



January 29, 1999

HOUSE BILL No. 1002

DIGEST OF HB 1002 (Updated January 19, 1999 12:52 pm - DI 87)

Citations Affected: IC 5-14.

Synopsis: Public records and open door compliance. Creates the office of the public access counselor. Provides for the appointment of a public access counselor by the governor. Establishes a formal complaint procedure for the office of the public access counselor. Provides that the filing of an informal inquiry or formal complaint does not toll the running of any applicable statutes of limitation. Prohibits the public access counselor from issuing an advisory opinion concerning a matter that is in litigation. Creates the public access education account within the state general fund for the following purposes: (1) Conducting seminars and educational programs for the public, public agencies, and the media on public access. (2) Creating publications and educational materials on public access. Requires a court to expedite the hearing of an action filed under the open door law or the public records law. Provides that if an employee or officer of a public agency knowingly
(Continued next page)

Effective: July 1, 1999.

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

January 6, 1999, read first time and referred to Committee on Rules and Legislative Procedures.
January 27, 1999, amended, reported — Do Pass.

HB 1002—LS 6656/DI 87+



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Digest Continued

violates the open door law or the public records law, a court may assess a civil penalty not to exceed \$1,000. Provides that the civil penalty is a personal liability of the employee or officer and that the public agency may not pay the penalty or reimburse the employee or officer. Requires the court clerk to remit the civil penalties to the treasurer of the state for deposit in the public access education account. Requires a court to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to a prevailing plaintiff. (Current law allows a court to award attorney's fees, court costs, and other reasonable expenses of litigation to a prevailing plaintiff if the court finds the defendant's violation was knowing and intentional.) 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. (The introduced version of this bill was prepared by the interim study committee on state government issues.)

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January 29, 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.

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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

HB 1002—LS 6656/DI 87+



1 (D) taken at a meeting held in a location in violation of section
2 8 of this chapter.

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

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

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

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

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

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

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

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

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

31 (1) The extent to which the violation:

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

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

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

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

41 (3) Whether the public interest will be served by voiding the
42 policy, decision, or final action by determining which of the

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1 following factors outweighs the other:

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

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

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

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

17 (1) the plaintiff prevails; ~~and the court finds that the defendant's~~
18 ~~violation is knowing and intentional;~~ or

19 (2) the defendant prevails and the court finds that the action is
20 frivolous and vexatious.

21 (g) **A court shall expedite the hearing of an action filed under**
22 **this section.**

23 SECTION 2. IC 5-14-1.5-9 IS ADDED TO THE INDIANA CODE
24 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
25 1, 1999]: **Sec. 9. (a) This section applies to an action filed under**
26 **section 7 of this chapter.**

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

34 (1) **pay a civil penalty imposed under this section; or**

35 (2) **reimburse an employee or officer who pays a civil penalty**
36 **under this section.**

37 (c) **The court clerk shall remit a penalty collected under this**
38 **section to the treasurer of state for deposit in the public access**
39 **education account created under IC 5-14-6-2.**

40 SECTION 3. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS
41 [EFFECTIVE JULY 1, 1999]: **Sec. 9. (a) A denial of disclosure by a**
42 **public agency occurs when the person making the request is physically**

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1 present in the office of the agency, makes the request by telephone, or
2 requests enhanced access to a document and:

3 (1) the person designated by the public agency as being
4 responsible for public records release decisions refuses to permit
5 inspection and copying of a public record when a request has
6 been made; or

7 (2) twenty-four (24) hours elapse after any employee of the public
8 agency refuses to permit inspection and copying of a public
9 record when a request has been made;

10 whichever occurs first.

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

14 (c) If a request is made orally, either in person or by telephone, a
15 public agency may deny the request orally. However, if a request
16 initially is made in writing, by facsimile, or through enhanced access,
17 or if an oral request that has been denied is renewed in writing or by
18 facsimile, a public agency may deny the request if:

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

20 (2) the denial includes:

21 (A) a statement of the specific exemption or exemptions
22 authorizing the withholding of all or part of the public record;
23 and

24 (B) the name and the title or position of the person responsible
25 for the denial.

26 (d) A person who has been denied the right to inspect or copy a
27 public record by a public agency may file an action in the circuit or
28 superior court of the county in which the denial occurred to compel the
29 public agency to permit the person to inspect and copy the public
30 record. Whenever an action is filed under this subsection, the public
31 agency must notify each person who supplied any part of the public
32 record at issue that a request for release of the public record has been
33 denied. Such persons are entitled to intervene in any litigation that
34 results from the denial. The person who has been denied the right to
35 inspect or copy need not allege or prove any special damage different
36 from that suffered by the public at large.

37 (e) The court shall determine the matter de novo, with the burden of
38 proof on the public agency to sustain its denial. If the issue in de novo
39 review under this section is whether a public agency properly denied
40 access to a public record because the record is exempted under section
41 4(a) of this chapter, the public agency meets its burden of proof under
42 this subsection by establishing the content of the record with adequate

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1 specificity and not by relying on a conclusory statement or affidavit.

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

5 (1) the public agency meets its burden of proof under this
6 subsection by:

7 (A) proving that the record falls within any one (1) of the
8 categories of exempted records under section 4(b) of this
9 chapter; and

10 (B) establishing the content of the record with adequate
11 specificity and not by relying on a conclusory statement or
12 affidavit; and

13 (2) a person requesting access to a public record meets the
14 person's burden of proof under this subsection by proving that the
15 denial of access is arbitrary or capricious.

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

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

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

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

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

27 SECTION 4. IC 5-14-3-11 IS ADDED TO THE INDIANA CODE
28 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
29 1, 1999]: **Sec. 11. (a) This section applies to an action filed under**
30 **section 9 of this chapter.**

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

38 **(1) pay a civil penalty imposed under this section; or**

39 **(2) reimburse an employee or officer who pays a civil penalty**
40 **under this section.**

41 **(c) The court clerk shall remit a penalty collected under this**
42 **section to the treasurer of state for deposit in the public access**

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1 **education account created under IC 5-14-6-2.**

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

5 **Chapter 4. Public Access Counselor**

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

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

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

11 (1) IC 5-14-1.5;

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

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

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

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

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

21 **Sec. 5. There is created the office of the public access counselor.**
22 **The office shall be administered by the public access counselor**
23 **appointed under section 6 of this chapter.**

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

26 (b) A person may serve more than one (1) term as counselor.

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

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

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

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

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

36 (1) To establish and administer a program to train public
37 officials and educate the public and the media on the rights of
38 the public and the responsibilities of public agencies under the
39 public access laws. The counselor may contract with a person
40 or a public or private entity to fulfill the counselor's
41 responsibility under this subdivision.

42 (2) To conduct research.



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- 1 **(3) To prepare interpretive and educational materials and**
 2 **programs in cooperation with the office of the attorney**
 3 **general.**
 4 **(4) To distribute to newly elected or appointed public officials**
 5 **the public access laws and educational materials concerning**
 6 **the public access laws.**
 7 **(5) To respond to informal inquiries made by the public and**
 8 **public agencies by telephone, in writing, in person, by**
 9 **facsimile, or by electronic mail concerning the public access**
 10 **laws.**
 11 **(6) To issue advisory opinions to interpret public access laws**
 12 **upon the request of a person or a public agency. However, the**
 13 **counselor may not issue an advisory opinion concerning a**
 14 **specific matter with respect to which a lawsuit has been filed**
 15 **under IC 5-14-1.5 or IC 5-14-3.**
 16 **(7) To make recommendations to the general assembly**
 17 **concerning ways to improve public access.**
 18 **Sec. 11. The counselor may employ additional personnel**
 19 **necessary to carry out the functions of the office.**
 20 **Sec. 12. An informal inquiry or other request for assistance**
 21 **under this chapter does not delay the running of a statute of**
 22 **limitation that applies to a lawsuit under IC 5-14-1.5 or IC 5-14-3**
 23 **concerning the subject matter of the inquiry or other request.**
 24 **SECTION 6. IC 5-14-5 IS ADDED TO THE INDIANA CODE AS**
 25 **A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY**
 26 **1, 1999]:**
 27 **Chapter 5. Formal Complaint Procedure**
 28 **Sec. 1. As used in this chapter, "counselor" refers to the public**
 29 **access counselor appointed under IC 5-14-4-6.**
 30 **Sec. 2. As used in this chapter, "person" means an individual, a**
 31 **business, a corporation, an association, or an organization. The**
 32 **term does not include a public agency.**
 33 **Sec. 3. As used in this chapter, "public agency" has the meaning**
 34 **set forth in:**
 35 **(1) IC 5-14-1.5-2 for purposes of matters concerning public**
 36 **meetings; and**
 37 **(2) IC 5-14-3-2 for purposes of matters concerning public**
 38 **records.**
 39 **Sec. 4. A person or a public agency is not required to file a**
 40 **complaint under this chapter before filing an action under**
 41 **IC 5-14-1.5 or IC 5-14-3.**
 42 **Sec. 5. A public agency shall cooperate with the counselor in any**

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1 investigation or proceeding under this chapter.

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

- 3 (1) the right to inspect or copy records under IC 5-14-3;
 4 (2) the right to attend any public meeting of a public agency
 5 in violation of IC 5-14-1.5; or
 6 (3) any other right conferred by IC 5-14-3 or IC 5-14-1.5 or
 7 any other state statute or rule governing access to public
 8 meetings or public records;

9 may file a formal complaint with the counselor as set forth in this
 10 chapter or may make an informal inquiry under IC 5-14-4-10(5).

11 **Sec. 7. (a) A person or a public agency that chooses to file a**
 12 **formal complaint with the counselor must file the complaint not**
 13 **later than thirty (30) days after:**

- 14 (1) the denial; or
 15 (2) the person filing the complaint receives notice in fact that
 16 a meeting was held by a public agency if the meeting was
 17 conducted secretly or without notice.

18 **(b) A complaint is considered filed on the date it is:**

- 19 (1) received by the counselor; or
 20 (2) postmarked, if received more than thirty (30) days after
 21 the date of the denial that is the subject of the complaint.

22 **Sec. 8. When the counselor receives a complaint under section**
 23 **7 of this chapter, the counselor shall immediately forward a copy**
 24 **of the complaint to the public agency that is the subject of the**
 25 **complaint.**

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

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

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

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

36 **Sec. 12. The filing of a formal complaint under this chapter does**
 37 **not delay the running of a statute of limitation that applies to a**
 38 **lawsuit under IC 5-14-1.5 or IC 5-14-3 concerning the subject**
 39 **matter of the complaint.**

40 SECTION 7. IC 5-14-6 IS ADDED TO THE INDIANA CODE AS
 41 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
 42 1, 1999]:

HB 1002—LS 6656/DI 87+



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1 **Chapter 6. Public Access Education Account**
2 **Sec. 1. As used in this chapter, "counselor" refers to the public**
3 **access counselor appointed under IC 5-14-4-6.**
4 **Sec. 2. The public access education account is created within the**
5 **state general fund to provide money for the following purposes:**
6 **(1) To conduct seminars and educational programs for the**
7 **public and public agencies on public access.**
8 **(2) To create publications and educational materials on public**
9 **access.**
10 **Sec. 3. The counselor may use money in the account, with the**
11 **approval of the budget agency, to supplement the funds**
12 **appropriated to the office of the counselor for the purposes listed**
13 **in section 2 of this chapter.**
14 **Sec. 4. The account consists of all civil penalties collected under**
15 **IC 5-14-1.5-9 and IC 5-14-3-11.**
16 **Sec. 5. Money in the account at the end of the state fiscal year**
17 **does not revert to any other account within the state general fund.**

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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



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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.

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