

HOUSE BILL No. 1002

DIGEST OF INTRODUCED BILL

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. Creates the public access education account within the state general fund for the following purposes: (1) Conducting seminars and educational programs for the public and public agencies 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 a public agency violates the open door law or the public records law, a court may assess a civil
(Continued next page)

Effective: July 1, 1999.

Kruzan

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

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Digest Continued

penalty not to exceed \$1,000. 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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Introduced

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



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) Any action to declare any policy, decision, or final action of a
6 governing body void, or to enter an injunction which would invalidate
7 any policy, decision, or final action of a governing body, based on
8 violation of this chapter occurring before the action is commenced,
9 shall be commenced:

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

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

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

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

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

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

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

30 (1) The extent to which the violation:

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

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

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

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

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

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

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

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

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

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

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

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

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

26 **(b) If a court finds that a public agency conducted a public**
27 **meeting in violation of this chapter without a reasonable basis in**
28 **law, the court may assess a civil penalty in an amount not to exceed**
29 **one thousand dollars (\$1,000).**

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

33 SECTION 3. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS
34 [EFFECTIVE JULY 1, 1999]: Sec. 9. (a) A denial of disclosure by a
35 public agency occurs when the person making the request is physically
36 present in the office of the agency, makes the request by telephone, or
37 requests enhanced access to a document and:

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

42 (2) twenty-four (24) hours elapse after any employee of the public

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1 agency refuses to permit inspection and copying of a public
 2 record when a request has been made;
 3 whichever occurs first.

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

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

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

13 (2) the denial includes:

14 (A) a statement of the specific exemption or exemptions
 15 authorizing the withholding of all or part of the public record;
 16 and

17 (B) the name and the title or position of the person responsible
 18 for the denial.

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

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

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

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

42 (A) proving that the record falls within any one (1) of the

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- 1 categories of exempted records under section 4(b) of this
 2 chapter; and
 3 (B) establishing the content of the record with adequate
 4 specificity and not by relying on a conclusory statement or
 5 affidavit; and
 6 (2) a person requesting access to a public record meets the
 7 person's burden of proof under this subsection by proving that the
 8 denial of access is arbitrary or capricious.
 9 (g) The court may review the public record in camera to determine
 10 whether any part of it may be withheld under this chapter.
 11 (h) In any action filed under this section, a court ~~may~~ **shall** award
 12 reasonable attorney fees, court costs, and other reasonable expenses of
 13 litigation to the prevailing party if:
 14 (1) the plaintiff substantially prevails; ~~and the court finds the~~
 15 ~~defendant's violation was knowing or intentional;~~ or
 16 (2) the defendant substantially prevails and the court finds the
 17 action was frivolous or vexatious.
 18 **(i) A court shall expedite the hearing of an action filed under**
 19 **this section.**
 20 SECTION 4. IC 5-14-3-11 IS ADDED TO THE INDIANA CODE
 21 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 22 1, 1999]: **Sec. 11. (a) This section applies to an action filed under**
 23 **section 9 of this chapter.**
 24 **(b) If a court finds that a public agency denied a person the**
 25 **right to inspect or copy a public record in violation of this chapter**
 26 **without a reasonable basis in law, the court may assess a civil**
 27 **penalty in an amount not to exceed one thousand dollars (\$1,000).**
 28 **(c) The court clerk shall remit a penalty collected under this**
 29 **section to the treasurer of state for deposit in the public access**
 30 **education account created under IC 5-14-6-2.**
 31 SECTION 5. IC 5-14-4 IS ADDED TO THE INDIANA CODE AS
 32 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
 33 1, 1999]:
 34 **Chapter 4. Public Access Counselor**
 35 **Sec. 1. As used in this chapter, "counselor" refers to the public**
 36 **access counselor appointed under section 6 of this chapter.**
 37 **Sec. 2. As used in this chapter, "office" refers to the office of the**
 38 **public access counselor created under section 5 of this chapter.**
 39 **Sec. 3. As used in this chapter, "public access laws" refers to:**
 40 (1) IC 5-14-1.5;
 41 (2) IC 5-14-3; or
 42 (3) any other state statute or rule governing access to public

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- 1 meetings or public records.
 2 **Sec. 4.** As used in this chapter, "public agency" has the meaning
 3 set forth in:
 4 (1) IC 5-14-1.5-2 for purposes of matters concerning public
 5 meetings; and
 6 (2) IC 5-14-3-2 for purposes of matters concerning public
 7 records.
 8 **Sec. 5.** There is created the office of the public access counselor.
 9 The office shall be administered by the public access counselor
 10 appointed under section 6 of this chapter.
 11 **Sec. 6.** (a) The governor shall appoint a public access counselor
 12 for a term of four (4) years at a salary to be fixed by the governor.
 13 (b) A person may serve more than one (1) term as counselor.
 14 **Sec. 7.** The governor may remove the counselor for cause.
 15 **Sec. 8.** If a vacancy occurs in the office, the governor shall
 16 appoint an individual to serve for the remainder of the counselor's
 17 unexpired term.
 18 **Sec. 9.** (a) The counselor must be a practicing attorney.
 19 (b) The counselor shall apply the counselor's full efforts to the
 20 duties of the office and may not be actively engaged in any other
 21 occupation, practice, profession, or business.
 22 **Sec. 10.** The counselor has the following powers and duties:
 23 (1) To establish and administer a program to train public
 24 officials and educate the public on the rights of the public and
 25 the responsibilities of public agencies under the public access
 26 laws. The counselor may contract with a person or a public or
 27 private entity to fulfill the counselor's responsibility under
 28 this subdivision.
 29 (2) To conduct research.
 30 (3) To prepare interpretive and educational materials and
 31 programs in cooperation with the office of the attorney
 32 general.
 33 (4) To distribute to newly elected or appointed public officials
 34 the public access laws and educational materials concerning
 35 the public access laws.
 36 (5) To respond to informal inquiries made by the public and
 37 public agencies by telephone, in writing, in person, by
 38 facsimile, or by electronic mail concerning the public access
 39 laws.
 40 (6) To issue advisory opinions to interpret public access laws
 41 upon the request of a person or a public agency.
 42 (7) To make recommendations to the general assembly



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1 concerning ways to improve public access.

2 **Sec. 11. The counselor may employ additional personnel**
3 **necessary to carry out the functions of the office.**

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

7 **Chapter 5. Formal Complaint Procedure**

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

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

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

- 15 (1) IC 5-14-1.5-2 for purposes of matters concerning public
16 meetings; and
17 (2) IC 5-14-3-2 for purposes of matters concerning public
18 records.

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

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

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

- 25 (1) the right to inspect or copy records under IC 5-14-3;
26 (2) the right to attend any public meeting of a public agency
27 in violation of IC 5-14-1.5; or
28 (3) any other right conferred by IC 5-14-3 or IC 5-14-1.5 or
29 any other state statute or rule governing access to public
30 meetings or public records;

31 **may file a formal complaint with the counselor as set forth in this**
32 **chapter.**

33 **Sec. 7. (a) A person or a public agency shall file a formal**
34 **complaint with the counselor not later than thirty (30) days after:**

- 35 (1) the denial; or
36 (2) the person filing the complaint receives notice in fact that
37 a meeting was held by a public agency if the meeting was
38 conducted secretly or without notice.

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

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



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1 **Sec. 8. When the counselor receives a complaint under section**
 2 **7 of this chapter, the counselor shall immediately forward a copy**
 3 **of the complaint to the public agency that is the subject of the**
 4 **complaint.**

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

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

11 **(b) The counselor shall adopt rules establishing criteria for**
 12 **those complaints that have priority.**

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

15 SECTION 7. IC 5-14-6 IS ADDED TO THE INDIANA CODE AS
 16 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
 17 1, 1999]:

18 **Chapter 6. Public Access Education Account**

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

21 **Sec. 2. The public access education account is created within the**
 22 **state general fund to provide money for the following purposes:**

23 **(1) To conduct seminars and educational programs for the**
 24 **public and public agencies on public access.**

25 **(2) To create publications and educational materials on public**
 26 **access.**

27 **Sec. 3. The counselor may use money in the account, with the**
 28 **approval of the budget agency, to supplement the funds**
 29 **appropriated to the office of the counselor for the purposes listed**
 30 **in section 2 of this chapter.**

31 **Sec. 4. The account consists of all civil penalties collected under**
 32 **IC 5-14-1.5-9 and IC 5-14-3-11.**

33 **Sec. 5. Money in the account at the end of the state fiscal year**
 34 **does not revert to any other account within the state general fund.**

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