



April 6, 1999

ENGROSSED HOUSE BILL No. 1002

DIGEST OF HB 1002 (Updated March 31, 1999 3:17 pm - DI 87)

Citations Affected: IC 5-14.

Synopsis: Public access counselor and complaint procedure. Creates the office of the public access counselor. Provides for the appointment of a public access counselor by the governor. Establishes an informal inquiry and formal complaint procedure for the office of the public access counselor. Provides that the making an informal inquiry or filing a formal complaint does not toll the running of any applicable statutes of limitation. Prohibits the public access counselor from issuing an
(Continued next page)

Effective: July 1, 1999.

**Kruzan, Mangus, Mannweiler,
Frenz, Linder, Sturtz, Pelath,
Bodiker, Torr, Whetstone, Kruse,
Saunders, Munson**

(SENATE SPONSORS — MERRITT, ALEXA, SKILLMAN, BLADE)

January 6, 1999, read first time and referred to Committee on Rules and Legislative Procedures.

January 27, 1999, amended, reported — Do Pass.

February 2, 1999, read second time, amended, ordered engrossed.

February 3, 1999, engrossed.

February 8, 1999, read third time, recommitted to Committee of One, amended, passed.

Yeas 97, nays 1. Engrossed.

February 9, 1999, re-engrossed.

SENATE ACTION

March 23, 1999, read first time and referred to Committee on Governmental and Regulatory Affairs.

April 5, 1999, amended, reported favorably — Do Pass.

EH 1002—LS 6656/DI 87+



C
o
p
y

Digest Continued

advisory opinion concerning a matter that is in litigation. Requires a court to expedite the hearing of an action filed under the open door law (IC 5-14-1.5) or the public records law (IC 5-14-3). Requires, rather than permits, a court to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to a prevailing plaintiff. Provides that a plaintiff is not eligible for attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the civil action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor unless the plaintiff can show (1) the filing of the civil action was necessary to prevent a violation of the open door law; or (2) the filing of the civil action was necessary because the denial of access to the public record 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. Requires, rather than permits, a court to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to a prevailing defendant if the court finds that the action is frivolous or vexatious. Provides that when a civil action is filed under the open records law, the public agency must notify each person who supplies any part of the public record whether the denial was in compliance with an informal inquiry request of advisory opinion of the public access counselor. Provides that a court in determining whether to declare a policy, decision, or final action of a public agency void as a result of a violation of the open door law, the court may consider whether the plaintiff acted in compliance with an informal inquiry response or advisory opinion issued by the public access counselor. Provides immunity to an employee or official of a public agency who discloses confidential information in reliance on an advisory opinion issued by the public access counselor. Requires the public access counselor to submit a report to the legislative services agency not later than June 30 of each year concerning the activities of the counselor for the previous year. (The introduced version of this bill was prepared by the interim study committee on state government issues.)

C
O
P
Y



April 6, 1999

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

ENGROSSED HOUSE BILL No. 1002

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 5-14-1.5-7 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 7. (a) An action may be
3 filed by any person in any court of competent jurisdiction to:
4 (1) obtain a declaratory judgment;
5 (2) enjoin continuing, threatened, or future violations of this
6 chapter; or
7 (3) declare void any policy, decision, or final action:
8 (A) taken at an executive session in violation of section 3(a) of
9 this chapter;
10 (B) taken at any meeting of which notice is not given in
11 accordance with section 5 of this chapter;
12 (C) that is based in whole or in part upon official action taken
13 at any executive session in violation of section 3(a) of this
14 chapter or at any meeting of which notice is not given in
15 accordance with section 5 of this chapter; or
16 (D) taken at a meeting held in a location in violation of section
17 8 of this chapter.

EH 1002—LS 6656/DI 87+



C
O
P
Y

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

3 (b) **Regardless of whether a formal complaint or an informal**
4 **inquiry is pending before the public access counselor**, any action to
5 declare any policy, decision, or final action of a governing body void,
6 or to enter an injunction which would invalidate any policy, decision,
7 or final action of a governing body, based on violation of this chapter
8 occurring before the action is commenced, shall be commenced:

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

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

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

15 (B) the date that the plaintiff knew or should have known that
16 the act or failure to act complained of had occurred;

17 whichever is later. If the challenged policy, decision, or final action is
18 recorded in the memoranda or minutes of a governing body, a plaintiff
19 is considered to have known that the act or failure to act complained of
20 had occurred not later than the date that the memoranda or minutes are
21 first available for public inspection.

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

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

29 (1) The extent to which the violation:

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

32 (B) denied or impaired access to any meetings that the public
33 had a right to observe and record; and

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

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

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

42 (A) The remedial benefits gained by effectuating the public

C
O
P
Y



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

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 the 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 ~~may~~ **shall** award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

- (1) the plaintiff prevails; ~~and the court finds that the defendant's violation is knowing and intentional;~~ 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 shall expedite the hearing of an action filed under this section.

SECTION 2. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 9. (a) 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
O
P
Y



1 (b) If a person requests by mail or by facsimile a copy or copies of
 2 a public record, a denial of disclosure does not occur until seven (7)
 3 days have elapsed from the date the public agency receives the request.

4 (c) If a request is made orally, either in person or by telephone, a
 5 public agency may deny the request orally. However, if a request
 6 initially is made in writing, by facsimile, or through enhanced access,
 7 or if an oral request that has been denied is renewed in writing or by
 8 facsimile, a public agency may deny the request if:

9 (1) the denial is in writing or by facsimile; and

10 (2) the denial includes:

11 (A) a statement of the specific exemption or exemptions
 12 authorizing the withholding of all or part of the public record;
 13 and

14 (B) the name and the title or position of the person responsible
 15 for the denial.

16 (d) A person who has been denied the right to inspect or copy a
 17 public record by a public agency may file an action in the circuit or
 18 superior court of the county in which the denial occurred to compel the
 19 public agency to permit the person to inspect and copy the public
 20 record. Whenever an action is filed under this subsection, the public
 21 agency must notify each person who supplied any part of the public
 22 record at issue:

23 (1) that a request for release of the public record has been denied;
 24 **and**

25 (2) **whether the denial was in compliance with an informal**
 26 **inquiry response or advisory opinion of the public access**
 27 **counselor.**

28 Such persons are entitled to intervene in any litigation that results from
 29 the denial. The person who has been denied the right to inspect or copy
 30 need not allege or prove any special damage different from that
 31 suffered by the public at large.

32 (e) The court shall determine the matter de novo, with the burden of
 33 proof on the public agency to sustain its denial. If the issue in de novo
 34 review under this section is whether a public agency properly denied
 35 access to a public record because the record is exempted under section
 36 4(a) of this chapter, the public agency meets its burden of proof under
 37 this subsection by establishing the content of the record with adequate
 38 specificity and not by relying on a conclusory statement or affidavit.

39 (f) If the issue in a de novo review under this section is whether a
 40 public agency properly denied access to a public record because the
 41 record is exempted under section 4(b) of this chapter:

42 (1) the public agency meets its burden of proof under this

C
O
P
Y



- 1 subsection by:
- 2 (A) proving that the record falls within any one (1) of the
- 3 categories of exempted records under section 4(b) of this
- 4 chapter; and
- 5 (B) establishing the content of the record with adequate
- 6 specificity and not by relying on a conclusory statement or
- 7 affidavit; and
- 8 (2) a person requesting access to a public record meets the
- 9 person's burden of proof under this subsection by proving that the
- 10 denial of access is arbitrary or capricious.
- 11 (g) The court may review the public record in camera to determine
- 12 whether any part of it may be withheld under this chapter.
- 13 (h) In any action filed under this section, a court ~~may~~ **shall** award
- 14 reasonable attorney fees, court costs, and other reasonable expenses of
- 15 litigation to the prevailing party if:
- 16 (1) the plaintiff substantially prevails; ~~and the court finds the~~
- 17 ~~defendant's violation was knowing or intentional;~~ or
- 18 (2) the defendant substantially prevails and the court finds the
- 19 action was frivolous or vexatious.
- 20 **The plaintiff is not eligible for the awarding of attorney's fees,**
- 21 **court costs, and other reasonable expenses if the plaintiff filed the**
- 22 **action without first seeking and receiving an informal inquiry**
- 23 **response or advisory opinion from the public access counselor,**
- 24 **unless the plaintiff can show the filing of the action was necessary**
- 25 **because the denial of access to a public record under this chapter**
- 26 **would prevent the plaintiff from presenting that public record to**
- 27 **a public agency preparing to act on a matter of relevance to the**
- 28 **public record whose disclosure was denied.**
- 29 **(i) A court shall expedite the hearing of an action filed under**
- 30 **this section.**
- 31 SECTION 3. IC 5-14-3-10 IS AMENDED TO READ AS
- 32 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 10. (a) A public
- 33 employee, a public official, or an employee or officer of a contractor or
- 34 subcontractor of a public agency, except as provided by IC 4-15-10,
- 35 who knowingly or intentionally discloses information classified as
- 36 confidential by state statute commits a Class A misdemeanor.
- 37 (b) A public employee may be disciplined in accordance with the
- 38 personnel policies of the agency by which the employee is employed
- 39 if the employee intentionally, knowingly, or recklessly discloses or fails
- 40 to protect information classified as confidential by state statute.
- 41 (c) A public employee, a public official, or an employee or officer
- 42 of a contractor or subcontractor of a public agency who unintentionally



1 and unknowingly discloses confidential or erroneous information in
 2 response to a request under IC 5-14-3-3(d) **or who discloses**
 3 **confidential information in reliance on an advisory opinion by the**
 4 **public access counselor** is immune from liability for such a disclosure.

5 (d) This section does not apply to any provision incorporated into
 6 state law from a federal statute.

7 SECTION 4. IC 5-14-4 IS ADDED TO THE INDIANA CODE AS
 8 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
 9 1, 1999]:

10 **Chapter 4. Public Access Counselor**

11 **Sec. 1. As used in this chapter, "counselor" refers to the public**
 12 **access counselor appointed under section 6 of this chapter.**

13 **Sec. 2. As used in this chapter, "office" refers to the office of the**
 14 **public access counselor established under section 5 of this chapter.**

15 **Sec. 3. As used in this chapter, "public access laws" refers to:**

16 (1) IC 5-14-1.5;

17 (2) IC 5-14-3; or

18 (3) any other state statute or rule governing access to public
 19 meetings or public records.

20 **Sec. 4. As used in this chapter, "public agency" has the meaning**
 21 **set forth in:**

22 (1) IC 5-14-1.5-2 for purposes of matters concerning public
 23 meetings; and

24 (2) IC 5-14-3-2 for purposes of matters concerning public
 25 records.

26 **Sec. 5. The office of the public access counselor is established.**
 27 **The office shall be administered by the public access counselor**
 28 **appointed under section 6 of this chapter.**

29 **Sec. 6. The governor shall appoint a public access counselor for**
 30 **a term of four (4) years at a salary to be fixed by the governor.**

31 **Sec. 7. The governor may remove the counselor for cause.**

32 **Sec. 8. If a vacancy occurs in the office, the governor shall**
 33 **appoint an individual to serve for the remainder of the counselor's**
 34 **unexpired term.**

35 **Sec. 9. (a) The counselor must be a practicing attorney.**

36 **(b) The counselor shall apply the counselor's full efforts to the**
 37 **duties of the office and may not be actively engaged in any other**
 38 **occupation, practice, profession, or business.**

39 **Sec. 10. The counselor has the following powers and duties:**

40 (1) **To establish and administer a program to train public**
 41 **officials and educate the public on the rights of the public and**
 42 **the responsibilities of public agencies under the public access**

C
O
P
Y



1 laws. The counselor may contract with a person or a public or
2 private entity to fulfill the counselor's responsibility under
3 this subdivision.

4 (2) To conduct research.

5 (3) To prepare interpretive and educational materials and
6 programs in cooperation with the office of the attorney
7 general.

8 (4) To distribute to newly elected or appointed public officials
9 the public access laws and educational materials concerning
10 the public access laws.

11 (5) To respond to informal inquiries made by the public and
12 public agencies by telephone, in writing, in person, by
13 facsimile, or by electronic mail concerning the public access
14 laws.

15 (6) To issue advisory opinions to interpret the public access
16 laws upon the request of a person or a public agency.
17 However, the counselor may not issue an advisory opinion
18 concerning a specific matter with respect to which a lawsuit
19 has been filed under IC 5-14-1.5 or IC 5-14-3.

20 (7) To make recommendations to the general assembly
21 concerning ways to improve public access.

22 **Sec. 11.** The counselor may employ additional personnel
23 necessary to carry out the functions of the office subject to the
24 approval of the budget agency.

25 **Sec. 12.** The counselor shall submit a report not later than June
26 30 of each year to the legislative services agency concerning the
27 activities of the counselor for the previous year. The report must
28 include the following information:

29 (1) The total number of inquiries and complaints received.

30 (2) The number of inquiries and complaints received each
31 from the public, the media, and government agencies.

32 (3) The number of inquiries and complaints that were
33 resolved.

34 (4) The number of complaints received about each of the
35 following:

36 (A) State agencies.

37 (B) County agencies.

38 (C) City agencies.

39 (D) Town agencies.

40 (E) Township agencies.

41 (F) School corporations.

42 (G) Other local agencies.



C
O
P
Y

1 **(5) The number of complaints received concerning each of the**
 2 **following:**

3 **(A) Public records.**

4 **(B) Public meetings.**

5 **(6) The total number of written advisory opinions issued and**
 6 **pending.**

7 **Sec. 13. An informal inquiry or other request for assistance**
 8 **under this chapter does not delay the running of a statute of**
 9 **limitation that applies to a lawsuit under IC 5-14-1.5 or IC 5-14-3**
 10 **concerning the subject matter of the inquiry or other request.**

11 **SECTION 5. IC 5-14-5 IS ADDED TO THE INDIANA CODE AS**
 12 **A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY**
 13 **1, 1999]:**

14 **Chapter 5. Formal Complaint Procedure**

15 **Sec. 1. As used in this chapter, "counselor" refers to the public**
 16 **access counselor appointed under IC 5-14-4-6.**

17 **Sec. 2. As used in this chapter, "person" means an individual, a**
 18 **business, a corporation, an association, or an organization. The**
 19 **term does not include a public agency.**

20 **Sec. 3. As used in this chapter, "public agency" has the meaning**
 21 **set forth in:**

22 **(1) IC 5-14-1.5-2, for purposes of matters concerning public**
 23 **meetings; and**

24 **(2) IC 5-14-3-2, for purposes of matters concerning public**
 25 **records.**

26 **Sec. 4. A person or a public agency is not required to file a**
 27 **complaint under this chapter before filing an action under**
 28 **IC 5-14-1.5 or IC 5-14-3.**

29 **Sec. 5. A public agency shall cooperate with the counselor in any**
 30 **investigation or proceeding under this chapter.**

31 **Sec. 6. A person or a public agency denied:**

32 **(1) the right to inspect or copy records under IC 5-14-3;**

33 **(2) the right to attend any public meeting of a public agency**
 34 **in violation of IC 5-14-1.5; or**

35 **(3) any other right conferred by IC 5-14-3 or IC 5-14-1.5 or**
 36 **any other state statute or rule governing access to public**
 37 **meetings or public records;**

38 **may file a formal complaint with the counselor under the**
 39 **procedure prescribed by this chapter or may make an informal**
 40 **inquiry under IC 5-14-4-10(5).**

41 **Sec. 7. (a) A person or a public agency that chooses to file a**
 42 **formal complaint with the counselor must file the complaint not**

C
O
P
Y



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

later than thirty (30) 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 (30) days after the date of the denial that is the subject of the complaint.

Sec. 8. 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.

Sec. 9. Except as provided in section 10 of this chapter, the counselor shall issue an advisory opinion on the complaint not later than thirty (30) days after the complaint is filed.

Sec. 10. (a) If the counselor determines that a complaint has priority, the counselor shall issue an advisory opinion on the complaint not later than seven (7) days after the complaint is filed.

(b) The counselor shall adopt rules under IC 4-22-2 establishing criteria for complaints that have priority.

Sec. 11. The public access counselor shall determine the form of a formal complaint filed under this chapter.

Sec. 12. 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 IC 5-14-1.5 or IC 5-14-3 concerning the subject matter of the complaint.

C
O
P
Y



COMMITTEE REPORT

Mr. Speaker: Your Committee on Rules and Legislative Procedures, to which was referred House Bill 1002, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 2, line 5, after "(b)" insert "**Regardless of whether a formal complaint or informal inquiry is pending before the public access counselor,**".

Page 2, line 5, delete "Any" and insert "any".

Page 3, delete lines 26 through 29, begin a new paragraph and insert:

"(b) If a court finds by a preponderance of the evidence that this chapter has been knowingly violated, the court may assess a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against each employee or officer of a public agency who knowingly violated this chapter. A civil penalty assessed under this section is a personal liability of the employee or officer, and a public agency may not:

- (1) pay a civil penalty imposed under this section; or**
- (2) reimburse an employee or officer who pays a civil penalty under this section."**

Page 5, delete lines 24 through 27, begin a new paragraph and insert:

"(b) If a court finds by a preponderance of the evidence that this chapter has been knowingly violated, the court may assess a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against each employee or officer of a public agency who knowingly violated this chapter. A civil penalty imposed under this section is a personal liability of the employee or officer, and a public agency may not:

- (1) pay a civil penalty imposed under this section; or**
- (2) reimburse an employee or officer who pays a civil penalty under this section."**

Page 6, line 24, before "on" insert "**and the media**".

Page 6, line 41, after "agency." insert "**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.**".

Page 7, between lines 3 and 4, begin a new paragraph and insert:

"Sec. 12. 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

C
O
P
Y

concerning the subject matter of the inquiry or other request."

Page 7, line 32, after "chapter" insert "**or may make an informal inquiry under IC 5-14-4-10(5)**".

Page 7, line 33, delete "shall" and insert "**that chooses to**".

Page 7, line 34, after "counselor" insert "**must file the complaint**".

Page 8, line 11, after "rules" insert "**under IC 4-22-2**".

Page 8, between lines 14 and 15, begin a new paragraph and insert:
"Sec. 12. 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 IC 5-14-1.5 or IC 5-14-3 concerning the subject matter of the complaint."

and when so amended that said bill do pass.

(Reference is to HB 1002 as introduced.)

MOSES, Chair

Committee Vote: yeas 9, nays 0.

C
O
P
Y



HOUSE MOTION

Mr. Speaker: I move that House Bill 1002 be amended to read as follows:

Page 3, delete lines 27 through 30.

Page 3, line 31, delete "violated this chapter." and insert in bold:

"(b) If a court finds by a preponderance of the evidence that this chapter has been knowingly or intentionally violated, the court shall determine the individual or individuals responsible for the violation and:

(1) if it is the first knowing or intentional violation by an individual, order that individual to attend a training session on the Open Door Law and Access to Public Records Act approved by the state's Public Access Counselor;

(2) if it is not the first knowing or intentional violation by an individual, assess a civil penalty in an amount not to exceed one thousand dollars (\$1,000).

(c)"

Page 3, line 32, delete "the employee or officer" and insert **"individual"**.

Page 3, line 37, delete "(c)" and insert **"(d)"**.

Page 5, delete lines 31 through 34.

Page 5, line 35, delete "violated this chapter." and insert in bold:

"(b) If a court finds by a preponderance of the evidence that this chapter has been knowingly or intentionally violated, the court shall determine the individual or individuals responsible for the violation and:

(1) if it is the first knowing or intentional violation by an individual, order that individual to attend a training session on the Open Door Law and Access to Public Records Act approved by the state's Public Access Counselor;

(2) if it is not the first knowing or intentional violation by an individual, assess a civil penalty in an amount not to exceed one thousand dollars (\$1,000).

(c)"

Page 5, line 36, delete "employee or officer" and insert **"individual"**.

Page 5, line 41, delete "(c)" and insert **"(d)"**.

(Reference is to HB1002 as printed January 29, 1999.)

KRUZAN



C
O
P
Y

HOUSE MOTION

Mr. Speaker: I move that House Bill 1002 be amended to read as follows:

Page 3, between lines 8 and 9, begin a new line block indented and insert:

"(4) Whether the plaintiff acted in compliance with an informal inquiry response or advisory opinion issued by the public access counselor concerning the violation."

Page 3, line 25, after "(a)" delete "This" and insert "Except as provided in subsection (d), this".

Page 3, between lines 39 and 40, begin a new paragraph and insert:

"(d) No civil penalty may be assessed against any employee or officer of a public agency acting in compliance with an informal inquiry response or advisory opinion issued by the public access counselor."

Page 4, line 32, after "that" insert ":", delete "a request for release of the public record has been", begin a new line block indented and insert:

**"(1) a request for release of the public record has been denied;
and
(2) whether the denial was in compliance with an informal inquiry request or advisory opinion of the public access counselor."**

Page 5, line 29, after "(a)" delete "This" and insert "Except as provided in subsection (d), this".

Page 6, between lines 1 and 2, begin a new paragraph and insert:

"(d) No civil penalty may be assessed against any employee or officer of a public agency acting in compliance with an informal inquiry response or advisory opinion issued by the public access counselor."

(Reference is to HB 1002 as printed January 29, 1999.)

MURPHY

C
O
P
Y



HOUSE MOTION

Mr. Speaker: I move that House Bill 1002 be recommitted to a Committee of One, its author, with specific instructions to amend as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 5-14-1.5-6.2 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **A public official, as defined in IC 5-14-1.5-6.1(a), who votes against or states a public objection to convening a meeting held in accordance with IC 5-14-1.5-6.1(b) shall incur no liability if:**

- (1) the vote or objection occurs prior to the convening of the meeting; and**
- (2) the court or the public access counselor subsequently finds that the meeting was held in violation of IC 5-14-1.5-6.1(b)."**

Re-number all SECTIONS consecutively.

Page 3, line 28, delete "**subsection (d)**" and insert "**subsections (e) and (f)**".

Page 4, line 8, delete "**(d)**" and insert "**(e)**".

Page 4, between lines 11 and 12, begin a new paragraph and insert: "**(f) No civil penalty may be assessed against any employee or officer of a public agency who voted against or publicly stated an objection to a violation of section 7 of this chapter, prior to the commission of the violation.**"

Page 5, line 10, strike "denied".

Page 6, line 6, delete "**(d)**" and insert "**(e)**".

Page 6, line 28, delete "**(d)**" and insert "**(e)**".

(Reference is to HB 1002 as reprinted February 3, 1999.)

KRUZAN

 HOUSE MOTION

Mr. Speaker: I move that House Bill 1002 be recommitted to a Committee of One, its author, with specific instructions to amend as follows:

Page 3, line 28, delete "(d)" and insert "(e)".

Page 3, line 34, delete "intentional violation" and insert "**intentional violation**".

EH 1002—LS 6656/DI 87+



C
O
P
Y

Page 3, line 38, after "Counselor;" insert "**or**".
Page 3, line 42, before "(c)" begin a new paragraph.
Page 4, line 1, before "individual" insert "**an**".
Page 4, line 8, delete "(d)" and insert "**(e)**".
Page 6, line 6, delete "1999]:" and insert "1999]:".
Page 6, line 6, delete "(d)" and insert "**(e)**".
Page 6, line 16, after "Counselor;" insert "**or**".
Page 6, line 28, delete "(d)" and insert "**(e)**".
Page 6, line 34, delete "1999]:" and insert "1999]:".
Page 8, line 14, delete "1999]:" and insert "1999]:".

(Reference is to HB 1002 as reprinted February 3, 1999.)

KRUZAN

C
o
p
y



COMMITTEE REPORT

Mr. President: The Senate Committee on Governmental and Regulatory Affairs, to which was referred House Bill No. 1002, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, delete lines 1 through 11.

Page 2, line 16, after "or" insert "**an**".

Page 3, delete lines 12 through 42, begin a new line block indented and insert:

"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 the 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 ~~may~~ **shall** award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff prevails; ~~and the court finds that the defendant's violation is knowing and intentional;~~ 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 shall expedite the hearing of an action filed under this section.

SECTION 2. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS

EH 1002—LS 6656/DI 87+



C
O
P
Y

[EFFECTIVE JULY 1, 1999]: Sec. 9. (a) 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.

(b) 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.

(c) 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.

(d) 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

C
O
P
Y



suffered by the public at large.

(e) 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.

(f) 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 the record falls within any one (1) of the categories of exempted records under section 4(b) 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.

(g) The court may review the public record in camera to determine whether any part of it may be withheld under this chapter.

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

(1) the plaintiff substantially prevails; ~~and the court finds the defendant's violation was knowing or intentional;~~ or

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

(i) A court shall expedite the hearing of an action filed under this section.



C
O
P
Y

SECTION 3. IC 5-14-3-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 10. (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 commits a Class A misdemeanor.

(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.

SECTION 4. IC 5-14-4 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]:

Chapter 4. Public Access Counselor

Sec. 1. As used in this chapter, "counselor" refers to the public access counselor appointed under section 6 of this chapter.

Sec. 2. As used in this chapter, "office" refers to the office of the public access counselor established under section 5 of this chapter.

Sec. 3. As used in this chapter, "public access laws" refers to:

- (1) IC 5-14-1.5;
- (2) IC 5-14-3; or
- (3) any other state statute or rule governing access to public meetings or public records.

Sec. 4. 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.

Sec. 5. 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.

Sec. 6. The governor shall appoint a public access counselor for a term of four (4) years at a salary to be fixed by the governor.



C
O
P
Y

Sec. 7. The governor may remove the counselor for cause.

Sec. 8. If a vacancy occurs in the office, the governor shall appoint an individual to serve for the remainder of the counselor's unexpired term.

Sec. 9. (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.

Sec. 10. 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 the 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.

Sec. 11. The counselor may employ additional personnel necessary to carry out the functions of the office subject to the approval of the budget agency.

Sec. 12. The counselor shall submit a report 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

C
O
P
Y



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.

Sec. 13. 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.

SECTION 5. IC 5-14-5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]:

Chapter 5. Formal Complaint Procedure

Sec. 1. As used in this chapter, "counselor" refers to the public access counselor appointed under IC 5-14-4-6.

Sec. 2. 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.

Sec. 3. 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.

Sec. 4. 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.

Sec. 5. A public agency shall cooperate with the counselor in any investigation or proceeding under this chapter.



C
O
P
Y

Sec. 6. 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 IC 5-14-4-10(5).

Sec. 7. (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 (30) 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 (30) days after the date of the denial that is the subject of the complaint.

Sec. 8. 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.

Sec. 9. Except as provided in section 10 of this chapter, the counselor shall issue an advisory opinion on the complaint not later than thirty (30) days after the complaint is filed.

Sec. 10. (a) If the counselor determines that a complaint has priority, the counselor shall issue an advisory opinion on the complaint not later than seven (7) days after the complaint is filed.

(b) The counselor shall adopt rules under IC 4-22-2 establishing criteria for complaints that have priority.

Sec. 11. The public access counselor shall determine the form of a formal complaint filed under this chapter.

Sec. 12. 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 IC 5-14-1.5 or IC 5-14-3 concerning the subject matter of the complaint."

Delete pages 4 through 10.

Renumber all SECTIONS consecutively.

C
O
P
Y



and when so amended that said bill do pass.

(Reference is to HB 1002 as reprinted February 9, 1999.)

MERRITT, Chairperson

Committee Vote: Yeas 9, Nays 0.

C
o
p
y

