body that has not appointed an agent or agents to conduct collective bargaining on behalf of the governing body as described in subsection (b)(3).

(d) "Official action" means to:

(1) receive information;

(2) deliberate;

(3) make recommendations;

(4) establish policy;

(5) make decisions; or

(6) take final action.

(e) "Public business" means any function upon which the public agency is empowered or authorized to take official action.

(f) "Executive session" means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.

(g) "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.

(h) "Caucus" means a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action.

(i) "Deliberate" means a discussion which may

reasonably be expected to result in official action (defined under subsection (d)(3), (d)(4), (d)(5), or (d)(6)).

(j) "News media" means all newspapers qualified to receive legal advertisements under Indiana Code 5-3-1, all news services (as defined in Indiana Code 34-6-2-87), and all licensed commercial or public radio or television stations.

(k) "Person" means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity. (As added by Acts 1977, P.L. 57, § 1; 1979, P.L. 39, § 1; P.L.33-1984, § 1; P.L.67-1987, § 2; P.L.8-1993, § 56; P.L.277-1993(ss), § 127; P.L.1-1994, § 20; P.L.50-1995, § 14; P.L.1-1998, § 71; P.L.90-2002, § 16; P.L.35-2003, § 1; P.L.179-2007, § 1; P.L.103-2013, § 1.)

COMMENTARY

In Robinson v. Indiana University, 638 N.E.2d 435 (Ind.Ct. App. 1994), the Court of Appeals held that the definition of a governing body included committees that are directly appointed by the governing body or its presiding officer.

A group of state employees who meets to conduct business under state or federal law is not a governing body under the Open Door Law. Indiana State Board of Health v. Journal-Gazette Co., 608 N.E.2d 989 (Ind. Ct. App. 1993), modified 603 N.E.2d 989 (Ind. Ct. App. 1993).

If a majority of the members of a governing body attend a political "caucus," this is not converted to a meeting under the Open Door Law unless official action is taken. Evansville Courier v. Willner, 563 N.E.2d 1269 (Ind. 1990).

When a university hospital and a private hospital consolidated to form a private, nonprofit corporation that (1) assumed all the liabilities of the university hospital; (2) would not receive any State funds; and (3) would engage non-public employees, the corporation formed is not a public "entity" subject to audit by the Indiana State Board of Accounts and is not subject to the Open Door Law. However, to the extent a portion of the newly formed private, nonprofit corporation is a "public office" subject to Indiana State Board of

Accounts' audits, that portion of the corporation will be subject to the Open Door Law. Indiana State Bd. of Accounts v. Consolidated Health Group, Inc., 700 N.E.2d 247, 251-53 (Ind. Ct. App. 1998).

Failure to give notice of an on-site inspection is not a violation of the ODL as an on-site inspection is not a meeting. Opinion of the Public Access Counselor 98-FC-03.

Whether an email exchange is considered a meeting is largely dependent upon the nature and intent of the communication. If the governing body is trying to communicate simultaneously and expecting an immediate call-and-response type dialogue for the purpose of taking official action on business, the exchange constitutes a meeting. Opinion of the Public Access Counselor 13-FC-324.

When a private university establishes a charter school, which is a public entity under I.C. 20-24-1-4, meetings relating to the charter school are subject to the ODL. Opinion of the Public Access Counselor 16-FC-32

I.C. § 5-14-1.5-2.1 "PUBLIC AGENCY" DEFINED; CERTAIN PROVIDERS EXEMPTED

"Public agency," for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

(1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:

(A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.

(B) The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.

(C) The amount of the fees are negotiated by the entity and the state, county, or municipality.

(D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the

entity.

(2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts. (*As added by Act P.L.179-2007, § 2.*)

I.C. § 5-14-1.5-3 OPEN MEETINGS; SECRET BALLOT VOTES; MEMBER PARTICIPATING BY ELECTRONIC MEANS OF COMMUNICATION

(a) Except as provided in section 6.1 of this chapter, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.

(b) A secret ballot vote may not be taken at a meeting.

(c) A meeting conducted in compliance with section 3.5 or 3.6 of this chapter or any other statute that authorizes a governing body to conduct a meeting using an electronic means of communication does not violate this section. (*As added by Acts 1977, P.L.57, § 1; P.L.38-1988, § 6; P.L.1-1991, § 35; P.L.179-2007, § 3.; P.L.134-2012, §10.*)

COMMENTARY

Governing bodies may not ban the use of cameras and tape recorders at public meetings. Berry v. Peoples Broadcasting Corp., 547 N.E.2d 231 (Ind. 1989).

The Hammond Board of Works and Public Safety violated the Open Door Law when it conferred with its legal counsel off the record during the course of an administrative hearing. Hinojosa v. Board of Public Works & Safety for the City of Hammond, Indiana, 789 N.E.2d 533, 549 (Ind. 2003).

I.C. § 5-14-1.5-3.1 SERIAL MEETINGS

(a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2)

members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(b) This subsection applies only to the city-county council of a consolidated city or county having a consolidated city. The city-county council violates this chapter if its members participate in a series of at least two (2) gatherings of members of the city-county council and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least five (5) members of the city-county council and the other gatherings include at least three (3) members of the city-county council.

(2) The sum of the number of different members of the city-county council attending any of the gatherings at least equals a quorum of the city-county council.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of the city-county council attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to the betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;

(7) a gathering for the sole purpose of administering an oath of office to an individual; or

(8) a gathering between less than a quorum of the members of the governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.

(d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter. (As added by P.L.179-2007, §4.)

While email discussion and deliberation are excluded from serial meetings as not being violative, final decisions are meant to be open and transparent. Opinion of the Public Access Counselor 13-FC-324.

I.C. § 5-14-1.5-3.5 ELECTRONIC MEETINGS OF POLITICAL SUBDIVISIONS; AUTHORIZATION REQUIRED

(a) This section applies only to a governing body of a public agency of a political subdivision, other than a governing body of an airport authority or a department of aviation as set forth in section 3.6 of this chapter.

(b) A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, video conferencing, or any other electronic means of communication:

(1) may not participate in final action taken at the meeting unless the member's participation

is expressly authorized by statute; and

(2) may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

(c) The memoranda prepared under section 4 of this chapter for a meeting in which a member participates by using a means of communication described in subsection (b) must state the name of:

(1) each member who was physically present at the place where the meeting was conducted;

(2) each member who participated in the meeting by using a means of communication described in subsection (b); and

(3) each member who was absent. (As added by P.L. 134-2012, § 11; P.L. 154-2016, §1.)

I.C. § 5-14-1.5-3.6 ELECTRONIC MEETINGS OF STATE AGENCIES

(a) This section applies only to a governing body of the following:

(1) A charter school (as defined in IC 20-24-1-4).

(2) A public agency of the state, including a body corporate and politic established as an instrumentality of the state.

(3) An airport authority or a department of aviation under IC 8-22.

(b) A member of the governing body who is not physically present at a meeting of the governing body may participate in a meeting of the governing body by electronic communication only if the member uses a means of communication that permits:

(1) the member;

(2) all other members participating in the meeting;

(3) all members of the public physically present at the place where the meeting is conducted; and

(4) if the meeting is conducted under a policy adopted under subsection (g)(7), all members of the public physically present at a public location at which a member participates by means of electronic communication; to simultaneously communicate with each other during the meeting.

(c) The governing body must fulfill both of

the following requirements for a member of the governing body to participate in a meeting by electronic communication:

(1) This subdivision does not apply to committees appointed by a board of trustees of a state educational institution, by the commission for higher education, or the board of directors of the Indiana secondary market for education loans, as established, incorporated, and designated under IC 21-16-5-1. The minimum number of members who must be physically present at the place where the meeting is conducted must be the greater of:

- (A) two (2) of the members; or
- (B) one-third (1/3) of the members.

(2) All votes of the governing body during the electronic meeting must be taken by roll call vote.

Nothing in this section affects the public's right under this chapter to attend a meeting of the governing body at the place where the meeting is conducted and the minimum number of members is physically present as provided for in subdivision (1).

(d) Each member of the governing body is required to physically attend at least one (1) meeting of the governing body annually.

(e) Unless a policy adopted by a governing body under subsection (g) provides otherwise, a member who participates in a meeting by electronic communication:

(1) is considered to be present at the meeting;

(2) shall be counted for purposes of establishing a quorum; and

(3) may vote at the meeting.

(f) A governing body may not conduct meetings using a means of electronic communication until the governing body:

(1) meets all requirements of this chapter; and

(2) by a favorable vote of a majority of the members of the governing body, adopts a policy under subsection (g) governing participation in meetings of the governing body by electronic communication.

(g) A policy adopted by a governing body to govern participation in the governing body's meetings by electronic communication may do any of the following:

(1) Require a member to request

authorization to participate in a meeting of the governing body by electronic communication within a certain number of days before the meeting to allow for arrangements to be made for the member's participation by electronic communication.

(2) Subject to subsection (e), limit the number of members who may participate in any one (1) meeting by electronic communication.

(3) Limit the total number of meetings that the governing body may conduct in a calendar year by electronic communication.

(4) Limit the number of meetings in a calendar year in which any one (1) member of the governing body may participate by electronic communication.

(5) Provide that a member who participates in a meeting by electronic communication may not cast the deciding vote on any official action. For purposes of this subdivision, a member casts the deciding vote on an official action if, regardless of the order in which the votes are cast:

(A) the member votes with the majority; and

(B) the official action is adopted or defeated by one (1) vote.

(6) Require a member participating in a meeting by electronic communication to confirm in writing the votes cast by the member during the meeting within a certain number of days after the date of the meeting.

(7) Provide that in addition to the location where a meeting is conducted, the public may also attend some or all meetings of the governing body, excluding executive sessions, at a public place or public places at which a member is physically present and participates by electronic communication. If the governing body's policy includes this provision, a meeting notice must provide the following information:

(A) The identity of each member who will be physically present at a public place and participate in the meeting by electronic communication.

(B) The address and telephone number of each public place where a member will be physically present and participate by electronic communication.

(C) Unless the meeting is an executive session, a statement that a location described in

clause (B) will be open and accessible to the public.

(8) Require at least a quorum of members to be physically present at the location where the meeting is conducted.

(9) Provide that a member participating by electronic communication may vote on official action only if, subject to subsection (e), a specified number of members:

(A) are physically present at the location where the meeting is conducted; and

(B) concur in the official action.

(10) Establish any other procedures, limitations, or conditions that govern participation in meetings of the governing body by electronic communication and are not in conflict with this chapter.

(h) The policy adopted by the governing body must be posted on the Internet web site of the governing body, the charter school, the airport, or the public agency.

(i) Nothing in this section affects a public agency's or charter school's right to exclude the public from an executive session in which a member participates by electronic communication.

(As added by P.L. 134-2012, §12; P.L. 62-2013, §1; P.L. 132-2013 §1; P.L. 280-2013, §4; P.L. 30-2015, §1; P.L. 154-2016, §2.)

I.C. § 5-14-1.5-4 POSTING AGENDA; MEMORANDA OF MEETINGS; PUBLIC INSPECTION OF MINUTES

(a) A governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. A rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.

(b) As the meeting progresses, the following memoranda shall be kept:

(1) The date, time, and place of the meeting.

(2) The members of the governing body recorded as either present or absent.

(3) The general substance of all matters proposed, discussed, or decided.

(4) A record of all votes taken, by individual members if there is a roll call.

(5) Any additional information required under section 3.5 or 3.6 of this chapter or any other

statute that authorizes a governing body to conduct a meeting using an electronic means of communication.

(c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, if any, are to be open for public inspection and copying. *(As added by Acts 1977, P.L.57, § 1; P.L.38-1988, § 7; P.L.76-1995, § 1; P.L.2-2007, § 99.;P.L. 134-2012,§13.)*

COMMENTARY

Draft copies of minutes taken during a public meeting are considered to be disclosable public records despite not yet being approved by a governing body or in their official final form. Opinion of the Public Access Counselor 98-FC-08; 10-FC-56; 05-FC-23; 12-FC-80.

I.C. § 5-14-1.5-5 PUBLIC NOTICE OF MEETINGS

(a) Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. This requirement does not apply to reconvened meetings (not including executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda.

(b) Public notice shall be given by the governing body of a public agency as follows:

(1) The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held.

(2) The governing body of a public agency shall give public notice by delivering notice to all news media which deliver an annual written request for the notices not later than December 31 for the next succeeding calendar year to the governing body of the public agency. The governing body shall give notice by one (1) of the following methods, which shall be determined by the governing body:

(A) Depositing the notice in the United States mail with postage prepaid.

(B) Transmitting the notice by electronic mail, if the public agency has the capacity to transmit electronic mail.

(C) Transmitting the notice by facsimile (fax).

(3) This subdivision applies only to the governing body of a public agency of a political subdivision described in section 2(a)(2), 2(a)(4), or 2(a)(5) of this chapter that adopts a policy to provide notice under this subdivision. Notice under this subsection is in addition to providing notice under subdivisions (1) and (2). If the governing body adopts a policy under this subdivision, the governing body of a public agency shall give public notice by delivering notice to any person (other than news media) who delivers to the governing body of the public agency an annual written request for the notices not later than December 31 for the next succeeding calendar year. The governing body shall give notice by one (1) of the following methods, which shall be determined by the governing body:

(A) Transmitting the notice by electronic mail, if the public agency has the capacity to send electronic mail.

(B) Publishing the notice on the public agency's Internet web site at least forty-eight (48) hours in advance of the meeting, if the public agency has an Internet web site. A court may not declare void any policy, decision, or final action under section 7 of this chapter based on a failure to give a person notice under subdivision (3) if the public agency made a good faith effort to comply with subdivision (3). If a governing body comes into existence after December 31, it shall comply with this subsection upon receipt of a written request for notice. In addition, a state agency (as defined in Ind. Code §4-13-1-1) shall provide electronic access to the notice through the computer gateway administered by the Indiana Office of Technology under Indiana Code 5-21-2.

(c) Notice of regular meetings need be given only once each year, except that an additional notice shall be given where the date, time, or place of a regular meeting or meetings is changed. This subsection does not apply to executive sessions.

(d) If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under this section shall not apply, but:

(1) news media which have requested notice of meetings under subsection (b)(2) must be given the same notice as is given to members of the governing body; and

(2) the public must be notified by posting a copy of the notice according to subsection (b)(1).

(e) This section shall not apply where notice by publication is required by statute, ordinance, rule, or regulation.

(f) This section shall not apply to:

(1) the department of local government finance, the Indiana board of tax review, or any other governing body which meets in continuous session, except that this section applies to meetings of these governing bodies which are required by or held pursuant to statute, ordinance, rule, or regulation; or

(2) the executive of a county or the legislative body of a town if the meetings are held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit.

“Administrative functions” do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town.

(g) This section does not apply to the General Assembly.

(h) Notice has not been given in accordance with this section if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *(As added by Acts 1977, P.L. 57, § 1; 1979, P.L. 39, § 2; P.L.67-1987, § 3; P.L.3-1989, § 29; P.L.8-1989, § 22; P.L.46-1990, § 1; P.L.251-1999, § 4; P.L.90-2002, § 17; P.L.200-2003, § 1; P.L.177-2005, § 14; P.L. 134-2012, §14.)*

COMMENTARY

Action taken at a city council meeting was not void simply because the meeting was held at 11:00p.m. Blinn v. City of Marion, 390 N.E.2d 1066 (Ind. Ct. App. 1979).

Notice of a county council meeting was adequate despite the failure to post the notice on the door of the meeting room when the council posted the notice outside the courthouse where notices are usually posted and notified the daily newspaper, which published news articles on three separate days. Pepinsky v. Monroe County Council, 461 N.E.2d 128 (Ind. Ct. App. 1984).

A court's inquiry does not end with the determination that meetings subject to the Open Door Law were not in "technical compliance" with the law. Turner v. Town of Speedway, 528 N.E. 2d 858 (Ind. Ct. App. 1988). Instead, a court may look for "substantial compliance" which includes (1) the extent to which the violation denied or impaired access to a meeting; and (2) the extent to which public knowledge or understanding of the public business conducted was impeded. Town of Merrillville v. Blanco, 687N.E.2d 191 (Ind. Ct. App. 1998) (Town violated the technical requirements of the Open Door Law by failing to post notice at least 48 hours in advance of its meetings at the city hall but was not in substantial compliance since a police officer's termination was a matter of primary interest to the general public; the town's failure to give adequate notice about this public matter restricted interested spectators' access to the hearing). See also, Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. Ct. App. 1988)(substantial compliance standard met).

County commissioners do not meet in continuous session and must post notice of meetings 48 hours prior to meetings. Opinion of the Public Access Counselor 16-FC-11 and 98-INF-05.

IC 5-14-1.5-6.1 EXECUTIVE SESSIONS

Sec. 6.1. (a) As used in this section, "public official" means a person:

(1) who is a member of a governing body of a public agency; or

(2) whose tenure and compensation are fixed by law and who executes an oath.

(b) Executive sessions may be held only in the following instances:

(1) Where authorized by federal or state statute.

(2) For discussion of strategy with respect to any of the following:

(A) Collective bargaining.

(B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing. As used in this clause, "litigation" includes any judicial action or administrative law proceeding under federal or state law.

(C) The implementation of security systems.

(D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

(E) School consolidation
However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

(3) For discussion of the assessment, design, and implementation of school safety and security measures, plans, and systems.

(4) Interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by:

(A) the Indiana economic development corporation;

(B) the office of tourism development;

(C) the Indiana finance authority;

(D) the ports of Indiana;

(E) an economic development commission;

(F) the Indiana state department of agriculture;

(G) a local economic development organization that is a nonprofit corporation established under state law whose primary purpose is the promotion of industrial or business development in Indiana, the retention or expansion of Indiana businesses, or the development of entrepreneurial activities in Indiana; or

(H) a governing body of a political subdivision.

- (5) To receive information about and interview prospective employees.
- (6) With respect to any individual over whom the governing body has jurisdiction:
- (A) to receive information concerning the individual's alleged misconduct; and
 - (B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:
 - (i) a physician; or
 - (ii) a school bus driver.
- (7) For discussion of records classified as confidential by state or federal statute.
- (8) To discuss before a placement decision an individual student's abilities, past performance, behavior, and needs.
- (9) To discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.
- (10) When considering the appointment of a public official, to do the following:
- (A) Develop a list of prospective appointees.
 - (B) Consider applications.
 - (C) Make one (1) initial exclusion of prospective appointees from further consideration.
- Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. Interviews of prospective appointees must be conducted at a meeting that is open to the public.
- (11) To train school board members with an outside consultant about the performance of the role of the members as public officials.
- (12) To prepare or score examinations used in issuing licenses, certificates, permits, or registrations under IC 25.
- (13) To discuss information and intelligence intended to prevent, mitigate, or respond to the threat of terrorism.

(14) To train members of a board of aviation commissioners appointed under IC 8-22-2 or members of an airport authority board appointed under IC 8-22-3 with an outside consultant about the performance of the role of the members as public officials. A board may hold not more than one (1) executive session per calendar year under this subdivision.

(c) A final action must be taken at a meeting open to the public.

(d) Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). The requirements stated in section 4 of this chapter for memoranda and minutes being made available to the public is modified as to executive sessions in that the memoranda and minutes must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

(e) A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. A meeting may not be recessed and reconvened with the intent of circumventing this subsection. *(As added by P.L.1-1991, § 37 and P.L.10-1991, § 8. Amended by P.L.48-1991, § 1; P.L.37-2000, § 1; P.L.200-2003, § 2; P.L.4-2005, § 28; P.L.229-2005, § 2; P.L.235-2005, § 84; P.L.101-2006, § 3; P.L.179-2007, § 5; P.L.2-2008, § 20; P.L.98-2008, § 3; P.L.120-2008, § 1; P.L.139-2011, § 1; P.L.24-2012, § 1; P.L.103-2013 § 2; P.L.145-2016 § 2.)*

COMMENTARY

A goal of a government unit is to schedule executive sessions sparingly. They should not be held regularly, nor should they be a standing meeting on a governing body's schedule. A governing body should hold only a handful of them a year, if at all. These sessions are heavily scrutinized by the Public Access Counselor. Opinions of the Public Access Counselor 99-FC-23; 16-FC-146.

Public agencies may not seek legal advice from their attorneys in private about matters which are not related to litigation. Simon v. City of Auburn, Ind., Bd. of Zoning Appeals, 519 N.E.2d 205 (Ind. App. 3d Dist. 1988).

The term "employee," as used in the Open Door Law, does not include an independent contractor with the agency and, therefore, a public agency may not hold an executive session to receive information about that independent contractor. Opinion of the Indiana Attorney General, 1997, No. 2 (OAG 97-02).

Municipal board applicants are not prospective "employees" but are prospective officers and executive sessions to interview these applicants are not permitted under the Open Door Law. Common Council of the City of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726 (Ind. App. 2d Dist. 1982).

Police commissioners board could conduct a hearing on police disciplinary charges in executive session because the police disciplinary statute authorizes a hearing, rather than a public hearing, and the Open Door Law authorizes executive sessions for the purpose of receiving information about alleged misconduct and to discuss, before determination, a person's employment status. Town of Merrillville, Lake County v. Peters, 655 N.E.2d 341, 343 (Ind. 1995).

The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. Baker v. Town of Middlebury, 753 N.E. 2d 67, 71 (Ind. Ct. App. 2001). The act of compiling a rehire list in an executive session, and excluding the town marshal from that list, was appropriate according to both the language and goals of the statute and did not constitute impermissible final action. Id. at 73.

Notice of an executive session which refers to "legal matters" and "FOI requests" does not comply with the Open Door Law. Gary/Chicago Airport Board of Authority v. Maclin, 772 N.E.2d 463, 468 (Ind. Ct. App. 2002). The Court of

Appeals found that the Board's argument that it substantially complied with the Open Door Law lacked merit because I.C. §5-14-1.5-6.1 requires the Board to identify the subject matter by specific reference to subsection (b). Id. The airport board further violated the ODL by failing to keep memoranda containing specific information from its executive sessions. Id.

A county council may not post the notice of executive sessions on an annual basis; instead, council must specify each executive session and list a permissible statutory exception. Opinion of the Public Access Counselor 99-FC-23.

Final actions of a public agency, including selection of a Town Council President and deliberation of an employee's termination, taken during executive sessions were taken in violation of the ODL. Opinions of the Public Access Counselor 99-FC-04; 00-FC-06.

Commission's order substantially complied with the Open Door Law when final order had not actually been signed and released in public meeting but all prior proceedings and findings had occurred in public meetings. Ind. Dep't of Env'tl. Mgmt. v. West, 812 N.E.2d 1099 (Ind. App. 2004), transfer granted, opinion vacated sub nom. IDEM v. West, 831 N.E.2d 734 (Ind. 2005), and vacated, 838 N.E.2d 408 (Ind. 2005).

Former city employee was terminated in an open meeting by the council's vote on a motion to appoint another person to the employee's position under I.C. §§5-14-1.5-2 and 5-14-1.5-6.1(c); accordingly, no violation of the ODL occurred. Furthermore, a letter sent to the employee by the council president was not a final action by the council because it was a mere formality to inform the employee of the council's action. City of Gary v. McCrady, 851 N.E.2d 359 (Ind. App. 2006).

Notice of an executive session shall include the language of the statute and the citation to the specific instance. "To discuss a performance evaluation of an individual employee, pursuant to IC 5-14-1.5-6.1(b)(9)" for example, would satisfy the notice requirements. Opinions of the Public Access Counselor, 05-FC-223; 07-FC-64 and 11-FC-39.

IC 5-14-1.5-6.5 COLLECTIVE BARGAINING MEETINGS; APPLICABLE REQUIREMENTS

Sec. 6.5. (a) Whenever a governing body, or any person authorized to act for a governing body, meets with an employee organization, or any person authorized to act for an employee organization, for the purpose of collective bargaining or discussion, the following apply:

(1) Any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information.

(2) If a mediator is appointed, any report the mediator may file at the conclusion of mediation is a public record open to public inspection.

(3) If a fact finder is appointed, any hearings the fact finder holds must be open at all times for the purpose of permitting members of the public to observe and record them. Any findings and recommendations the fact finder makes are public records open to public inspection as provided by any applicable statute relating to fact finding in connection with public collective bargaining.

(b) This section supplements and does not limit any other provision of this chapter. *(As added by Acts 1979, P.L.39, § 4. Amended by P.L.67-1987, § 5; P.L.1-2005, § 8; P.L. 48-2011, § 1.)*

I.C. § 5-14-1.5-7 VIOLATIONS; REMEDIES; LIMITATIONS; COSTS AND FEES

(a) An action may be filed by any person in any court of competent jurisdiction to:

(1) obtain a declaratory judgment;
(2) enjoin continuing, threatened, or future violations of this chapter; or
(3) declare void any policy, decision, or final action:

(A) taken at an executive session in violation of section 3(a) of this chapter;

(B) taken at any meeting of which notice is not given in accordance with section 5 of this chapter;

(C) that is based in whole or in part upon official action taken at any:

(i) executive session in violation of section 3(a) of this chapter;

(ii) meeting of which notice is not given in accordance with section 5 of this chapter; or

(iii) series of gatherings in violation of section 3.1 of this chapter; or

(D) taken at a meeting held in a location in violation of section 8 of this chapter.

The plaintiff need not allege or prove special damage different from that suffered by the public at large.

(b) Regardless of whether a formal complaint or an informal inquiry is pending before the Public Access Counselor, any action to declare any policy, decision, or final action of a governing body void, or to enter an injunction which would invalidate any policy, decision, or final action of a governing body, based on violation of this chapter occurring before the action is commenced, shall be commenced:

(1) prior to the delivery of any warrants, notes, bonds, or obligations if the relief sought would have the effect, if granted, of invalidating the notes, bonds, or obligations; or

(2) with respect to any other subject matter, within thirty (30) days of either:

(A) the date of the act or failure to act complained of; or

(B) the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred; whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of a governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection.

(c) If a court finds that a governing body of a public agency has violated this chapter, it may not find that the violation was cured by the governing body by only having taken final action at a meeting that complies with this chapter.

(d) In determining whether to declare any policy, decision, or final action void, a court shall consider the following factors among other relevant factors:

(1) The extent to which the violation:

(A) affected the substance of the policy, decision, or final action;

(B) denied or impaired access to any meetings that the public had a right to observe

and record; and

(C) prevented or impaired public knowledge or understanding of the public's business.

(2) Whether voiding of the policy, decision, or final action is a necessary prerequisite to a substantial reconsideration of the subject matter.

(3) Whether the public interest will be served by voiding the policy, decision, or final action by determining which of the following factors outweighs the other:

(A) The remedial benefits gained by effectuating the public policy of the state declared in section 1 of this chapter.

(B) The prejudice likely to accrue to the public if the policy, decision, or final action is voided, including the extent to which persons have relied upon the validity of the challenged action and the effect declaring the challenged action void would have on them.

(4) Whether the defendant acted in compliance with an informal inquiry response or advisory opinion issued by the Public Access Counselor concerning a violation.

(e) If a court declares a policy, decision, or final action of a governing body of a public agency void, the court may enjoin the governing body from subsequently acting upon the subject matter of the voided act until it has been given substantial reconsideration at a meeting or meetings that comply with this chapter.

(f) In any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff prevails; or

(2) the defendant prevails and the court finds that the action is frivolous and vexatious. The plaintiff is not eligible for the awarding of attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor, unless the plaintiff can show the filing of the action was necessary to prevent a violation of this chapter.

(g) A court may assess a civil penalty under section 7.5 of this chapter only if the plaintiff obtained an advisory opinion from the public access counselor before filing an action under this section as set forth in section 7.5 of this chapter.(h) A court shall expedite the hearing of

an action filed under this section. *(As added by Acts 1977, P.L. 57, §1; 1979, P.L. 39, §5; P.L.67-1987, §6; P.L.38-1992, §1; P.L.70-1999, §1; P.L.191-1999, §1; P.L.179-2007, §6; P.L.134-2012, §15)*

COMMENTARY

A party challenging the action of a public agency need not prove special damage that is different from the public at large in order to obtain an injunction under this section of the ODL. Common Council v. Peru Daily Tribune, Inc., 440 N.E.2d 726 (Ind. App. 2d Dist. 1982).

A city resident was entitled to file a taxpayer's action and initiate proceedings to force the city council's compliance with the Open Door Law. Reichhart v. City of New Haven, 674 N.E.2d 27, 32 (Ind. Ct. App. 1996).

Whether to invalidate any policy, decision, or final action taken by a public agency in violation of the Open Door Law is left to the court's discretion. Town of Merrillville v. Blanco, 687 N.E.2d 191 (Ind. Ct. App. 1997).

Because appellant's suit against government board was necessary to prevent current and further violations of the Open Door Law, award of attorney fees to appellant under I.C. §5-14-1.5-7(f) was proper. Hinojosa v. Bd. of Pub. Works & Safety for City of Hammond, Ind., 789 N.E.2d 533 (Ind. App. 2003), transfer denied, 812 N.E.2d 796, (Ind. 2004).

Former city employee was not entitled under I.C. §5-14-1.5-7(f) to an award of attorney's fees before the trial court or on appeal because the appellate court found for the city council and reversed the trial court's entry of summary judgment for the employee. City of Gary v. McCrady, 851 N.E.2d 359, 2006 (Ind. Ct. App. 2006).

I.C. § 5-14-1.5-7.5 CIVIL PENALTIES IMPOSED ON PUBLIC AGENCY, OFFICER, OR MANAGEMENT LEVEL EMPLOYEE

(a) This section applies only to an individual who is:

(1) an officer of a public agency; or

(2) employed in a management level

position with a public agency.

(b) If an individual with the specific intent to violate the law fails to perform a duty imposed on the individual under this chapter by:

(1) failing to give proper notice of a regular meeting, special meeting, or executive session;

(2) taking final action outside a regular meeting or special meeting;

(3) participating in a secret ballot during a meeting;

(4) discussing in an executive session subjects not eligible for discussion in an executive session;

(5) failing to prepare a memorandum of a meeting as required by section 4 of this chapter; or

(6) participating in at least one (1) gathering of a series of gatherings under section 3.1 of this chapter; the individual and the public agency are subject to a civil penalty under subsection (f).

(c) A civil penalty may only be imposed as part of an action filed under section 7 of this chapter. A court may not impose a civil penalty under this section unless the public access counselor has issued an advisory opinion:

(1) to the complainant and the public agency;

(2) that finds that the individual or public agency violated this chapter; and

(3) before the action under section 7 of this chapter is filed.

Nothing in this section prevents both the complainant and the public agency from requesting an advisory opinion from the public access counselor.

(d) It is a defense to the imposition of a civil penalty under this section that the individual failed to perform a duty under subsection (b) in reliance on either of the following:

(1) An opinion of the public agency's legal counsel.

(2) An opinion of the attorney general.

(e) Except as provided in subsection (i), in an action filed under section 7 of this chapter, a court may impose a civil penalty against one (1) or more of the following:

(1) The individual named as a defendant in the action.

(2) The public agency named as a defendant in the action.

(f) The court may impose against each defendant listed in subsection (c) the following civil penalties:

(1) Not more than one hundred dollars (\$100) for the first violation.

(2) Not more than five hundred dollars (\$500) for each additional violation.

A civil penalty imposed under this section is in addition to any other civil or criminal penalty imposed. However, in any one (1) action brought under section 7 of this chapter, a court may impose only one (1) civil penalty against an individual, even if the court finds that the individual committed multiple violations. This subsection does not preclude a court from imposing another civil penalty against an individual in a separate action, but an individual may not be assessed more than one (1) civil penalty in any one (1) action brought under this section.

(g) A court shall distribute monthly to the auditor of state any penalties collected under this section for deposit in the education fund established by IC 5-14-4-14.

(h) An individual is personally liable for a civil penalty imposed on the individual under this section. A civil penalty imposed against a public agency under this section shall be paid from the public agency's budget.

(i) If an officer of a public agency directs an individual who is employed in a management level position to fail to give proper notice as described in subsection (b)(1), the management level employee is not subject to civil penalties under subsection (f). (*As added by P.L. 134-2012, § 16.*)

I.C. § 5-14-1.5-8 ACCESSIBILITY TO INDIVIDUALS WITH DISABILITIES

(a) This section applies only to the following public agencies:

(1) A public agency described in section 2(a)(1) of this chapter.

(2) A public agency:

(A) described in section 2(a)(5) of this chapter; and

(B) created to advise the governing body of a public agency described in section 2(a)(1) of this chapter.

(b) As used in this section, "accessible" means the design, construction, or alteration of

facilities in conformance with the Uniform Federal Accessibility Standards (41 C.F.R. 101-19.6, App. A (1991)) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (56 Fed. Reg. 35605 (1991)).

(c) As used in this section, "individual with a disability" means an individual who has a temporary or permanent physical disability.

(d) A public agency may not hold a meeting at a location that is not accessible to an individual with a disability. (*As added by Acts P.L. 38-1992, § 2.*)

COMMENTARY

Ind. Code §5-14-1.5-8 mandates that public agency hearings must be held in facilities that permit barrier-free physical access to the physically handicapped; the statute does not make allowances for agencies who plan to accommodate disabled individuals only when those individuals express interest in attending the meetings. Town of Merrillville v. Blanco, 687 N.E.2d 191, 198 (Ind. App. 1997).

SECTION THREE: OVERVIEW OF THE ACCESS TO PUBLIC RECORDS ACT

INTRODUCTION

The Access to Public Records Act ("APRA") (Ind. Code § 5-14-1.5), originally passed by the Indiana General Assembly in 1983 and most recently amended in 2016, was enacted to permit the citizens of Indiana broad and easy access to public records. By providing the public with the opportunity to review and copy public records, the APRA gives individuals the opportunity to obtain information relating to their government and to more fully participate in the governmental process. For the APRA to be useful to the public, it is important that the public understands the APRA. This guide sets forth the basic elements of the APRA and provides answers to common questions. This guide does not, however, contain specific answers to specific questions. For more detailed guidance, please consult the provisions of the Indiana Code set forth at Section 4 of this handbook.

COMMONLY ASKED QUESTIONS ABOUT THE ACCESS TO PUBLIC RECORDS ACT

The following are commonly asked questions about the APRA. It is important to note that the answers are not the final authority on a particular issue, as the facts will vary from situation to situation. Indeed, laws and court interpretations of the law are ever changing. Therefore, it is important to remember that the answers to these questions are only guides for the public, may only apply to specific situations, and are subject to change.

Who may access public records?

The explicit policy statement and statutory language of the APRA permit all persons access to public records. A "person" includes individuals as well as corporations, limited liability companies, partnerships, associations and governmental entities.

Example: A company may access minutes of a public board meeting just as an individual may.

Example: A non-resident of the State of Indiana may make a request for records under the APRA.

What kinds of documents may be accessed?

To be required to be accessible, a document must be a public record from a public agency. The APRA defines a public record as

. . . any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. I.C. § 5-14-3-2.

I.C. § 5-14-3-2 defines public agency very broadly to include boards, commissions, departments, divisions, bureaus, committees, agencies and offices exercising administrative, judicial or legislative power; counties, townships, cities, towns, law enforcement agencies; school corporations; advisory commissions, committees and bodies; license branches; the lottery commission; the gaming commission; the horse racing commission; and a private university police department. Additionally, any entity that is subject to audit by the State Board of Accounts

by statute, rule, or regulation is a public agency for purposes of the APRA. An entity that is maintained or supported, in whole or in part, by public funds may fall within the APRA, and, therefore, its records are accessible.

Example: The following public records are generally accessible from public agencies: applications for permits and licenses, contracts to which the state or local unit of government is a party, survey plats, commission, board and committee reports and recommendations, and transcripts of public hearings in which testimony was taken.

Example: A person may obtain a copy of a property record card maintained by a county or township assessor.

What records may not be accessed?

The stated policy of the APRA and its broad definition of public records make most documents accessible to the public. But the APRA specifically excludes certain types of documents from disclosure. These exceptions can be found in I.C. § 5-14-3-4. In determining whether a particular record is excepted from disclosure under the APRA, Indiana courts are to interpret these exceptions narrowly. Under I.C. § 5-14-3-4(a), certain records cannot be disclosed by a public agency unless the disclosure is specifically required by state or federal statute, or is ordered by a court under the rules of discovery. I.C. 5-14-3-4(a) is not an exhaustive list of records that are considered to be confidential pursuant to state law. Various provisions throughout the Indiana Code declare certain records to be confidential. The most commonly cited exceptions found in I.C. § 5-14-3-4(a) include:

- Records made confidential by state statute;
 - Juvenile Law Enforcement Records (IC 31-39-3, 4);
 - Juvenile Court Records (IC 31-39-2);
 - Protective Orders (IC 5-2-9-6); Address Confidentiality Program (IC 5-26.5-2);
 - Confidential Motor Vehicle Records (IC 9-14-3-9);
 - Victim Addresses (IC 11-13-3-

4);

- TANF Records (IC 12-14-1-7);
 - Patient Treatment Records (IC 12-23-18-5.6);
 - School Records (IC 31-39-6-1);
 - Hotline Calls (IC 31-33-18-5)
- Records made confidential by rule adopted by a public agency under specific authority;
 - Records made confidential by federal law;
 - FERPA (20 U.S.C. §1232g *et seq.*)
 - Records containing trade secrets;
 - Records containing confidential financial information received upon request from a person;
 - Grade transcripts and license examination scores;
 - Records made confidential by rules adopted by the Indiana Supreme Court;
 - Patient medical records and charts created by a health care provider unless the patient provides written consent for the record's disclosure;
 - A photograph, a video recording, or an audio recording of an autopsy; and
 - A social security number contained in the records of a public agency.

In certain circumstances, the APRA grants public agencies discretion in determining which public records should be disclosed. I.C. §5-14-3-4(b) provides public agencies the discretion to withhold the following records from public access: The following are the most commonly cited discretionary exceptions found under 4(b):

- Investigatory records of law enforcement agencies. Records compiled during the course of an investigation of a crime are considered to be investigatory records. However, pursuant to *I.C. § 5-14-3-5, certain factual information relating to the identity of a person arrested or jailed and the agency's response to a complaint, accident or incident must be made available to the public.*)

Example: Statements made to police by witnesses of a crime may be withheld at the discretion of the agency pursuant to I.C. 5-14-3-

4(b)(1).

- The work product of an attorney employed by the state or a public agency who is representing a public agency, the state, or an individual in reasonable anticipation of litigation;

Example: A letter written by a school board attorney to the board, advising the board of his strategy regarding pending litigation, may be withheld at the agency's discretion pursuant to I.C. 5-14-3-4(b)(2).

- Intra-agency or interagency advisory or deliberative materials that express opinions and are used for decision-making;

Example: A memo from a staff member to the mayor expressing the staff member's opinion on a proposed change in office policy may be withheld under I.C. § 5-14-3-4(b)(6).

- Diaries, journals or other personal notes;

Example: The written contents of a county employee's calendar, used at her office for the purpose of maintaining a journal of personal notes, may be withheld at the discretion of the agency pursuant to I.C. § 5-14-3-4(b)(7).

- Certain information contained in the files of public employees and applicants for public employment (*Certain information in an employee's personnel file is required to be disclosed under this exception*);

Example: An employee's job performance evaluation kept in his personnel file may be withheld at the agency's discretion pursuant to I.C. § 5-14-3-4(b)(8). The factual basis for an employee's termination however must be disclosed under subsection (C).

- Certain administrative or technical information that would jeopardize a record keeping or security system;

Example: A diagram of the security system for the State Museum's artifacts may be withheld by the agency under I.C. § 5-14-3-4(b)(10).

- Certain software owned by the public agency, I.C. § 5-14-3-4(b)(11); Records specifically prepared for discussion in executive sessions, I.C. § 5-14-3-4(b)(12);
- Work product of the legislative services agency, I.C. § 5-14-3-4(b)(13);
- Work product of the general assembly and its staff, I.C. § 5-14-3-4(b)(14);
- Information disclosure of which would threaten public safety by exposing a vulnerability to a terrorist attack, I.C. § 5-14-3-4(b)(19);
- Personal information concerning a customer of a municipally owned utility, including the customer's telephone number, address, and social security number, I.C. § 5-14-3-4(b)(20); and
- Records requested by an "offender" that contain personal information relating to law enforcement and correctional officers, judges, victims, and their family members, I.C. § 5-14-3-4(b)(23).

With the exception of adoption records, public records classified as confidential are available for public inspection and copying 75 years after they were created. If a public agency argues that a document is not disclosable, the agency bears the burden of proving that the document does not fall within the scope of the APRA.

May I request information in the form of a list?

The Act provides that a public agency is not required to create and release a list of names and addresses upon request. If a list of names has been compiled, or if a public agency maintains a list of information under some statutory requirement, the list is accessible to the public. In general, however, a public agency is not required to create a "list" to satisfy a public records request. But an agency that maintains its records on an "electronic data storage system" must make a reasonable effort to satisfy a request for information from that system.

When a commercial entity requests a list that

contains the names and addresses of (1) the employees of a public agency, (2) the names of the people attending conferences or meetings at a state institution of higher education, or (3) students enrolled in a public school corporation which adopts a policy that such information need not be released, the public agency may not permit a commercial entity access to the list when the list is sought for a commercial purpose.

Example: A request is received by the county highway department for “the dates that County Road 500 North has been paved between the years 1995 and 1997.” This request seeks information in list form. If the county does not maintain such a list, it need not create one. The requestor would, however, be entitled to access any of the county’s documents that may provide pertinent information to satisfy his request.

When can public records be accessed?

The APRA permits the public access to public records during the regular business hours of the particular public agency from which the records are sought. On occasion, part-time public officials may have limited business hours. The APRA does not require a public agency to be open for any particular hours of the day, but it is the responsibility of the public official to ensure there is adequate time for persons who wish to inspect and copy records. Once a public agency indicates there are disclosable public records which will be provided in response to a request, the compilation and copying of the records may not unreasonably interfere with the regular business of that agency.

Example 1: A citizen requests access to and copies of numerous records of a state agency. The agency responds to the request by stating the estimated time for preparation of the copies and the estimated copying fee. So long as the copies will be provided within a reasonable period of time after the request is made, the agency is in compliance with the APRA.

How can public records be accessed?

A request for the inspection or copying of public records must identify with reasonable particularity the record being requested. The

public agency, in its discretion, may require the request to be in writing on or in a form provided by the agency. It is advisable to first contact the public agency to determine whether a request form is required and/or if specific information is required to quickly locate particular documents.

What is enhanced access to public records?

In 1993, the Indiana General Assembly added a new dimension to accessing public records-enhanced access. Enhanced access permits individuals who enter into a contract with a public agency to obtain access to public records by means of electronic devices. Essentially, the enhanced access provision allows individuals who frequently use information from a public agency to examine public records using their own computer equipment.

State agencies may provide enhanced access only through a computer gateway established by the Indiana Office of Technology, unless an exception has been made by the state data processing oversight commission. All other public agencies covered by the APRA may provide enhanced access to their records either directly through an individual’s computer gateway, by contracting with a third party to serve as the agency’s gateway or through the gateway established and approved by the Indiana Office of Technology. Any provision of enhanced access, whether by contract or otherwise, must provide that the public agency, the user or a third party gateway provider will not engage in unauthorized enhanced access or alteration of public records and will not lead to the disclosure of confidential information.

What are the public agency’s responsibilities when I submit a request?

If a requestor is physically present in the office of the public agency or makes a request by telephone or requests enhanced access to a document, the public agency must respond to the request within 24 hours after any employee of the agency receives the request. If a request is mailed or sent by facsimile or email, a public agency must respond within seven calendar days of the receipt of that request. The APRA requires only a response and not the actual production of records within this specified time period. The APRA requires that all records must be produced in a

reasonable period of time, considering the facts and circumstances. See Appendix B for a checklist for agencies responding to requests under the APRA.

Example: A person appears at the county auditor's office and asks to inspect the minutes of the council's last ten meetings. The auditor need not produce the records on demand but must at a minimum orally acknowledge the request within 24 hours.

May a public agency deny a request?

In general, if a requested record (1) is a public record from a public agency; (2) is not exempt from disclosure; and (3) is identified with reasonable particularity pursuant to I.C. § 5-14-3-3(a), the public agency cannot deny access to the record.

If access to a public record would reveal disclosable and nondisclosable information, the information that is disclosable must be made available for inspection. The public agency must separate, or redact, the nondisclosable information.

Oral requests made by telephone or in person may be denied orally. If a request is made in writing, by facsimile or by email, or if an oral request that was denied is renewed in writing, the public agency may only deny the request in writing. A denial **must** include a statement of the specific statutory reason for nondisclosure of the information and the name and title of the person responsible for the denial.

What if a public agency denies my request?

If a person feels he or she has been wrongly denied, that person should contact the Public Access Counselor for an informal response or to file a formal complaint. See Sections 5 and 6 of this handbook for more information.

The APRA authorizes an individual who has been denied access to a public record to file a civil lawsuit in the circuit or superior court of the county in which the denial occurred. The purpose of the lawsuit is to compel disclosure of the records sought. When such a lawsuit is filed, the public agency must notify each person who supplied a part of the public record in dispute that a request for its release has been denied.

The burden of proof then falls upon the public

agency to establish that it properly denied access to the public record because the record falls outside the scope of the Act. If certain conditions are met, the prevailing party is entitled to reasonable attorney fees, court costs and other litigation expenses. Further, a civil penalty may be assessed by the court if a request for records is denied with the specific intent to unlawfully withhold a record that is subject to disclosure under the APRA. See I.C. 5-14-3-9.5.

May a public agency charge a fee for inspecting and copying public records?

The APRA provides that a public agency cannot charge for inspection or a search for records unless it is authorized to do so by statute. For copies of records from a state agency, the state Department of Administration has established a copying fee for agencies under the executive branch of \$.10 per page for black and white copies or \$.25 per page for color copies. A public agency may require that the payment for copying costs be made in advance. The state judicial and legislative branches set their own fees.

For non-state agencies covered by the APRA, the fiscal body of the agency is required to establish a fee schedule for the certification or copying of documents that does not exceed the actual cost of certification or copying. The fee for copying documents may not exceed the greater of \$.10 for black and white copies, \$.25 for color copies, or the actual cost to the agency in copying the document. "Actual cost" is defined as the cost of the paper plus the per-page cost of use of the copying and may not include labor and overhead. The fee for certification of documents may not exceed \$5.00 per document. All fees must be uniform to all purchasers.

Copies of public records may also be provided in other forms. For a duplicate of a computer tape, disc, microfilm, law enforcement recording, or similar record system containing public records, an agency may charge a fee as prescribed by statute. I.C. § 5-14-3-8(g). The fee for a copy of a law enforcement recording may not exceed \$150. I.C. § 5-14-3-8(g)(1). An agency may also provide enhanced access to a public record and charge a reasonable fee under the provisions governing enhanced access, I.C. § 5-14-3-3.5 and I.C. § 5-14-3-3.6.

What happens if confidential records are disclosed or if there is a failure to protect the public records from destruction?

It is a Class A infraction for a public official or employee(s) of contractors with public agencies to knowingly or intentionally disclose records that are confidential by state statute. In addition, a public employee can be disciplined in accordance with agency personnel guidelines for reckless disclosure or failure to protect information classified as confidential by state statute. Additionally, the APRA requires a public agency to protect public records from loss, alteration, mutilation, or destruction. The APRA does not identify a penalty if the agency fails to do so.

May I inspect a law enforcement recording?

The APRA requires a public agency to permit any person to inspect or copy a law enforcement recording, however, the agency may deny the request if the public agency finds the distribution of the recording:

- Creates a significant risk of substantial harm to any person or the general public.
- Will likely interfere with the ability of an individual to receive a fair trial.
- May affect an ongoing investigation, if the recording is an investigatory record.
- Would not serve the public interest.

I.C. § 5-14-3-5.2(a).

All requests to inspect or copy a law enforcement recording must be in writing. The request must identify a law enforcement recording with reasonable particularity. To meet this standard, the individual must identify:

- (1) The date and approximate time of the law enforcement activity.
- (2) The specific location where the law enforcement activity occurred.
- (3) The name of at least one (1) individual, other than a law enforcement officer, who was directly involved in the law enforcement activity.

I.C. 5-14-3-3(i).

Additionally, the agency is required to obscure certain depictions and information that may be included in the recording, including crime victims and witnesses, when necessary for safety.

I.C. § 5-14-3-5.2(e).

How long does a public agency keep a law enforcement recording?

A public agency must retain a law enforcement recording for 190 days from the date of the recording if the public agency is not the state or a state agency, or 280 days if the public agency is the state or a state agency. If a complaint has been filed with the public agency regarding a specific recording, it must be retained for at least two years after the date of the recording. I.C. § 5-14-3-5.3.

Should I contact the Public Access Counselor if my request to view a law enforcement recording is denied?

Any appeal relating to the denial of access to a law enforcement recording should be submitted to the appropriate court, not the Public Access Counselor.

CONCLUSION

The APRA provides the people of Indiana with broad access to the public documents maintained by public agencies. Access to public records is the rule and not the exception. This handbook is published with the hope that it will help public officials and individual citizens understand and apply the APRA. The examples and explanations used in the guide are meant to be illustrative of the law's provisions; they can in no way address every conceivable factual situation. When confronted with a question of interpretation, the law should be liberally construed in favor of openness.

SECTION FOUR: THE ACCESS TO PUBLIC RECORDS ACT AND LEGAL COMMENTARY

INTRODUCTION

This section contains the text of the Access to Public Records Act, I.C. § 5-14-3-1 *et seq.*, which is current as of the close of the 2016 session of the Indiana General Assembly. After those sections which have been interpreted by Indiana courts, the Office of the Attorney General, or the Public Access Counselor, we have provided legal commentary. These commentaries are included merely to provide the reader with practical

guidance on how the law has been interpreted and are not intended to be a substitute for specific legal advice.

I.C. § 5-14-3-1 PUBLIC POLICY; CONSTRUCTION; BURDEN OF PROOF FOR NON-DISCLOSURE

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. (As added by P.L. 19-1983, § 6; Amended by P.L. 77-1995, § 1.)

COMMENTARY

The APRA clearly provides that the public is to have access to the affairs of government and actions of officials who represent them. A liberal construction of the Act does not mean that expressed exceptions specified by the legislature are to be contravened. Heltzel v. Thomas, 516 N.E.2d 103 (Ind. App. 3d Dist. 1987).

A public agency has the burden to establish that a requested record is included in categories not disclosable under the APRA. Indianapolis Convention and Visitors Association, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208 (Ind. 1991).

Because an affidavit signed by the judge of a small claims court was not public record, the court was not required to respond to a citizen's request for the affidavit; furthermore, the court did not maintain a copy of the affidavit and, therefore, could not produce it. Woolley v. Wash.

Twp. of Marion County Small Claims Court, 804 N.E.2d 761, (Ind. Ct. App. 2004).

Regardless of whether it kept paper copies or electronic records, a local health department was required to collect and maintain death certificates. Evansville Courier & Press v. Vanderburgh County Health Dept., 17 N.E.3d 922 (Ind. 2014).

When an inmate sought a police department's public records, the police chief was not a proper party because the Indiana Access to Public Records Act did not provide for suits against individuals. Lane-El v. Spears, 13 N.E.3d 859 (Ind. Ct. App. 2014), transfer denied, 20 N.E.3d 851 (Ind. 2014), and cert. denied, 135 S. Ct. 1903 (2015).

When a civil servant is acting in his or her official capacity as a public figure, any documented record received or generated by the public official, including business conducted over private email, is a potentially disclosable public record. Opinion of the Public Access Counselor 14-FC-199.

There is a danger that the public will be denied access to important public documents when a private agency is exercising a public function if the courts construe the Indiana APRA to categorically exclude such agencies; accordingly, the APRA phrase "any agency or a department of any level of government," and therefore the definition of "law enforcement agency," includes private educational institutions that choose to appoint police officers. ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dept., 50 N.E.3d 385 (Ind. Ct. App. 2016), transfer granted, opinion vacated sub nom. ESPN, Inc. v. Univ. of Notre Dame Police Dept., 54 N.E.3d 371 (Ind. 2016).

I.C. § 5-14-3-2 DEFINITIONS

(a) The definitions set forth in this section apply throughout this chapter.

(b) "Copy" includes transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any

other means.

(c) "Criminal intelligence information" means data that has been evaluated to determine that the data is relevant to:

- (1) the identification of; and
- (2) the criminal activity engaged in by;

an individual who or organization that is reasonably suspected of involvement in criminal activity.

(d) "Direct cost" means one hundred five percent (105%) of the sum of the cost of:

- (1) the initial development of a program, if any;
- (2) the labor required to retrieve electronically stored data; and
- (3) any medium used for electronic output; for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

(e) "Electronic map" means copyrighted data provided by a public agency from an electronic geographic information system.

(f) "Enhanced access" means the inspection of a public record by a person other than a governmental entity and that:

- (1) is by means of an electronic device other than an electronic device provided by a public agency in the office of the public agency; or
- (2) requires the compilation or creation of a list or report that does not result in the permanent electronic storage of the information.

(g) "Facsimile machine" means a machine that electronically transmits exact images through connection with a telephone network.

(h) "Inspect" includes the right to do the following:

- (1) Manually transcribe and make notes, abstracts, or memoranda.
- (2) In the case of tape recordings or other aural public records, to listen and manually transcribe or duplicate, or make notes, abstracts, or other memoranda from them.
- (3) In the case of public records available:
 - (A) by enhanced access under section 3.5 of this chapter; or
 - (B) to a governmental entity under section 3(c)(2) of this chapter; to examine and copy the public records by use of an electronic device.
- (4) In the case of electronically stored data, to

manually transcribe and make notes, abstracts, or memoranda or to duplicate the data onto a disk, tape, drum, or any other medium of electronic storage.

(i) "Investigatory record" means information compiled in the course of the investigation of a crime.

(j) "Law enforcement activity" means:

- (1) a traffic stop;
- (2) a pedestrian stop;
- (3) an arrest;
- (4) a search;
- (5) an investigation;
- (6) a pursuit;
- (7) crowd control;
- (8) traffic control; or
- (9) any other instance in which a law enforcement officer is enforcing the law.

The term does not include an administrative activity, including the completion of paperwork related to a law enforcement activity, or a custodial interrogation conducted in a place of detention as described in Indiana Evidence Rule 617, regardless of the ultimate admissibility of a statement made during the custodial interrogation.

(k) "Law enforcement recording" means an audio, visual, or audiovisual recording of a law enforcement activity captured by a camera or other device that is:

- (1) provided to or used by a law enforcement officer in the scope of the officer's duties; and
- (2) designed to be worn by a law enforcement officer or attached to the vehicle or transportation of a law enforcement officer.

(l) "Offender" means a person confined in a penal institution as the result of the conviction for a crime.

(m) "Patient" has the meaning set out in IC 16-18-2-272(d).

(n) "Person" means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

(o) "Private university police department" means the police officers appointed by the governing board of a private university under IC 21-17-5.

(p) "Provider" has the meaning set out in IC 16-18-2-295(b) and includes employees of the state department of health or local boards of health who create patient records at the request of

another provider or who are social workers and create records concerning the family background of children who may need assistance.

(q) "Public agency," except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(2) Any:

(A) county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town;

(B) political subdivision (as defined by IC 36-1-2-13); or

(C) other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.

(3) Any entity or office that is subject to:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) an audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming

commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

(7) Any license branch operated under IC 9-14.1.

(8) The state lottery commission established by IC 4-30-3-1, including any department, division, or office of the commission.

(9) The Indiana gaming commission established under IC 4-33, including any department, division, or office of the commission.

(10) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

(11) A private university police department. The term does not include the governing board of a private university or any other department, division, board, entity, or office of a private university.

(r) "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

(s) "Standard-sized documents" includes all documents that can be mechanically reproduced (without mechanical reduction) on paper sized eight and one-half (8 ½) inches by eleven (11) inches or eight and one-half (8 ½) inches by fourteen (14) inches.

(t) "Trade secret" has the meaning set forth in IC 24-2-3-2.

(u) "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

(1) notes and statements taken during interviews of prospective witnesses; and

(2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

This definition does not restrict the application of any exception under section 4 of this chapter.

(As added by P.L.19-1983, § 6; P.L.34-1984, § 1; P.L.54-1985, § 1; P.L.42-1986, § 2; P.L.50-1986, § 1; P.L.341-1989(ss), § 6; P.L.2-1991, § 29; P.L.2-1992, § 53; P.L.2-1993, § 49; P.L.8-1993, § 57; P.L.58-1993, § 1; P.L.277-1993(ss), § 128; P.L.1-1994, § 21; P.L.77-1995, § 2; P.L.50-1995, § 15; P.L.1-1999, § 6; P.L.256-1999, § 1; P.L.204-2001, § 12; P.L.90-2002, § 18; P.L.261-2003, § 5; P.L.2-2005, § 16; P.L.170-2005, § 17; P.L.1-2006, § 101; P.L.1-2007, § 28; P.L.179-2007, § 7; P.L.227-2007, § 57; P.L. 3-2008, § 28; P.L. 51-2008, § 1; P.L. 248-2013, § 2; P.L. 58-2016, § 1; P.L. 198-2016, § 12.)

COMMENTARY

Coroner's office is a "law enforcement agency" due to various statutes under which he or she performs investigations into deaths often involving crimes. Heltzel v. Thomas, 516 N.E.2d 103 (Ind. Ct. App. 1987).

The APRA applies to municipally owned utilities as public agencies. Opinion of the Attorney General, 1984, No. 7, page 106.

Township's small claims court was a "public agency" for purposes of the Access to Public Records Act. Woolley v. Wash. Twp. of Marion County Small Claims Court, 804 N.E.2d 761 (Ind. Ct. App. 2004).

Trial court qualifies as "public agency" within meaning of Indiana Access to Public Records Act, Ind. Code 5-14-3. Bobrow v. Bobrow, 810 N.E.2d 726 (Ind. App. 2004).

I.C. § 5-14-3-2.1 "PUBLIC AGENCY"; CERTAIN PROVIDERS EXEMPTED

"Public agency," for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

(1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:

(A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.

(B) The amount of fees received by the

entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.

(C) The amount of the fees are negotiated by the entity and the state, county, or municipality.

(D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.

(2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts. (As added by P.L.179-2007, § 8.)

I.C. § 5-14-3-3 RIGHT TO INSPECT AND COPY PUBLIC AGENCY RECORDS OR RECORDINGS; ELECTRONIC DATA STORAGE; USE OF INFORMATION FOR COMMERCIAL PURPOSES; CONTRACTS

(a) Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter. A request for inspection or copying must:

(1) identify with reasonable particularity the record being requested; and

(2) be, at the discretion of the agency, in writing on or in a form provided by the agency. No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute. If a request is for inspection or copying of a law enforcement recording, the request must provide the information required under subsection (i).

(b) A public agency may not deny or interfere with the exercise of the right stated in subsection (a). Within a reasonable time after the request is received by the agency, the public agency shall either:

(1) provide the requested copies to the person making the request; or

(2) allow the person to make copies:

(A) on the agency's equipment; or

(B) on the person's own equipment.

(c) Notwithstanding subsections (a) and (b), a public agency may or may not do the following:

(1) In accordance with a contract described in section 3.5 of this chapter, permit a person to inspect and copy through the use of enhanced access public records containing information

owned by or entrusted to the public agency.

(2) Permit a governmental entity to use an electronic device to inspect and copy public records containing information owned by or entrusted to the public agency.

(d) Except as provided in subsection (e), a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. This subsection does not apply to an electronic map.

(e) A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d).

(f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. The lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to

any individual or entity for political purposes and may not be used by any individual or entity for political purposes. In addition, the lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes. The prohibition in this subsection against the disclosure of lists for political or commercial purposes applies to the following lists of names and addresses (including electronic mail account addresses):

(1) A list of employees of a public agency.

(2) A list of persons attending conferences or meetings at a state educational institution or of persons involved in programs or activities conducted or supervised by the state educational institution.

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes; or

(C) with respect to disclosure related to a political purpose, prohibiting the disclosure of the list to individuals and entities for political purposes.

A policy adopted under subdivision (3)(A) or (3)(B) must be uniform and may not discriminate among similarly situated commercial entities. For purposes of this subsection, "political purposes" means influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.

(g) A public agency may not enter into or renew a contract or an obligation:

(1) for the storage or copying of public records;

or

(2) that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute;

if the contract, obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records.

(h) If this section conflicts with IC 3-7, the provisions of IC 3-7 apply.

(i) A request to inspect or copy a law enforcement recording must be in writing. A request identifies a law enforcement recording with reasonable particularity as required by this section only if the request provides the following information regarding the law enforcement activity depicted in the recording:

(1) The date and approximate time of the law enforcement activity.

(2) The specific location where the law enforcement activity occurred.

(3) The name of at least one (1) individual, other than a law enforcement officer, who was directly involved in the law enforcement activity.

(As added by P.L.19-1983, § 6; P.L.54-1985, § 2; P.L.51-1986, § 1; P.L.58-1993, § 2; P.L.77-1995, § 3; P.L.173-2003, § 4; P.L.261-2003, § 6; P.L.22-2006, § 1; P.L.1-2007, § 29; P.L.2-2007, § 100; P.L. 134-2012, §17; P.L. 58-2016 § 2.)

COMMENTARY

“Regular business hours” is not defined by the APRA. Although it is understandable that part-time public officials may have limited hours of operation, it is nevertheless the responsibility of a public official to ensure there is adequate opportunity and time for persons who wish to inspect and copy records. Opinion of the Public Access Counselor, 98-4.

“Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed

on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. See generally IC 5-14-3-1; Opinions of the Public Access Counselor 02-FC-13; 08-FC-176; 10-FC-7.

Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records. Jent v. Fort Wayne Police Dept., 973 N.E. 2d 30 (Ind. Ct. App. 2012).

In regard to a request for email communication, this Office typically relies on the following case:

A request that seeks “all email correspondence sent and received by Jane Doe for a specific date range” is not reasonably particular. A request for “all email correspondence from Jane Doe to Jim Smith for a specific date range” would be reasonably particular. Anderson v. Huntington Co. Bd. of Comm’rs, 983 N.E.2d 613 (Ind. Ct. App. 2013).

I.C. § 5-14-3-3.5 STATE AGENCIES; ENHANCED ACCESS TO PUBLIC RECORDS; OFFICE OF TECHNOLOGY

(a) As used in this section, "state agency" has the meaning set forth in IC 4-13-1-1. The term does not include the office of the following elected state officials:

- (1) Secretary of state.
- (2) Auditor.
- (3) Treasurer.
- (4) Attorney general.
- (5) Superintendent of public instruction.

However, each state office described in subdivisions (1) through (5) and the judicial department of state government may use the computer gateway administered by the office of technology established by I.C. §4-13.1-2-1, subject to the requirements of this section. (b) As an additional means of inspecting and copying public records, a state agency may provide enhanced access to public records maintained by the state agency.

(c) If the state agency has entered into a contract with a third party under which the state agency provides enhanced access to the person through the third party's computer gateway or otherwise, all of the following apply to the contract:

(1) The contract between the state agency and the third party must provide for the protection of public records in accordance with subsection (d).

(2) The contract between the state agency and the third party may provide for the payment of a reasonable fee to the state agency by either:

- (A) the third party; or
- (B) the person.

(d) A contract required by this section must provide that the person and the third party will not engage in the following:

(1) Unauthorized enhanced access to public records.

(2) Unauthorized alteration of public records.

(3) Disclosure of confidential public records.

(e) A state agency shall provide enhanced access to public records only through the computer gateway administered by the office of technology.

(As added by P.L.58-1993, § 3; P.L.77-1995, § 4; P.L.19-1997, § 2; P.L.14-2004, § 183; P.L.177-2005, § 15.)

COMMENTARY

While there are no reported decisions on enhanced access, in 1997 the Indiana General Assembly amended this section to apply only to state agencies and enacted I.C. §5-14-3-3.6 to govern enhanced access to records of other public agencies covered by the APRA.

I.C. § 5-14-3-3.6 PUBLIC AGENCIES; ENHANCED ACCESS TO PUBLIC RECORDS; OFFICE OF TECHNOLOGY

(a) As used in this section "public agency" does not include a state agency (as defined in section 3.5(a) of this chapter).

(b) As an additional means of inspecting and copying public records, a public agency may provide enhanced access to public records maintained by the public agency.

(c) A public agency may provide a person with enhanced access to public records if any of the following apply:

(1) The public agency provides enhanced access to the person through its own computer gateway and provides for the protection of public records under subsection (d).

(2) The public agency has entered into a contract with a third party under which the public agency provides enhanced access to the person through the third party's computer gateway or otherwise, and the contract between the public agency and the third party provides for the protection of public records in accordance with subsection (d).

(d) A contract entered into under this section and any other provision of enhanced access must provide that the third party and the person will not engage in the following:

(1) Unauthorized enhanced access to public records.

(2) Unauthorized alteration of public records.

(3) Disclosure of confidential public records.

(e) A contract entered into under this section or any provision of enhanced access may require the payment of a reasonable fee to either the third party to a contract or to the public agency, or both, from the person.

(f) A public agency may provide enhanced access to public records through the computer gateway administered by the office of technology established by IC 4-13.1-2-1. *(As added by P.L.19-1997, § 3; P.L.177-2005, § 16.)*

IC 5-14-3-4 RECORDS EXCEPTED FROM DISCLOSURE; TIME LIMITATIONS; DESTRUCTION OF RECORDS

(a) The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

(1) Those declared confidential by state statute.

(2) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.

(3) Those required to be kept confidential

by federal law.

(4) Records containing trade secrets.

(5) Confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute.

(6) Information concerning research, including actual research documents, conducted under the auspices of a state educational institution, including information:

(A) concerning any negotiations made with respect to the research; and

(B) received from another party involved in the research.

(7) Grade transcripts and license examination scores obtained as part of a licensure process.

(8) Those declared confidential by or under rules adopted by the supreme court of Indiana.

(9) Patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39 or as provided under IC 16-41-8.

(10) Application information declared confidential by the Indiana economic development corporation under IC 5-28-16.

(11) A photograph, a video recording, or an audio recording of an autopsy, except as provided in IC 36-2-14-10.

(12) A Social Security number contained in the records of a public agency.

(13) The following information that is part of a foreclosure action subject to IC 32-30-10.5:

(A) Contact information for a debtor, as described in IC 32-30-10.5-8(d)(1)(B).

(B) Any document submitted to the court as part of the debtor's loss mitigation package under IC 32-30-10.5-10(a)(3).

(14) The following information obtained from a call made to a fraud hotline established under IC 36-1-8-8.5:

(A) The identity of any individual who makes a call to the fraud hotline.

(B) A report, transcript, audio recording, or other information concerning a call to the fraud hotline.

However, records described in this subdivision may be disclosed to a law enforcement agency, a private university police department, the attorney general, the inspector

general, the state examiner, or a prosecuting attorney.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(1) Investigatory records of law enforcement agencies or private university police departments. For purposes of this chapter, a law enforcement recording is not an investigatory record. Law enforcement agencies or private university police departments may share investigatory records with a person who advocates on behalf of a crime victim, including a victim advocate (as defined in IC 35-37-6-3.5) or a victim service provider (as defined in IC 35-37-6-5), for the purposes of providing services to a victim or describing services that may be available to a victim, without the law enforcement agency or private university police department losing its discretion to keep those records confidential from other records requesters. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter.

(2) The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

(A) a public agency;

(B) the state; or

(C) an individual.

(3) Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests if the person is identified by name and has not consented to the release of the person's scores.

(5) The following:

(A) Records relating to negotiations between:

(i) the Indiana economic development corporation;

(ii) the ports of Indiana;

(iii) the Indiana state department of agriculture;

(iv) the Indiana finance authority;

(v) an economic development commission;

(vi) a local economic development organization that is a nonprofit corporation established under state law whose primary purpose is the promotion of industrial or business development in Indiana, the retention or expansion of Indiana businesses, or the development of entrepreneurial activities in Indiana;; or

(vii) a governing body of a political subdivision with industrial, research, or commercial prospects;

if the records are created while negotiations are in progress.

(B) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, the ports of Indiana, the Indiana finance authority, an economic development commission, or a governing body of a political subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(C) When disclosing a final offer under clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

(D) Notwithstanding clause (A), an incentive agreement with an incentive recipient shall be available for inspection and copying under section 3 of this chapter after the date the incentive recipient and the Indiana economic development corporation execute the incentive agreement regardless of whether negotiations are in progress with the recipient after that date regarding a modification or extension of the incentive agreement.

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

(9) Minutes or records of hospital medical staff meetings.

(10) Administrative or technical information that would jeopardize a record keeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility.

(12) Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1. However, this subdivision does not apply to that information required to be available for inspection and copying under subdivision (8).

(13) The work product of the legislative services agency under personnel rules approved by the legislative council.

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if:

(A) the donor requires nondisclosure of the donor's identity as a condition of making the gift; or

(B) after the gift is made, the donor or a

member of the donor's family requests nondisclosure.

(16) Library or archival records:

(A) which can be used to identify any library patron; or

(B) deposited with or acquired by a library upon a condition that the records be disclosed only:

(i) to qualified researchers;

(ii) after the passing of a period of years that is specified in the documents under which the deposit or acquisition is made; or

(iii) after the death of persons specified at the time of the acquisition or deposit.

However, nothing in this subdivision shall limit or affect contracts entered into by the Indiana state library pursuant to IC 4-1-6-8.

(17) The identity of any person who contacts the bureau of motor vehicles concerning the ability of a driver to operate a motor vehicle safely and the medical records and evaluations made by the bureau of motor vehicles staff or members of the driver licensing medical advisory board regarding the ability of a driver to operate a motor vehicle safely.

However, upon written request to the commissioner of the bureau of motor vehicles, the driver must be given copies of the driver's medical records and evaluations.

(18) School safety and security measures, plans, and systems, including emergency preparedness plans developed under 511 IAC 6.1-2-2.5.

(19) A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. A record described under this subdivision includes the following:

(A) A record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2.

(B) Vulnerability assessments.

(C) Risk planning documents.

(D) Needs assessments.

(E) Threat assessments.

(F) Intelligence assessments.

(G) Domestic preparedness strategies.

(H) The location of community drinking

water wells and surface water intakes.

(I) The emergency contact information of emergency responders and volunteers.

(J) Infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water, and wastewater systems.

(K) Detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems, whether in paper or electronic form, of any building or facility located on an airport (as defined in IC 8-21-1-1) that is owned, occupied, leased, or maintained by a public agency, or any part of a law enforcement recording that captures information about airport security procedures, areas, or systems. A record described in this clause may not be released for public inspection by any public agency without the prior approval of the public agency that owns, occupies, leases, or maintains the airport. Both of the following apply to the public agency that owns, occupies, leases, or maintains the airport:

(i) The public agency is responsible for determining whether the public disclosure of a record or a part of a record, including a law enforcement recording, has a reasonable likelihood of threatening public safety by exposing a security procedure, area, system, or vulnerability to terrorist attack.

(ii) The public agency must identify a record described under item (i) and clearly mark the record as "confidential and not subject to public disclosure under IC 5-14-3-4(b)(19)(J) without approval of (insert name of submitting public agency)". However, in the case of a law enforcement recording, the public agency must clearly make the record as "confidential and not subject to public disclosure under IC 5-14-3-4(b)(19)(K) without approval of (insert name of the public agency that owns, occupies, leases, or maintains the airport)".

(L) The home address, home telephone number, and emergency contact information for any:

(i) emergency management worker (as defined in IC 10-14-3-3);

(ii) public safety officer (as defined in IC 35-47-4.5-3);

(iii) emergency medical responder (as defined in IC 16-18-2-109.8); or

(iv) advanced emergency medical technician (as defined in IC 16-18-2-6.5).

This subdivision does not apply to a record or portion of a record pertaining to a location or structure owned or protected by a public agency in the event that an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2 has occurred at that location or structure, unless release of the record or portion of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability of other locations or structures to terrorist attack.

(20) The following personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1):

- (A) Telephone number.
- (B) Address.
- (C) Social Security number.

(21) The following personal information about a complainant contained in records of a law enforcement agency:

- (A) Telephone number.
- (B) The complainant's address. However, if the complainant's address is the location of the suspected crime, infraction, accident, or complaint reported, the address shall be made available for public inspection and copying.

(22) Notwithstanding subdivision (8)(A), the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first employment of a law enforcement officer who is operating in an undercover capacity.

(23) Records requested by an offender that:

(A) contain personal information relating to:

- (i) a correctional officer (as defined in IC 5-10-10-1.5);
- (ii) a law enforcement officer (as defined in IC 35-31.5-2-185);
- (iii) a judge (as defined in IC 33-38-12-3);
- (iv) the victim of a crime; or
- (v) a family member of a correctional officer, law enforcement officer (as defined in IC 35-31.5-2-185), judge (as defined in IC 33-38-12-3), or the victim of a crime; or

(B) concern or could affect the security of a jail or correctional facility.

(24) Information concerning an individual less than eighteen (18) years of age who participates in a conference, meeting, program, or activity conducted or supervised by a state educational institution, including the following information regarding the individual or the individual's parent or guardian:

- (A) Name.
- (B) Address.
- (C) Telephone number.
- (D) Electronic mail account address.

(25) Criminal intelligence information.

(26) The following information contained in a report of unclaimed property under IC 32-34-1-26 or in a claim for unclaimed property under IC 32-34-1-36:

- (A) Date of birth.
- (B) Driver's license number.
- (C) Taxpayer identification number.
- (D) Employer identification number.
- (E) Account number.

(27) Except as provided in subdivision (19) and sections 5.1 and 5.2 of this chapter, a law enforcement recording. However, before disclosing the recording, the public agency must comply with the obscuring requirements of sections 5.1 and 5.2 of this chapter, if applicable.

(c) Nothing contained in subsection (b) shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.

(d) Notwithstanding any other law, a public record that is classified as confidential, other than a record concerning an adoption or patient medical records, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.

(e) Only the content of a public record may form the basis for the adoption by any public agency of a rule or procedure creating an exception from disclosure under this section.

(f) Except as provided by law, a public agency may not adopt a rule or procedure that creates an exception from disclosure under this section based upon whether a public record is stored or accessed using paper, electronic media, magnetic media, optical media, or other information storage technology.

(g) Except as provided by law, a public agency may not adopt a rule or procedure nor

impose any costs or liabilities that impede or restrict the reproduction or dissemination of any public record.

(h) Notwithstanding subsection (d) and section 7 of this chapter:

(1) public records subject to IC 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15; or

(2) public records not subject to IC 5-15 may be destroyed in the ordinary course of business. *(As added by P.L.19-1983, § 6. Amended by P.L.57-1983, § 1; P.L.34-1984, § 2; P.L.54-1985, § 3; P.L.50-1986, § 2; P.L.20-1988, § 12; P.L.11-1990, § 111; P.L.1-1991, § 38; P.L.10-1991, § 9; P.L.50-1991, § 1; P.L.49-1991, § 1; P.L.1-1992, § 11; P.L.2-1993, § 50; P.L.58-1993, § 4; P.L.190-1999, § 2; P.L.37-2000, § 2; P.L.271-2001, § 1; P.L.201-2001, § 1; P.L.1-2002, § 17; P.L.173-2003, § 5; P.L.261-2003, § 7; P.L.208-2003, § 1; P.L.200-2003, § 3; P.L.210-2005, § 1; P.L.1-2006, § 102; P.L.101-2006, § 4; P.L.2-2007, § 101; P.L.172-2007, § 1; P.L.179-2007, § 9; P.L.3-2008, § 29; P.L.51-2008, § 2; P.L.98-2008, § 4; P.L.120-2008, § 2; P.L.94-2010, § 1; P.L. 170-2011, §1; P.L. 134-2012, §18; P.L. 184-2013, § 1; P.L. 248-2013, § 3; P.L. 175-2013, § 1; P.L. 56-2014, § 1; P.L. 168-2014, § 9; P.L. 9-2015, § 1; P.L. 181-2015, § 20; P.L. 58-2016, § 3; P.L. 145-2016, § 3.)*

COMMENTARY

The rules of discovery do not allow discovery of privileged matters such as those protected by the attorney-client privilege and, therefore, I.C. §5-14-3-4(a) does not permit a court to order disclosure of such privileged information. Board of Trustees of Public Employees' Retirement Fund of Indiana v. Morley, 580 N.E.2d 371 (Ind. App. 4th Dist. 1991).

Animal research applications and references in a university committee's meeting minutes are exempt from disclosure under I.C. §5-14-3-4(a)(6). Robinson v. Indiana University, 659 N.E.2d 153 (Ind. Ct. App. 1995).

A board of voter registration is not required to publish a list of registered voters by statute and, therefore, is not required to create or provide a copy of its computer tapes. The general public is entitled to inspect the board's records and make

memoranda abstracts from those computer records. Laudig v. Marion County Board of Voters Registration, 585 N.E.2d 700 (Ind. App. 5th Dist. 1992).

Subpoenas do not automatically fall within the investigatory records of a law enforcement agency exception under I.C. §5-14-3-4(b)(1). The State must prove that nondisclosure is essential by submitting appropriate evidence. Evansville Courier v. Prosecutor, Vanderburgh County, 499 N.E.2d 286 (Ind. App. 1st Dist. 1986).

In Robinson v. Indiana Univ., 659 N.E.2d 153, 157 (Ind. Ct. App. 1995) the court held that information from research applications was information concerning research conducted under a university's auspices and therefore not subject to disclosure under the APRA.

Death certificates filed with county health departments pursuant to IC 16-37-3 are public records that a county health department must provide public access to death certificates under the APRA. Evansville Courier & Press v. Vanderburgh County Health Dept, 17 N.E.3d 922 (Ind. 2014).

City has the burden of proving that its denial of access to 1993 phone records was supported by statutory authority. The court in City of Elkhart v. Agenda: Open Gov't, Inc., 683 N.E.2d 622, 627 (Ind. Ct. App. 1997) found that the public records access statute exception prohibiting disclosure of administrative or technical information which would jeopardize record keeping or security systems did not include telephone numbers contained on public officials' cellular phone bills.

The APRA provides law enforcement agencies with the discretion to disclose certain categories of documents, called "investigatory records." A law enforcement agency must be conscious of the fact that, upon review of the denial of access based upon the investigatory record exception, the person denied access can bring forward proof that the denial was "arbitrary and capricious" under I.C. §5-14-3-9(f). For this reason, it is important that a law enforcement agency exercise consistency in any policies concerning the

disclosure of public records. Opinion of the Public Access Counselor 99-FC-7.

The Court in South Bend Tribune v. South Bend Community School Corporation, 740 N.E.2d 937, 938 (Ind. Ct. App. 2000) found that I.C. §5-14-3-4(b)(8)(A) requires public agencies to disclose designated information only with regard to present or former officers or employees of the agency. According to the Court, applicants for public employment are specifically exempted from the disclosure requirements.

The Marion County Prosecutor's written manual of plea negotiations policies for criminal cases are exempt from disclosure as deliberative materials. Newman v. Bernstein, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

Investigatory records of law enforcement agencies are exempt from disclosure even though there was designated evidence of little or no chance of prosecution because the plain language of I.C. §5-14-3-4(b)(1) makes no mention of the likelihood of prosecution. An Unincorporated Operating Division of Indiana Newspapers, Inc. v. The Trustees of Indiana University, 787 N.E.2d 893, 902 (Ind. Ct. App. 2003).

The Court of Appeals found that the Family Educational Rights and Privacy Act of 1974 ("FERPA") requires education records be kept confidential. An Unincorporated Operating Division of Indiana Newspapers, Inc. v. The Trustees of Indiana University, 787 N.E.2d 893, 904 (Ind. Ct. App. 2003). *Further, the Court of Appeals found that both the APRA and FERPA require redaction of nondisclosable information.* Id. at 908. *Specifically, information identifying or which could lead to the identity of a former or present student must be redacted.* Id. at 909.

The Court of Appeals determined that when a document contains both factual and deliberative materials the public agency must separate the factual information from the non-disclosable and make the factual information available for public access. See generally, An Unincorporated Operating Division of Indiana Newspapers, Inc. v. The Trustees of Indiana University, 787 N.E.2d 893, 913-914 (Ind. Ct. App. 2003).

Substantial evidence supported determination by Indiana Utility Regulatory Commission that local telephone service provider's responses to survey undertaken by commission to gather competitive information for Indiana legislature did not constitute protected confidential information or trade secrets but were simply public record. Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n, 810 N.E.2d 1179, 2004 (Ind. App. 2004), transfer denied, Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 734, (Ind. 2005).

I.C. § 5-14-3-4.3 JOB TITLE OR JOB DESCRIPTIONS OF LAW ENFORCEMENT OFFICERS

Nothing contained in section 4(b)(8) of this chapter requires a law enforcement agency to release to the public the job title or job description of law enforcement officers. (As added by P.L. 35-1984, § 1.)

I.C. § 5-14-3-4.4 INVESTIGATORY RECORDS; RECORDS RELATING TO CRIMINAL INTELLIGENCE INFORMATION; RECORDS RELATING TO PUBLIC SAFETY; AGENCY ACTIONS; COURT ACTIONS

(a) This section applies to a request for a record that the public agency considers to be excepted from disclosure under section 4(b)(1) or 4(b)(25) of this chapter. The public agency may do either of the following:

- (1) Deny disclosure of the record or part of the record. The person requesting the information may appeal the denial under section 9 of this chapter.
- (2) Refuse to confirm or deny the existence of the record, regardless of whether the record exists or does not exist, if the fact of the record's existence or nonexistence would reveal the information that would:
 - (A) impede or compromise an ongoing law enforcement investigation or result in danger to an individual's safety, including the safety of a law enforcement officer or a confidential source; or
 - (B) reveal information that would have a reasonable likelihood of threatening public safety.

(b) This subsection applies to a request for a record that the public agency considers to be excepted from disclosure under section 4(b)(19) of this chapter. The agency may consult with the counterterrorism and security council established by IC 10-19-8-1 in formulating a response. The public agency may do either of the following:

(1) Deny disclosure of the record or part of the record. The agency or the counterterrorism and security council shall provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. The person requesting the information may appeal the denial under section 9 of the chapter.

(2) Refuse to confirm or deny the existence of the record regardless of whether the record exists or does not exist, if the fact of the record's existence or nonexistence would reveal information that would have a reasonable likelihood of threatening public safety.

(c) If a public agency does not respond to a request for a record under this section:

(1) within twenty-four (24) hours of receiving the request for a record from a person who:

- (A) is physically present in the agency office;
- (B) makes the request by telephone; or
- (C) requests enhanced access to a document; or

(2) within seven (7) days of receiving the request for a record made by mail or facsimile; the request for the record is deemed denied. The person requesting the information may appeal the denial under section 9 of this chapter.

(d) If a public agency refuses to confirm or deny the existence of a record under this section, the name and title or position of the person responsible for the refusal shall be given to the person making the records request.

(e) A person who has received a refusal from an agency to confirm or deny the existence of a record may file an action in the circuit or superior court of the county in which the response was received:

(1) to compel the public agency to confirm whether the record exists or does not exist; and

(2) if the public agency confirms that the record exists, to compel the agency to permit the person to inspect and copy the record.

(f) The court shall determine the matter de novo, with the burden of proof on the public agency to sustain its refusal to confirm or deny the existence of the record. The public agency meets its burden of proof by filing a public affidavit with the court that provides with reasonable specificity of detail, and not simply conclusory statements, the basis of the agency's claim that it cannot be required to confirm or deny the existence of the requested record. If the public agency meets its burden of proof, the burden of proof shifts to the person requesting access to the record. The person requesting access to the record meets the person's burden of proof by proving any of the following:

(1) The agency's justifications for not confirming the existence of the record contradict other evidence in the trial record.

(2) The agency is withholding the record in bad faith.

(3) An official with authority to speak for the agency has acknowledged to the public in a documented disclosure that the record exists. The person requesting the record must prove that the information requested:

(A) is as specific as the information previously disclosed; and

(B) matches the previously disclosed information.

(g) Either party may make an interlocutory appeal of the trial court's determination on whether the agency's refusal to confirm or deny the existence of the record was proper.

(h) If the court, after the disposition of any interlocutory appeals, finds that the agency's refusal to confirm or deny was improper, the court shall order the agency to disclose whether the record exists or does not exist. If the record exists and the agency claims that the record is exempt from disclosure under this chapter, the court may review the public record in camera to determine whether any part of the record may be withheld.

(i) In an action filed under this section, the court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff substantially prevails; or

(2) the defendant substantially prevails and the courts finds the action was frivolous or vexatious.

A plaintiff is eligible for the awarding of attorney's fees, court costs, and other reasonable expenses regardless of whether the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor;

(j) A court that hears an action under this section may not assess a civil penalty under section 9.5 of this chapter in connection with the action.

(As added by P.L. 248-2013, § 4.)

IC 5-14-3-4.7 NEGOTIATION RECORDS; FINAL OFFERS; CERTIFICATION OF FINAL OFFER DISCLOSURE

(a) Records relating to negotiations between the Indiana finance authority and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the authority if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the authority to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the authority shall certify that the information being disclosed accurately and completely represents the terms of the final offer. *(As added by P.L.235-2005, § 85).*

IC 5-14-3-4.8 RECORDS EXEMPT FROM DISCLOSURE REQUIREMENTS; OFFICE OF TOURISM DEVELOPMENT NEGOTIATIONS; FINAL OFFERS PUBLIC

(a) Records relating to negotiations between the office of tourism development and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the office of tourism development if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the office of tourism development to an industrial, a research, or a

commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the office of tourism development shall certify that the information being disclosed accurately and completely represents the terms of the final offer. *(As added by P.L.229-2005, § 3).*

I.C. § 5-14-3-4.9 PORTS OF INDIANA NEGOTIATION RECORDS EXEMPTED FROM DISCLOSURE; DISCLOSURE OF FINAL OFFERS

(a) Records relating to negotiations between the ports of Indiana and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the ports of Indiana if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the ports of Indiana to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the ports of Indiana shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

(As added by P.L. 98-2008, § 5.)

I.C. § 5-14-3-5 INFORMATION RELATING TO ARREST OR SUMMONS; JAILED PERSONS; AGENCY RECORDS

(a) If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

(1) Information that identifies the person including the person's name, age, and address.

(2) Information concerning any charges on which the arrest or summons is based.

(3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:

(A) time and location of the arrest or the issuance of the summons;

(B) investigating or arresting officer (other

than an undercover officer or agent); and

(C) investigating or arresting law enforcement agency.

(b) If a person is received in a jail or lock-up, the following information shall be made available for inspection and copying:

(1) Information that identifies the person including the person's name, age, and address.

(2) Information concerning the reason for the person being placed in the jail or lock-up, including the name of the person on whose order the person is being held.

(3) The time and date that the person was received and the time and date of the person's discharge or transfer.

(4) The amount of the person's bail or bond, if it has been fixed.

(c) An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

(1) The time, substance, and location of all complaints or requests for assistance received by the agency.

(2) The time and nature of the agency's response to all complaints or requests for assistance.

(3) If the incident involves an alleged crime or infraction:

(A) the time, date, and location of occurrence;

(B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4 or IC 35-42-3.5;

(C) the factual circumstances surrounding the incident; and

(D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four hours after the suspected crime, accident, or complaint has been reported to the agency.

(d) This chapter does not affect IC 5-2-4, IC 10-13-3, or IC 5-11-1-9. (As added by P.L. 19-1983, § 6. Amended by P.L. 39-1992, § 1; P.L. 2-2003, § 24; P.L. 1-2012, § 1.)

COMMENTARY

A police department's duty to disclose the location of rape in daily record did not require the exact street address. The department's obligation was satisfied by giving the most specific location which also reasonably protected the privacy of the victim. Post-Tribune v. Police Department of City of Gary, 643 N.E.2d 307 (Ind. 1994).

I.C. § 5-14-3-5.1 INSPECTION OF LAW ENFORCEMENT RECORDINGS; OBSCURING OF UNDERCOVER LAW ENFORCEMENT OFFICER; OBSCURING OF CONFIDENTIAL INFORMANTS

(a) As used in this section, "requestor" means the following:

(1) An individual who is depicted in a law enforcement recording.

(2) If the individual described in subdivision (1) is deceased:

(A) the surviving spouse, father, mother, brother, sister, son, or daughter of the individual; or

(B) the personal representative (as defined in IC 6-4.1-1-9) of or an attorney representing the deceased individual's estate.

(3) If the individual described in subdivision (1) is an incapacitated person (as defined in IC 29-3-1-7.5), the legal guardian, attorney, or attorney in fact of the incapacitated person.

(4) A person that is an owner, tenant, lessee, or occupant of real property, if the interior of the real property is depicted in the recording.

(5) A person who:

(A) is the victim of a crime; or

(B) suffers a loss due to personal injury or property damage;

if the events depicted in the law enforcement recording are relevant to the person's loss or to the crime committed against the person.

(b) A public agency shall allow a requestor to inspect a law enforcement recording at least twice, if:

(1) the requestor submits a written request under section 3 of this chapter for inspection of the recording; and

(2) if section 4(b)(19) of this chapter applies, the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

The public agency shall allow the requestor to

inspect the recording in the company of the requestor's attorney. A law enforcement recording may not be copied or recorded by the requestor or the requestor's attorney during an inspection.

(c) Before an inspection under subsection (b), the public agency:

(1) shall obscure in the recording information described in section 4(a) of this chapter; and

(2) may obscure any information identifying:

(A) a law enforcement officer operating in an undercover capacity; or

(B) a confidential informant.

(d) Before an inspection under subsection (b), only the information in the recording described in subsection (c) may be obscured by the public agency.

(e) If a person is denied access to inspect a recording under this section, the person may appeal the denial under section 9 of this chapter. *(As added by P.L. 58-2016, § 4.)*

I.C. § 5-14-3-5.2 EXEMPTIONS TO RIGHT OF INSPECTION; COURT ORDERS PERMITTING INSPECTION

(a) A public agency shall permit any person to inspect or copy a law enforcement recording unless one (1) or more of the following circumstances apply:

(1) Section 4(b)(19) of this chapter applies and the person has not demonstrated that the public agency owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

(2) The public agency finds, after due consideration of the facts of the particular case, that access to or dissemination of the recording:

(A) creates a significant risk of substantial harm to any person or to the general public;

(B) is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person;

(C) may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency as defined in section 2 of this chapter and notwithstanding its exclusion under section 4(b)(1) of this chapter; or

(D) would not serve the public interest.

However, before permitting a person to inspect or copy the recording, the public agency must comply with the obscuring provisions of

subsection (f), if applicable.

(b) If a public agency denies a person the opportunity to inspect or copy a law enforcement recording under subsection (a), the person may petition the circuit or superior court of the county in which the law enforcement recording was made for an order permitting inspection or copying of a law enforcement recording. The court shall review the decision of the public agency de novo and grant the order unless one (1) or more of the following apply:

(1) If section 4(b)(19) of this chapter applies, the petitioner fails to establish by a preponderance of the evidence that the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

(2) The public agency establishes by a preponderance of the evidence in light of the facts of the particular case, that access to or dissemination of the recording:

(A) creates a significant risk of substantial harm to any person or to the general public;

(B) is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person;

(C) may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency, as defined in section 2 of this chapter, notwithstanding its exclusion under section 4; or

(D) would not serve the public interest.

(c) Notwithstanding section 9(i) of this chapter, a person that obtains an order for inspection of or to copy a law enforcement recording under this section may not be awarded attorney's fees, court costs, and other reasonable expenses of litigation. The penalty provisions of section 9.5 of this chapter do not apply to a petition filed under this section.

(d) If the court grants a petition for inspection of or to copy the law enforcement recording, the public agency shall disclose the recording. However, before disclosing the recording, the public agency must comply with the obscuring provisions of subsection (e), if applicable.

(e) A public agency that discloses a law enforcement recording under this section:

(1) shall obscure:

(A) any information that is required to be

obscured under section 4(a) of this chapter; and

(B) depictions of:

(i) an individual's death or a dead body;

(ii) acts of severe violence that are against any individual who is clearly visible and that result in serious bodily injury (as defined in IC 35-31.5-2-292);

(iii) serious bodily injury (as defined in IC 35-31.5-2-292);

(iv) nudity (as defined in IC 35-49-1-5)

(v) an individual whom the public agency reasonably believes is less than eighteen (18) years of age;

(vi) personal medical information;

(vii) a victim of a crime, or any information identifying the victim of a crime, if the public agency finds that obscuring this information is necessary for the victim's safety; and

(viii) a witness to a crime or an individual who reports a crime, or any information identifying a witness to a crime or an individual who reports a crime, if the public agency finds that obscuring this information is necessary for safety of the witness or individual who reports a crime; and

(2) may obscure:

(A) any information identifying:

(i) a law enforcement officer operating in an undercover capacity; or

(ii) a confidential informant; and

(B) any information that the public agency may withhold from disclosure under section 4(b)(2) through 4(b)(26) of this chapter.

(f) A court shall expedite a proceeding filed under this section.

Unless prevented by extraordinary circumstances, the court shall conduct a hearing (if required) and rule on a petition filed under this section not later than thirty (30) days after the date the petition is filed. *(As added by P.L. 58-2016, § 5.)*

I.C. § 5-14-3-5.3 RETENTION OF LAW ENFORCEMENT RECORDINGS

(a) Except as provided in subsection (c), a public agency that is not the state or a state agency shall retain an unaltered, unobscured law enforcement recording for at least one hundred ninety (190) days after the date of the recording.

(b) Except as provided in subsection (c), a public agency that is the state or a state agency shall

retain an unaltered, unobscured law enforcement recording for at least two hundred eighty (280) days after the date of the recording.

(c) The public agency shall retain an unaltered, unobscured law enforcement recording for a period longer than the period described in subsections (a) and (b) if the following conditions are met:

(1) Except as provided in subdivision (3), if a person defined as a requestor as set forth in section 5.1(a) of this chapter notifies the public agency in writing not more than:

(A) one hundred eighty (180) days (if the public agency is not the state or a state agency); or

(B) two hundred seventy (270) days (if the public agency is the state or a state agency); after the date of the recording that the recording is to be retained, the recording shall be retained for at least two (2) years after the date of the recording. The public agency may not request or require the person to provide a reason for the retention.

(2) Except as provided in subdivision (3), if a formal or informal complaint is filed with the public agency regarding a law enforcement activity depicted in the recording less than:

(A) one hundred eighty (180) days (if the public agency is not the state or a state agency); or

(B) two hundred seventy (270) days (if the public agency is the state or a state agency); after the date of the recording, the public agency shall automatically retain the recording for at least two (2) years after the date of the recording.

(3) If a recording is used in a criminal, civil, or administrative proceeding, the public agency shall retain the recording until final disposition of all appeals and order from the court.

(d) The public agency may retain a recording for training purposes for any length of time. *(As added by P.L. 58-2016, § 6.)*

I.C. § 5-14-3-5.5 SEALING CERTAIN RECORDS BY COURT; HEARING; NOTICE

(a) This section applies to a judicial public record.

(b) As used in this section, "judicial public record" does not include a record submitted to a court for the sole purpose of determining

whether the record should be sealed.

(c) Before a court may seal a public record not declared confidential under section 4(a) of this chapter, it must hold a hearing at a date and time established by the court. Notice of the hearing shall be posted at a place designated for posting notices in the courthouse.

(d) At the hearing, parties or members of the general public must be permitted to testify and submit written briefs.

A decision to seal all or part of a public record must be based on findings of fact and conclusions of law, showing that the remedial benefits to be gained by effectuating the public policy of the state declared in section 1 of this chapter are outweighed by proof by a preponderance of the evidence by the person seeking the sealing of the record that:

(1) a public interest will be secured by sealing the record;

(2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;

(3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record;

(4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; and

(5) it is reasonably necessary for the record to remain sealed for a period of time.

Sealed records shall be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records no longer exist. *(As added by P.L. 54-1985, § 4. Amended by P.L. 68-1987, § 1.)*

COMMENTARY

Trial court is permitted to seal public records which fall within a mandatory exception to the APRA without conducting a hearing required by I.C. § 5-14-3-5.5 either before or after records are admitted into evidence; interested third persons may request records to be sealed after they are admitted into evidence, but this right can be waived. Bobrow v. Bobrow, 810 N.E.2d 726 (Ind. App. 2004).

In a tax dispute, a taxpayer's contracts with hotels were shielded from public access because

they contained trade secrets. The contracts dealt with negotiated hotel rates, the taxpayer derived economic value from such, the pricing information was not readily ascertainable, and the taxpayer had taken reasonable efforts to maintain the secrecy of the information in the contracts. Orbitz, LLC v. Ind. Dept. of State Revenue, 997 N.E.2d 98 (Ind. Tax Ct. 2013).

I.C. § 5-14-3-6 PARTIALLY DISCLOSABLE RECORDS; COMPUTER OR MICROFILM RECORD SYSTEMS; FEES

(a) If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

(b) If a public record stored on computer tape, computer disks, microfilm, or a similar or analogous record system is made available to:

(1) a person by enhanced access under section 3.5 of this chapter; or

(2) a governmental entity by an electronic device;

the public agency may not make the record available for inspection without first separating the material in the manner required by subsection (a).

(c) A public agency may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if:

(1) the disclosable information is stored on a computer tape, computer disc, or a similar or analogous record system; and

(2) the public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information.

(d) A public agency is not required to reprogram a computer system to provide:

(1) enhanced access; or

(2) access to a governmental entity by an electronic device.

(As added by P.L. 19-1983, § 6. Amended by P.L. 54-1985, § 5; P.L. 58-1993, § 5; P.L. 77-1995, § 5.)

COMMENTARY

Any factual information which can be separated from the non-disclosable matters in a record must

be made available for public access. Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003).

I.C. § 5-14-3-6.5 CONFIDENTIALITY OF PUBLIC RECORDS

A public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record. *(As added by P.L. 34-1984, § 3.)*

I.C. § 5-14-3-7 PROTECTION AGAINST LOSS, ALTERATION, DESTRUCTION AND UNAUTHORIZED ENHANCED ACCESS

(a) A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.

(b) A public agency shall take precautions that protect the contents of public records from unauthorized enhanced access, unauthorized access by an electronic device, or alteration.

(c) This section does not operate to deny to any person the rights secured by section 3 of this chapter. *(As added by P.L. 19-1983, § 6. Amended by P.L. 58-1993, § 6.)*

I.C. §5-14-3-8: FEES; COPIES

(a) For the purposes of this section, "state agency" has the meaning set forth in I.C. 4-13-1-1.

(b) Except as provided in this section, a public agency may not charge any fee under this chapter:

(1) to inspect a public record; or

(2) to search for, examine, or review a record to determine whether the record may be disclosed.

(c) The Indiana department of administration shall establish a uniform copying fee for the copying of one (1) page of a standard-sized document by state agencies. The fee may not exceed the average cost of copying records by state agencies or ten cents (\$0.10) per page, whichever is greater. A state agency may not collect more than the uniform copying fee for providing a copy of a public record. However, a state agency shall establish and collect a reasonable fee for copying nonstandard-sized

documents.

(d) This subsection applies to a public agency that is not a state agency. The fiscal body (as defined in IC 36-1-2-6) of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification or copying of documents. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents may not exceed the greater of:

(1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or

(2) the actual cost to the agency of copying the document.

As used in this subsection, "actual cost" means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers.

(e) If:

(1) a person is entitled to a copy of a public record under this chapter; and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person.

However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

(f) Notwithstanding subsection (b), (c), (d), (g), (h), or (i), a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court.

(g) Except as provided by subsection (h), for providing a duplicate of a computer tape, computer disc, microfilm, law enforcement recording, or similar or analogous record system containing information owned by the public agency or entrusted to it, a public agency may charge a fee, uniform to all purchasers, that does not exceed the sum of the following:

(1) The agency's direct cost of supplying the information in that form. However, the fee for a copy of a law enforcement recording may not exceed one hundred fifty dollars (\$150).

(2) The standard cost for selling the same information to the public in the form of a publication if the agency has published the information and made the publication available for sale.

(3) In the case of the legislative services agency, a reasonable percentage of the agency's direct cost of maintaining the system in which the information is stored. However, the amount charged by the legislative services agency under this subdivision may not exceed the sum of the amounts it may charge under subdivisions (1) and (2).

(h) This subsection applies to the fee charged by a public agency for providing enhanced access to a public record. A public agency may charge any reasonable fee agreed on in the contract under section 3.5 of this chapter for providing enhanced access to public records.

(i) This subsection applies to the fee charged by a public agency for permitting a governmental entity to inspect public records by means of an electronic device. A public agency may charge any reasonable fee for the inspection of public records under this subsection, or the public agency may waive any fee for the inspection.

(j) Except as provided in subsection (k), a public agency may charge a fee, uniform to all purchasers, for providing an electronic map that is based upon a reasonable percentage of the agency's direct cost of maintaining, upgrading, and enhancing the electronic map and for the direct cost of supplying the electronic map in the form requested by the purchaser. If the public agency is within a political subdivision having a fiscal body, the fee is subject to the approval of the fiscal body of the political subdivision.

(k) The fee charged by a public agency under subsection (j) to cover costs for maintaining, upgrading, and enhancing an electronic map may be waived by the public agency if the electronic map for which the fee is charged will be used for a noncommercial purpose, including the following:

- (1) Public agency program support.
- (2) Nonprofit activities.
- (3) Journalism.

(4) Academic research.

(l) This subsection does not apply to a state agency. A fee collected under subsection (g) for the copying of law enforcement recording may be:

- (1) retained by the public agency; and
- (2) used without appropriation for one (1) or more of the following purposes:

(A) To purchase cameras and other equipment for use in connection with the agency's law enforcement recording program.

(B) For training concerning law enforcement recording.

(C) To defray the expenses of storing, producing, and copying law enforcement recordings.

Money from a fee described in this subsection does not revert to the local general fund at the end of a fiscal year.

(As added by P.L.19-1983, § 6; P.L.54-1985, § 6; P.L.51-1986, § 2; P.L.58-1993, § 7; P.L.78-1995, § 1; P.L.151-1999, § 1; P.L.89-2001, § 1; P.L.215-2007, § 1; P.L. 16-2008, § 1; P.L. 58-2016, §7.)

I.C. § 5-14-3-8.3 ENHANCED ACCESS FUND; ESTABLISHMENT BY ORDINANCE; PURPOSE

(a) The fiscal body of a political subdivision having a public agency that charges a fee under section 8(h) or 8(i) of this chapter shall adopt an ordinance establishing an enhanced access fund. The ordinance must specify that the fund consists of fees collected under section 8(h) or 8(i) of this chapter. The fund shall be administered by the public agency or officer designated in the ordinance or resolution. Money in the fund must be appropriated and expended in the manner authorized in the ordinance.

(b) The fund is a dedicated fund with the following purposes:

- (1) The replacement, improvement, and expansion of capital expenditures.
- (2) The reimbursement of operating expenses incurred in providing enhanced access to public information.

(As added by P.L. 58-1993, § 8.)

I.C. § 5-14-3-8.5 ELECTRONIC MAP GENERATION FUND; ESTABLISHMENT BY

ORDINANCE; PURPOSE

(a) The fiscal body of a political subdivision having a public agency that charges a fee under section 8(j) of this chapter shall adopt an ordinance establishing an electronic map generation fund. The ordinance must specify that the fund consists of fees collected under section 8(j) of this chapter. The fund shall be administered by the public agency that collects the fees.

(b) The electronic map generation fund is a dedicated fund with the following purposes:

(1) The maintenance, upgrading, and enhancement of the electronic map.

(2) The reimbursement of expenses incurred by a public agency in supplying an electronic map in the form requested by a purchaser. (*As added by P.L. 58-1993, § 9.*)

I.C. § 5-14-3-9 DENIAL OF DISCLOSURE; ACTION TO COMPEL DISCLOSURE; INTERVENORS; BURDEN OF PROOF; ATTORNEY'S FEES AND COSTS

(a) This section does not apply to a request for information under section 4.4 of this chapter.

(b) A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:

(1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or

(2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.

(c) If a person requests by mail or by facsimile a copy or copies of a public record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request.

(d) If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by

facsimile, a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial.

(e) A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record. Whenever an action is filed under this subsection, the public agency must notify each person who supplied any part of the public record at issue:

(1) that a request for release of the public record has been denied; and

(2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the public access counselor.

Such persons are entitled to intervene in any litigation that results from the denial. The person who has been denied the right to inspect or copy need not allege or prove any special damage different from that suffered by the public at large.

(f) The court shall determine the matter de novo, with the burden of proof on the public agency to sustain its denial. If the issue in de novo review under this section is whether a public agency properly denied access to a public record because the record is exempted under section 4(a) of this chapter, the public agency meets its burden of proof under this subsection by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit.

(g) This subsection does not apply to an action under section 5.2 of this chapter. If the issue in a de novo review under this section is whether a public agency properly denied access to a public record because the record is exempted under section 4(b) of this chapter:

(1) the public agency meets its burden of proof under this subsection by:

(A) proving that:

- (i) the record falls within any one (1) of

the categories of exempted records under section 4(b) of this chapter; and

(ii) if the action is for denial of access to a recording under section 5.1 of this chapter, the plaintiff is not a "requestor" as that term is defined in section 5.1 of this chapter; and

(B) establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit; and

(2) a person requesting access to a public record meets the person's burden of proof under this subsection by proving that the denial of access is arbitrary or capricious.

(h) The court may review the public record in camera to determine whether any part of it may be withheld under this chapter. However, if the complaint alleges that a public agency denied disclosure of a public record by redacting information in the public record, the court shall conduct an in camera inspection of the public record with the redacted information included.

(i) Except as provided in subsection (k), in any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff substantially prevails; or

(2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

Except as provided in subsection (k), the plaintiff is not eligible for the awarding of attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor, unless the plaintiff can show the filing of the action was necessary because the denial of access to a public record under this chapter would prevent the plaintiff from presenting that public record to a public agency preparing to act on a matter of relevance to the public record whose disclosure was denied.

(j) Except as provided in subsection (k), a court may assess a civil penalty under section 9.5 of this chapter only if the plaintiff obtained an advisory opinion from the public access counselor before filing an action under this section as set forth in section 9.5 of this chapter.

(k) This subsection applies only to an action to appeal the denial of access to a law enforcement recording under section 5.1 of this chapter. A

requestor (as defined in section 5.1 of this chapter) may bring an action to appeal from the denial of access to a law enforcement recording without first seeking or receiving an informal inquiry response or advisory opinion from the public access counselor. If the requestor prevails in an action under this subsection:

(1) the requestor is eligible for an award of reasonable attorney's fees, court costs, and other reasonable expenses; and

(2) a court may assess a civil penalty under section 9.5 of this chapter.

(l) A court shall expedite the hearing of an action filed under this section. (*As added by P.L.19-1983, § 6; Amended by P.L.54-1985, § 7; P.L.50-1986, § 3; P.L.68-1987, § 2; P.L.58-1993, § 10; P.L.19-1997, § 4; P.L.70-1999, § 2; P.L.191-1999, § 2; P.L.173-2003, § 6; P.L.261-2003, § 8; P.L.22-2005, § 2; PL.134-2012, §19; P.L. 248-2013, § 5; P.L. 58-2016, § 8.*)

COMMENTARY

If a coroner could not satisfy one of the conditions listed in the autopsy statute, nor demonstrate that the requested records are otherwise related to a criminal investigation, the records are not "investigatory records," and the requesting party may have access to the records on the grounds that the coroner's denial of access was arbitrary and capricious. Althaus v. Evansville Courier Co., 615 N.E.2d 441 (Ind. App. 1st Dist. 1993).

The attorney's fees provisions of APRA are directed toward public agencies. There is no corollary provision for assessment of attorney's fees against a private party in the event of improper nondisclosure. Absent a fee shifting statute or contractual provision for the payment of attorney's fees, the American Rule - that each party ordinarily must pay his or her own attorney's fees - is applicable. Indianapolis Newspapers, a Div. of Indiana Newspapers, Inc. v. Indiana State Lottery Commission, 739 N.E.2d 144, 156 (Ind. Ct. App. 2000).

Attorney who litigated a claim pro se under the Indiana APRA was not entitled to recover attorney fees because attorney fees were not recoverable by pro se attorney litigants under the Act. Marion Cnty. Election Bd. v. Bowes, 53 N.E.3d 1203, 1207 (Ind. Ct. App. 2016), transfer

denied, 57 N.E.3d 817 (Ind. 2016).

I.C. § 5-14-3-9.5 CIVIL PENALTIES IMPOSED ON PUBLIC AGENCY, OFFICER, OR MANAGEMENT LEVEL EMPLOYEE

(a) This section does not apply to any matter regarding:

(1) the work product of the legislative services agency under personnel rules approved by the legislative council; or

(2) the work product of individual members and the partisan staffs of the general assembly.

(b) As used in subsections (c) through (k), "individual" means:

(1) an officer of a public agency; or

(2) an individual employed in a management level position with a public agency.

(c) If an individual:

(1) continues to deny a request that complies with section 3(b) of this chapter for inspection or copying of a public record after the public access counselor has issued an advisory opinion:

(A) regarding the request for inspection or copying of the public record; and

(B) that instructs the public agency to allow access to the public record; and

(2) denies the request with the specific intent to unlawfully withhold a public record that is subject to disclosure under this chapter; the individual and the public agency employing the individual are subject to a civil penalty under subsection (h).

(d) If an individual intentionally charges a copying fee that the individual knows exceeds the amount set by statute, fee schedule, ordinance, or court order, the individual is subject to a civil penalty under subsection (h).

(e) A civil penalty may only be imposed as part of an action filed under section 9 of this chapter. A court may not impose a civil penalty under this section unless the public access counselor has issued an advisory opinion:

(1) to the complainant and the public agency;

(2) that instructs the public agency to allow access to the public record; and

(3) before the action under section 9 of this chapter is filed.

Nothing in this section prevents both the person requesting the public record and the public

agency from requesting an advisory opinion from the public access counselor.

(f) It is a defense to the imposition of a civil penalty under this section that the individual denied access to a public record in reliance on either of the following:

(1) An opinion of the public agency's legal counsel.

(2) An opinion of the attorney general.

(g) A court may impose a civil penalty for a violation under subsection (c) against one (1) or more of the following:

(1) The individual named as a defendant in the action.

(2) The public agency named as a defendant in the action.

(h) In an action under this section, a court may impose the following civil penalties:

(1) Not more than one hundred dollars (\$100) for the first violation.

(2) Not more than five hundred dollars (\$500) for each additional violation.

A civil penalty imposed under this section is in addition to any other civil or criminal penalty imposed. However, in any one (1) action brought under this section, a court may impose only one (1) civil penalty against an individual, even if the court finds that the individual committed multiple violations. This subsection does not preclude a court from imposing another civil penalty against an individual in a separate action, but an individual may not be assessed more than one (1) civil penalty in any one (1) action brought under this section.

(i) A court shall distribute monthly to the auditor of state any penalties collected under this section for deposit in the education fund established by IC 5-14-4-14.

(j) An individual is personally liable for a civil penalty imposed on the individual under this section. A civil penalty imposed against a public agency under this section shall be paid from the public agency's budget.

(k) If an officer of a public agency directs an individual who is employed in a management level position to deny a request as described in subsection (c)(1), the management level employee is not subject to civil penalties under subsection (h).

(As added by P.L. 134-2012, § 20.)

I.C. § 5-14-3-10 CLASSIFIED
CONFIDENTIAL INFORMATION;
UNAUTHORIZED DISCLOSURE OR
FAILURE TO PROTECT; OFFENSE;
DISCIPLINE

(a) A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency, except as provided by IC 4-15-10, who knowingly or intentionally discloses information classified as confidential by state statute including information declared confidential under:

- (1) section 4(a) of this chapter; or
- (2) section 4(b) of this chapter if the public agency having control of the information declares it to be confidential; commits a Class A infraction.

(b) A public employee may be disciplined in accordance with the personnel policies of the agency by which the employee is employed if the employee intentionally, knowingly, or recklessly discloses or fails to protect information classified as confidential by state statute.

(c) A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency who unintentionally and unknowingly discloses confidential or erroneous information in response to a request under IC 5-14-3-3(d) or who discloses confidential information in reliance on an advisory opinion by the Public Access Counselor is immune from liability for such a disclosure.

(d) This section does not apply to any provision incorporated into state law from a federal statute. *(As added by P.L. 17-1984, § 2. Amended by P.L. 54-1985, § 8; P.L. 68-1987, § 3; P.L. 77-1995, § 6; P.L. 191-1999, § 3; P.L. 126-2012, §24)*

SECTION FIVE: OVERVIEW OF THE OFFICE OF THE PUBLIC ACCESS COUNSELOR; FORMAL COMPLAINTS

INTRODUCTION

Effective July 1, 1999, the Indiana General Assembly created the Office of Public Access Counselor. This office serves as a resource for members of the public and public officials and their employees regarding Indiana's laws

governing access to meetings of public bodies and to the records of public agencies. The office provides advice, assistance, training and education regarding the Open Door Law and Access to Public Records Act, as well as other state statutes or rules governing access to public meetings and public records. The office does not have binding authority but is intended to serve as a resource for members of the public as well as public agencies throughout the state.

This section provides an overview of the office and its functions. For more detailed information, consult I.C. § 5-14-4-1, *et seq.*, and I.C. § 5-14-5-1, *et seq.*, set forth at Section 6 of this handbook.

FREQUENTLY ASKED QUESTIONS

What is the role of the Public Access Counselor?

The Public Access Counselor has several powers and duties under I.C. § 5-14-4-10:

1. To establish and administer a program to train public officials and educate the public on the rights of the public and the responsibilities of public agencies under public access laws.
2. To conduct research.
3. To prepare and distribute interpretative and education materials, such as this guide, and conduct programs in cooperation with the Office of the Attorney General.
4. To respond to informal inquiries made by the public and public agencies concerning the public access laws.
5. To interpret the public access laws and to issue advisory opinions upon the request of a person or a public agency. The counselor may not issue an advisory opinion concerning a matter if a lawsuit has been filed under the Open Door Law or the Access to Public Records Act.
6. To make recommendations to the General Assembly concerning ways to improve public access.

In addition to these powers and duties, the Public Access Counselor is required to prepare an annual report by June 30th concerning the activities of the office over the past year. This report is filed with the Legislative Services Agency.

Who may utilize the services of the office?

Members of the public, including the media, as well as representatives of public agencies may

contact the office for the purpose of making an informal inquiry or filing a formal complaint.

What is the process for filing a formal complaint?

A formal complaint may be filed against any public agency for denial of access to a public record or denial of the right to attend a public meeting of a public agency in violation of the Access to Public Records Act, the Open Door Law or another statute or rule that governs access to public records or public meetings. A person denied the right to inspect documents under I.C. 5-14-3 or denied the right to attend an otherwise public meeting as defined in I.C. 5-14-1.5 may file a formal complaint with the counselor.

A formal complaint must be filed within 30 days after:

1. the denial; or
2. the person filing the complaint receives notice that a meeting was held by a public agency and that the meeting was held secretly or without notice.

A complaint is considered filed on the date it is received by the Public Access Counselor or the date of the postmark, if the date of receipt is later than thirty days after the date of the denial.

Once received, a copy of the complaint is forwarded to the public agency which is the subject of the complaint, and the counselor requests a response from the agency. The counselor has thirty days to issue an advisory opinion on the complaint.

If the complaint has priority, as determined under the administrative rules adopted by the counselor, an advisory opinion will be issued within seven days following receipt of the complaint. See Section 6 of this guide for the text of the administrative rule. See Appendix G for the Formal Complaint Form.

NOTE: The filing of a formal complaint **does not** delay the running of any statute of limitations that applies to lawsuits filed under the ODL or the APRA concerning the subject matter of the complaint.

Must I file a formal complaint to obtain assistance?

Members of the public and representatives of public agencies need not file a formal complaint against a public agency to seek assistance from

the office. Informal inquiries and questions about rights to access or the responsibilities of public officials are submitted when there is no need for a formal written opinion. The informal inquiry may concern a general question about the state's public access laws or a question or complaint about a public agency. If necessary, the counselor will contact the public agency in question in an effort to resolve the matter without issuing a written formal opinion.

Is the public access counselor a finder of fact?

The public access counselor is not a finder of fact. Advisory and informal opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. A judge would have the authority to make factual determinations regarding complaints filed before the court.

What is the significance of filing a formal complaint or seeking an informal opinion from the counselor?

Under the 1999 statutory amendments to the Open Door Law and the Access to Public Records Act, contacting the Public Access Counselor through an informal inquiry or by filing a formal complaint is significant for both members of the public and representatives of public agencies. A person or a public agency seeking access to a public meeting or public record may contact the counselor, but since the counselor's opinions are not binding on public agencies, the person may wish to file a civil action under I.C. § 5-14-1.5-7 (Open Door Law) or I.C. § 5-14-3-9 (Access to Public Records Act). If the person seeking access prevails in the court action, the judge must award reasonable attorney's fees, court costs and cost of litigation. If the person has not contacted the counselor prior to filing a civil action, these fees and costs will not be awarded unless the person can show that the filing of an action was necessary:

1. to prevent a violation of the Open Door Law; or
2. because the denial of access to a public record would prevent the person from presenting that record to another public agency preparing to act on a related matter. See I.C. § 5-14-1.5-7(f) and I.C. § 5-14-3-9(i).

In an action to appeal the denial of access to a

law enforcement recording, a requestor (as defined by I.C. § 5-14-3-5.1(a)) is not required to seek the opinion of the Public Access Counselor in order to be awarded attorney's fees, court costs, and other reasonable expenses. See I.C. § 5-14-3-9(k).

Further, a court may assess a civil penalty under I.C. § 5-14-3-9.5 if the plaintiff first obtained an advisory opinion from the public access counselor. See I.C. § 5-14-3-9(j).

For public agencies it may also be significant to contact the counselor. Under the Open Door Law, a court will consider whether the public agency acted in accordance with an informal inquiry response or an advisory opinion in its determination as to whether to declare any action or policy void. I.C. § 5-14-1.5-7(d)(4).

In cases concerning denial of access to public records, the public agency is required to notify any person who has supplied any part of the public record at issue and inform that person whether the denial was in compliance with an informal or formal response from the counselor. See I.C. § 5-14-3-9(e)(2).

How do I contact the counselor?

You may contact the Public Access Counselor by telephone, email, facsimile or mail with informal inquiries. Contact information appears at the back of this handbook. If you wish to file a formal complaint, you must use the form prescribe by the counselor pursuant to I.C. § 5-14-5-11. A copy of the complaint form is included in this handbook and is available via the counselor's website: www.IN.gov/pac.

SECTION SIX: OFFICE OF THE PUBLIC ACCESS COUNSELOR AND FORMAL COMPLAINT ACT AND LEGAL COMMENTARY

I.C. § 5-14-4-1 "COUNSELOR" DEFINED

As used in this chapter, "counselor" refers to the public access counselor appointed under section 6 of this chapter. (As added by P.L. 70-1999 § 4 and P.L. 191-1999, § 4).

I.C. § 5-14-4-2 "OFFICE" DEFINED

As used in this chapter, "office" refers to the office of the public access counselor established under section 5 of this chapter. (As added by

P.L. 70-1999, § 4 and P.L. 191-1999, § 4).

I.C. § 5-14-4-3 "PUBLIC ACCESS LAWS" DEFINED

As used in this chapter, "public access laws" refers to:

- (1) Indiana Code 5-14-1.5;
- (2) Indiana Code 5-14-3; or
- (3) any other state statute or rule governing access to public meetings or public records. (As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4).

I.C. § 5-14-4-4 "PUBLIC AGENCY" DEFINED

As used in this chapter, "public agency" has the meaning set forth in :

- (1) I.C. §5-14-1.5-2 for purposes of matters concerning public meetings; and
- (2) I.C. §5-14-3-2 for purposes of matters concerning public records. (As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4.)

I.C. § 5-14-4-5 ESTABLISHMENT OF OFFICE

The office of the public access counselor is established. The office shall be administered by the public access counselor appointed under section 6 of this chapter. (As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4.)

I.C. § 5-14-4-6 APPOINTMENT; TERM

The governor shall appoint the public access counselor for a term of four years at a salary to be fixed by the governor. (As added by P.L. 70-1999, § 4, and P.L. 191-1999, § 4.)

I.C. § 5-14-4-7 REMOVAL FOR CAUSE

The governor may remove the counselor for cause. (As added by P.L. 70-1999, § 4, and P.L. 191-1999, § 4.)

I.C. § 5-14-4-8 VACANCIES IN OFFICE

If a vacancy occurs in the office, the governor shall appoint an individual to serve for the remainder of the counselor's unexpired term. (As added by P.L. 70-1999, § 4, and P.L. 191-1999, § 4.)

I.C. § 5-14-4-9 REQUIREMENTS FOR POSITION

- (a) The counselor must be a practicing attorney.
- (b) The counselor shall apply the counselor's full efforts to the duties of the office and may not be actively engaged in any other occupation, practice, profession, or business. (As added by P.L. 70-1999, § 4, and P.L. 191-1999, § 4.)

I.C. § 5-14-4-10 POWERS AND DUTIES

The counselor has the following powers and duties:

(1) To establish and administer a program to train public officials and educate the public on the rights of the public and the responsibilities of public agencies under the public access laws.

The counselor may contract with a person or a public or private entity to fulfill the counselor's responsibility under this subdivision.

(2) To conduct research.

(3) To prepare interpretive and educational materials and programs in cooperation with the office of attorney general.

(4) To distribute to newly elected or appointed public officials the public access laws and educational materials concerning the public access laws.

(5) To respond to informal inquiries made by the public and public agencies by telephone, in writing, in person, by facsimile, or by electronic mail concerning the public access laws.

(6) To issue advisory opinions to interpret the public access laws upon the request of a person or a public agency. However, the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under IC 5-14-1.5 or IC 5-14-3.

(7) To make recommendations to the general assembly concerning ways to improve public access. (As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4.)

COMMENTARY

In Azhar v. Town of Fishers, the Court stated that I.C. §5-14-4-10(6) prohibits the issuance of an advisory opinion concerning a matter with respect to which a lawsuit has been filed under I.C. 5-14-1.5 or I.C. 5-14-3. 744 N.E.2d 947, 951 (Ind. Ct. App. 2001). The Court, however, stated that I.C. §5-14-4-10(6) does not prohibit the filing of an affidavit by the counselor outlining the dictates of an advisory opinion issued prior to the filing of such lawsuit. Id.

A response as defined in I.C. § 5-14-1.5-7(f) does not mean that the public access counselor must state affirmatively whether the public access laws have been violated. Gary/Chicago Airport Board of Authority v. Maclin, 772 N.E.2d 463, 471 (Ind. Ct. App. 2002).

I.C. § 5-14-4-11 ADDITIONAL PERSONNEL

The counselor may employ additional personnel necessary to carry out the functions of the office subject to the approval of the budget agency. (As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4.)

I.C. § 5-14-4-12 ANNUAL REPORT BY COUNSELOR

The counselor shall submit a report in an electronic format under IC 5-14-6 not later than June 30 of each year to the legislative services agency concerning the activities of the counselor for the previous year. The report must include the following information:

(1) The total number of inquiries and complaints received.

(2) The number of inquiries and complaints received each from the public, the media, and government agencies.

(3) The number of inquiries and complaints that were resolved.

(4) The number of complaints received about each of the following:

(A) State agencies.

(B) County agencies.

(C) City agencies.

(D) Town agencies.

(E) Township agencies.

(F) School corporations.

(G) Other local agencies.

(5) The number of complaints received concerning each of the following:

(A) Public records.

(B) Public meetings.

(6) The total number of written advisory opinions issued and pending. (As added by P.L.70-1999, § 4; P.L.191-1999, § 4; P.L.28-2004, § 58.)

I.C. § 5-14-4-13 STATUTE OF LIMITATIONS

An informal inquiry or other request for assistance under this chapter does not delay the

running of a statute of limitation that applies to a lawsuit under IC 5-14-1.5 or IC 5-14-3 concerning the subject matter of the inquiry or other request. *(As added by P.L. 70-1999, § 4 and P.L. 191-1999, § 4.)*

I.C. § 5-14-4-14 EDUCATION FUND

(a) An education fund is established to provide funds for the program established under section 10(1) of this chapter.

(b) The fund consists of the following:

(1) Civil penalties collected under IC 5-14-1.5-7.5 and IC 5-14-3-9.5.

(2) Money appropriated by the general assembly.

(3) Grants, gifts, contributions, and money received from any other source.

(c) The treasurer of state shall administer the fund. The following may be paid from money in the fund:

(1) Expenses of administering the fund.

(2) Nonrecurring administrative expenses incurred to carry out the purposes of this section.

(d) Money in the fund at the end of a state fiscal year does not revert to the state general fund.

(e) The treasurer of state shall invest the money in the fund not currently needed to meet the obligations of the fund in the same manner as other public funds may be invested. Interest that accrues from these investments shall be deposited in the fund. *(As added by P.L. 134-2012, §21.)*

FORMAL COMPLAINTS TO THE PUBLIC ACCESS COUNSELOR

I.C. § 5-14-5-1 "COUNSELOR" DEFINED

As used in this chapter, "counselor" refers to the public access counselor appointed under I.C. §5-14-4-6. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-2 "PERSON" DEFINED

As used in this chapter, "person" means an individual, a business, a corporation, an association, or an organization. The term does not include a public agency. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-3 "PUBLIC AGENCY"

DEFINED

As used in this chapter, "public agency" has the meaning set forth in:

(1) IC 5-14-1.5-2, for purposes of matters concerning public meetings; and

(2) IC 5-14-3-2, for purposes of matters concerning public records. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-4 COMPLAINT NOT REQUIRED TO FILE ACTION

A person or a public agency is not required to file a complaint under this chapter before filing an action under IC 5-14-1.5 or IC 5-14-3. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-5 COOPERATION FROM PUBLIC AGENCIES

A public agency shall cooperate with the counselor in any investigation or proceeding under this chapter. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-6 GROUNDS FOR COMPLAINT

A person or a public agency denied:

(1) the right to inspect or copy records under IC 5-14-3;

(2) the right to attend any public meeting of a public agency in violation of IC 5-14-1.5; or

(3) any other right conferred by IC 5-14-3 or IC 5-14-1.5 or any other state statute or rule governing access to public meetings or public records;

may file a formal complaint with the counselor under the procedure prescribed by this chapter or may make an informal inquiry under I.C. §5-14-4-10(5). *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

COMMENTARY

See Opinion of the Public Access Counselor 00-FC-11 for a discussion of standing to file a formal complaint.

I.C. § 5-14-5-7 TIME FOR FILING

(a) A person or a public agency that chooses to file a formal complaint with the counselor must file the complaint not later than thirty days after:

(1) the denial; or

(2) the person filing the complaint receives notice in fact that a meeting was held by a public

agency, if the meeting was conducted secretly or without notice.

(b) A complaint is considered filed on the date it is:

- (1) received by the counselor; or
- (2) postmarked, if received more than thirty days after the denial that is the subject of the complaint. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-8 COMPLAINT FORWARDED TO PUBLIC AGENCY

When the counselor receives a complaint under section 7 of this chapter, the counselor shall immediately forward a copy of the complaint to the public agency that is the subject of the complaint. *(As added by P.L. 70-1995, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-9 ADVISORY OPINION

Except as provided in section 10 of this chapter, the counselor shall issue an advisory opinion on the complaint not later than thirty days after the complaint is filed. *(As added by P.L. 70-1995, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-10 PRIORITY OF COMPLAINTS

(a) If the counselor determines that a complaint has priority, the counselor shall issue an advisory opinion on the complaint not later than seven days after the complaint is filed.

(b) The counselor shall adopt rules under I.C. 4-22-2 establishing criteria for complaints that have priority.

(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)

I.C. § 5-14-5-11 FORM OF COMPLAINT

The public access counselor shall determine the form of a formal complaint filed under this chapter. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

I.C. § 5-14-5-12 STATUTE OF LIMITATIONS

The filing of a formal complaint under this chapter does not delay the running of a statute of limitation that applies to a lawsuit under I.C. 5-14-1.5 or I.C. 5-14-3 concerning the subject matter of the complaint. *(As added by P.L. 70-1999, § 5 and P.L. 191-1999, § 5.)*

APPENDICES

APPENDIX A

OFFICE OF THE PUBLIC ACCESS COUNSELOR ADMINISTRATIVE RULE

62 IAC 1-1-1: DEFINITIONS

Authority: IC 5-14-5-10

Affected: IC 5-14-1.5; IC 5-14-3; IC 5-14-5

The following definitions apply throughout this rule:

- (1) "Complainant" means a person who files a complaint under 5-14-5.
- (2) "Formal complaint" means a complaint filed under IC 5-14-5.

62 IAC 1-1-2: FORMAL COMPLAINTS THAT HAVE PRIORITY; PROCEDURE

Authority: IC 5-14-5-10

Affected: IC 5-14-1.5; IC 5-14-3; IC 5-14-5

- (a) Formal complaints may be filed with the public access counselor by hand delivery, United States Mail, facsimile, or electronic mail.
- (b) A complainant shall file a formal complaint on the form prescribed by the public access counselor. If any of the criteria for priority enumerated in section 3 of this rule are met, the complainant shall include the information in the complaint.
- (c) A formal complaint is considered received when date stamped by the office of the public access counselor.
- (d) If a formal complaint meets any of the criteria for priority listed under section 3 of this rule, the public access counselor shall issue a written advisory opinion within seven (7) days of receipt of that complaint.

62 IAC 1-1-3 PRIORITY COMPLAINTS; CRITERIA

Authority: IC 5-14-5-10

Affected: IC 5-14-1.5-7; IC 5-14-3; IC 5-14-5

A formal complaint has priority if one (1) of the following criteria are met:

- (1) The complainant intends to file an action in circuit or superior court under IC 5-14-1.5-7 to declare void any policy, decision, or final action of a governing body or seek an injunction that would invalidate any policy, decision, or final action based upon a violation of IC 5-14-1.5. A formal complaint must be filed under this subsection:
 - (A) before the delivery of any warrants, notes, bonds, or obligations if the relief sought would have the effect of invalidating those warrants, notes, bonds, or obligations; or
 - (B) within thirty (30) days of either:
 - (i) the date of the act or failure to act complained of; or
 - (ii) the date the complainant knew or should have known that the act or failure to act complained of had occurred.
- (2) The complainant has filed a complaint concerning the conduct of a meeting or an executive session of a public agency for which notice has been posted, but the meeting or executive session has not yet taken place.
- (3) The complainant has filed a complaint concerning denial of access to public records and at least one (1) of the public records requested was sought for the purpose of presenting the public record in a proceeding to be conducted by another public agency.

APPENDIX B

CHECKLIST FOR PUBLIC AGENCIES RESPONDING TO REQUESTS FOR ACCESS TO OR COPIES OF PUBLIC RECORDS

Time Period for Response

If the request was made orally or a written request was hand-delivered, the public agency must respond within **24 business hours** after the request was received.

If a written request was received by the public agency by facsimile, mail, or electronic mail, the public agency must respond **within 7 calendar days** after the request was received.

Substance of Response

Any or all of the following statements that apply to the request should be included in the response. If a statement does not apply, you need not include it in your response.

(A) A statement identifying the public records maintained by the agency that will be provided in response to the request and the estimated date the records will be produced.

(B) A statement indicating the record request is denied and the record will be withheld because the record is confidential or nondisclosable. Be sure to include the statutory authority for the claim that the record is confidential or otherwise nondisclosable.

(C) A statement that the public agency does not have a record responsive to the records request.

(D) A statement that the public agency may have records responsive to the request and is in the process of

- (i) reviewing the agency's files;
- (ii) retrieving stored files; or
- (iii) both items (i) and (ii);

in response to the request and an additional response will be provided on or before a specific date to advise the requestor of the agency's progress on the request.

Copy Fees

Notify the requestor of the estimated copy fee, if any and whether the fee must be provided before the copies of public records will be produced, or if the fee can be paid upon delivery of the public records.

Denial of Access to Any or All of the Public Records Requested

If the public agency is denying access to any or all of the requested public records, the response should include the name and title of the person responsible for the nondisclosure of the records and how that person may be contacted. If the request was made in writing, or if an oral request was renewed in writing, any denial, even of only a portion of a record, must be made in writing by the public agency.

APPENDIX C

SAMPLE LETTER

Requesting Access or Copy of Public Record

Date

Public Official or Agency

Title

Address

City, Indiana Zip Code

Dear Public Official:

Pursuant to the Access to Public Records Act (Ind. Code 5-14-3), I would like to (*inspect or obtain a copy of*) the following public records:

(Be sure to describe the records sought with enough detail for the public agency to be able to respond.)

I understand that if I seek a copy of this record, there may be a copying fee. Could you please inform me of that cost prior to making the copy? I can be reached at (*phone number and/or email address*).

According to the statute, you have ____ days to respond to this request. (*If this letter was delivered personally to the public official's office, the agency has 24 hours to respond to the request. If the letter is delivered by U.S. Mail, email or facsimile, the agency has seven days to respond to the request.*) If you choose to deny the request, you are required to respond in writing and state the statutory exception authorizing the withholding of all or part of the public record and the name and title or position of the person responsible for the denial.

Thank you for your assistance on this matter.

Respectfully,

APPENDIX D

SAMPLE NOTICES

Regular or Special Meetings Open to the Public

Meeting (or Special Meeting) of the
Any Town City Council
Wednesday, April 9, 2016
5:30 p.m.
City Hall Meeting Room; Two North Main Street; Any Town, Indiana

Executive session

Notice of Executive Session of the
Anytown City Council
Wednesday, April 9, 2016
4:30 p.m.
City Hall Meeting Room; Two North Main Street, Anytown, Indiana

The Council will meet to discuss a job performance evaluation of an individual employee as authorized under I.C. §5-14-1.5-6.1(b)(9).

APPENDIX E

Nonexclusive List of Helpful Indiana Code Statutes

Records Access Restricted

4-6-9-4 Complaints and correspondence with Consumer Protection Division of the Attorney General's Office are confidential with certain exceptions.

5-2-4-6 Criminal intelligence information is confidential.

5-2-9-6 County clerks' and sheriffs' information about a protected order is confidential.

6-1.1-35-9 All information concerning earnings, profits, losses or expenditures and which is either given by a person to an assessing official is confidential.

6-4.1-12-12 The Department of Revenue shall not divulge any information disclosed concerning inheritance taxes, with exceptions.

6-8.1-7-1 Department of Revenue may not divulge amount of tax paid, terms of settlement agreement, investigation records/reports, or other information disclosed by reports filed under the law relating to any of the listed taxes when it is agreed that the information is to be confidential.

9-14-13-2 Personal information or social security number in connection with a motor vehicle record may not be disclosed by the BMV.

9-26-3-4 Accident reports filed with the ISP by a driver involved in an accident are confidential.

10-13-3-27 Restrictions on the release of limited criminal histories.

31-39-1-2 Except under certain circumstances (see IC 31-39-2) juvenile court records are confidential.

31-39-3-4 Except under certain circumstances (see IC 31-39-3-2, 31-39-3-3, and 31-39-4) juvenile law enforcement records are confidential.

35-38-1-13 Pre-sentence reports or memoranda; report of physical/mental exam are confidential, except as provided by 35-38-1-13(b).

Records Specifically Required to be Disclosed

3-7-28-7 Voter registration lists are available for public access.

9-26-2-3 Accident reports filed with the Indiana State Police by a law enforcement agency are disclosable public records.

16-31-2-11 Ambulance report or record regarding an emergency patient that must be disclosed if services provided by or under a contract with a public agency.

20-28-6-2 Contracts entered into by a teacher are open to inspection by the people of each school corporation.

36-2-14-18 Information required to be disclosed by a coroner regarding the investigation of a death.

Meetings

36-2-2-9 Limitations on the location of county commissioner meetings.

Fees

36-2-7-10 Sets fee for county recorders.

33-37-5-1 Sets fees for county circuit court clerks and court records.

APPENDIX F

HOW TO FILE A FORMAL COMPLAINT

All formal complaints must be submitted on a formal complaint form, which is available on our website (www.in.gov/pac). All spaces on the form must be completed in order to ensure that your complaint is processed. Additional pages may be attached to the form for the narrative portion. Also include any relevant correspondence and communication relating to the denial for the consideration of the Public Access Counselor. Complaints may be rejected for lack of sufficient information.

The complaint must concern an issue that is related to the Access to Public Records Act or the Open Door Law or other state law pertaining to public access. The Public Access Counselor will not accept complaints dealing with issues outside the public access laws. Also, the agency the complaint is against must be a public agency as defined by statute. The Public Access Counselor cannot accept complaints against private agencies or corporations.

A formal complaint ***must be filed within thirty (30) days of the denial of records or receiving information regarding a meeting held in secret or without notice.*** I.C. § 5-14-5- 7(a).
Complaints filed beyond thirty (30) days are untimely and will be returned.

A complaint may request priority status under certain circumstances. This process allows the complainant to receive an opinion from the Counselor within seven days. The criteria required for this expedited process can be found in Appendix A (See 62 IAC 1-1-3). A request for priority status must be included in the narrative of the complaint. You must demonstrate circumstances warranting priority status. If possible, please include the date and cause number of any upcoming hearing or court date.

A complaint to the Public Access Counselor may be submitted via mail, email, fax, or hand delivery. Our contact information may be found in Appendix H.

The Public Access Counselor reserves the right to mediate all controversies for the benefit of public access. Pursuant to IC § 5-14-5-11, formal complaints may be rejected for being misleading, confusing, illegible, or for containing superfluous information.

Appendix G

RESPONDING TO A FORMAL COMPLAINT

When responding to a formal complaint, it is imperative that the agency respond in a timely fashion to allow the Public Access Counselor to consider whether a violation of public access law has occurred.

The agency should include a narrative explaining the reasoning for a denial, including the appropriate statutory authority permitting such denial. This narrative may acknowledge an error on the part of the agency in its denial or failure to respond to a request, reasons for delay, or other circumstances impacting the agency's ability to process the initial request. The agency should also include any correspondence or communication germane to the complaint.

The agency is encouraged to contact the Public Access Counselor with any questions or concerns encountered while formulating a response.

APPENDIX H

CONTACT INFORMATION FOR THE PUBLIC ACCESS COUNSELOR'S OFFICE

If you have a question or concern about obtaining access to public meetings or to public records, you may contact the state's Public Access Counselor for advice or assistance.

Public Access Counselor
Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204

Toll Free: 800-228-6013
Telephone: 317-234-0906
Facsimile: 317-233-3091

Email: pac@icpr.IN.gov
Website: www.IN.gov/pac

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