



January 22, 1999

SENATE BILL No. 1

DIGEST OF SB 1 (Updated January 20, 1999 4:56 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 a formal complaint procedure for the office of the public access counselor. 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 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. Provides immunity to an employee or official of a public agency who discloses confidential information in
(Continued next page)

Effective: July 1, 1999.

Merritt

January 6, 1999, read first time and referred to Committee on Governmental and Regulatory Affairs.
January 21, 1999, amended, reported favorably — Do Pass.

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Digest Continued

reliance on an advisory opinion issued by the public access counselor. Requires the public access counselor to submit a report to the general assembly not later than June 30 of each year concerning the activities of the counselor for the previous year.

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SB 1—LS 6909/DI 87+



January 22, 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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SENATE BILL No. 1

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

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

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

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

35 whichever occurs first.

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

39 (c) If a request is made orally, either in person or by telephone, a
40 public agency may deny the request orally. However, if a request
41 initially is made in writing, by facsimile, or through enhanced access,
42 or if an oral request that has been denied is renewed in writing or by

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- 1 facsimile, a public agency may deny the request if:
- 2 (1) the denial is in writing or by facsimile; and
- 3 (2) the denial includes:
- 4 (A) a statement of the specific exemption or exemptions
- 5 authorizing the withholding of all or part of the public record;
- 6 and
- 7 (B) the name and the title or position of the person responsible
- 8 for the denial.
- 9 (d) A person who has been denied the right to inspect or copy a
- 10 public record by a public agency may file an action in the circuit or
- 11 superior court of the county in which the denial occurred to compel the
- 12 public agency to permit the person to inspect and copy the public
- 13 record. Whenever an action is filed under this subsection, the public
- 14 agency must notify each person who supplied any part of the public
- 15 record at issue that a request for release of the public record has been
- 16 denied. Such persons are entitled to intervene in any litigation that
- 17 results from the denial. The person who has been denied the right to
- 18 inspect or copy need not allege or prove any special damage different
- 19 from that suffered by the public at large.
- 20 (e) The court shall determine the matter de novo, with the burden of
- 21 proof on the public agency to sustain its denial. If the issue in de novo
- 22 review under this section is whether a public agency properly denied
- 23 access to a public record because the record is exempted under section
- 24 4(a) of this chapter, the public agency meets its burden of proof under
- 25 this subsection by establishing the content of the record with adequate
- 26 specificity and not by relying on a conclusory statement or affidavit.
- 27 (f) If the issue in a de novo review under this section is whether a
- 28 public agency properly denied access to a public record because the
- 29 record is exempted under section 4(b) of this chapter:
- 30 (1) the public agency meets its burden of proof under this
- 31 subsection by:
- 32 (A) proving that the record falls within any one (1) of the
- 33 categories of exempted records under section 4(b) of this
- 34 chapter; and
- 35 (B) establishing the content of the record with adequate
- 36 specificity and not by relying on a conclusory statement or
- 37 affidavit; and
- 38 (2) a person requesting access to a public record meets the
- 39 person's burden of proof under this subsection by proving that the
- 40 denial of access is arbitrary or capricious.
- 41 (g) The court may review the public record in camera to determine
- 42 whether any part of it may be withheld under this chapter.

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

- 4 (1) the plaintiff substantially prevails and the court finds the
5 defendant's violation was knowing or intentional; or
6 (2) the defendant substantially prevails and the court finds the
7 action was frivolous or vexatious.

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

10 SECTION 3. IC 5-14-3-10 IS AMENDED TO READ AS
11 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 10. (a) A public
12 employee, a public official, or an employee or officer of a contractor or
13 subcontractor of a public agency, except as provided by IC 4-15-10,
14 who knowingly or intentionally discloses information classified as
15 confidential by state statute commits a Class A misdemeanor.

16 (b) A public employee may be disciplined in accordance with the
17 personnel policies of the agency by which the employee is employed
18 if the employee intentionally, knowingly, or recklessly discloses or fails
19 to protect information classified as confidential by state statute.

20 (c) A public employee, a public official, or an employee or officer
21 of a contractor or subcontractor of a public agency who unintentionally
22 and unknowingly discloses confidential or erroneous information in
23 response to a request under IC 5-14-3-3(d) **or who discloses**
24 **confidential information in reliance on an advisory opinion by the**
25 **public access counselor** is immune from liability for such a disclosure.

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

28 SECTION 4. IC 5-14-4 IS ADDED TO THE INDIANA CODE AS
29 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
30 1, 1999]:

31 **Chapter 4. Public Access Counselor**

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

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

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

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

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



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

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

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

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

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

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

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

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

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

19 **(1) To establish and administer a program to train public
20 officials and educate the public on the rights of the public and
21 the responsibilities of public agencies under the public access
22 laws. The counselor may contract with a person or a public or
23 private entity to fulfill the counselor's responsibility under
24 this subdivision.**

25 **(2) To conduct research.**

26 **(3) To prepare interpretive and educational materials and
27 programs in cooperation with the office of the attorney
28 general.**

29 **(4) To distribute to newly elected or appointed public officials
30 the public access laws and educational materials concerning
31 the public access laws.**

32 **(5) To respond to informal inquiries made by the public and
33 public agencies by telephone, in writing, in person, by
34 facsimile, or by electronic mail concerning the public access
35 laws.**

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

41 **(7) To make recommendations to the general assembly
42 concerning ways to improve public access.**



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

4 **Sec. 12. The counselor shall submit a report not later than June**
 5 **30 of each year to the general assembly concerning the activities of**
 6 **the counselor for the previous year. The report must include the**
 7 **following information:**

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

9 **(2) The number of inquiries and complaints received each**
 10 **from the public, the media, and government agencies.**

11 **(3) The number of inquiries and complaints that were**
 12 **resolved.**

13 **(4) The number of complaints received about each of the**
 14 **following:**

15 **(A) State agencies.**

16 **(B) County agencies.**

17 **(C) City agencies.**

18 **(D) Town agencies.**

19 **(E) Township agencies.**

20 **(F) School corporations.**

21 **(G) Other local agencies.**

22 **(5) The number of complaints received concerning each of the**
 23 **following:**

24 **(A) Public records.**

25 **(B) Public meetings.**

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

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

32 **SECTION 5. IC 5-14-5 IS ADDED TO THE INDIANA CODE AS**
 33 **A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY**
 34 **1, 1999]:**

35 **Chapter 5. Formal Complaint Procedure**

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

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

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



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

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

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

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

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

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

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

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

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

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

22 (1) the denial; or

23 (2) the person filing the complaint receives notice in fact that
24 a meeting was held by a public agency if the meeting was
25 conducted secretly or without notice.

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

27 (1) received by the counselor; or

28 (2) postmarked, if received more than thirty (30) days after
29 the date of the denial that is the subject of the complaint.

30 **Sec. 8.** When the counselor receives a complaint under section
31 7 of this chapter, the counselor shall immediately forward a copy
32 of the complaint to the public agency that is the subject of the
33 complaint.

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

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

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

42 **Sec. 11.** The public access counselor shall determine the form of



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1 a formal complaint filed under this chapter.
2 Sec. 12. The filing of a formal complaint under this chapter does
3 not delay the running of a statute of limitation that applies to a
4 lawsuit under IC 5-14-1.5 or IC 5-14-3 concerning the subject
5 matter of the complaint.

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COMMITTEE REPORT

Mr. President: The Senate Committee on Governmental and Regulatory Affairs, to which was referred Senate Bill No. 1, 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 2, line 5, after "(b)" insert "**Regardless of whether a formal complaint or an informal inquiry is pending before the public access counselor,**".

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

Page 3, line 16, after "prevails" delete ";".

Page 3, line 16, reset in roman "and the court finds that the defendant's".

Page 3, line 17, reset in roman, "violation is knowing and intentional;".

Page 5, line 3, after "prevails" delete ";".

Page 5, line 3, reset in roman "and the court finds the".

Page 5, line 4, reset in roman "defendant's violation was knowing or intentional;".

Page 5, between lines 8 and 9, begin a new paragraph and insert:

"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."

Page 5, line 31, delete "(a)".

Page 5, delete line 33.

Page 6, line 19, after "agency." insert "**However, the counselor may not issue an advisory opinion concerning a specific matter**

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with respect to which a lawsuit has been filed under IC 5-14-1.5 or IC 5-14-3."

Page 6, between lines 40 and 41, insert a new line double block indented and insert:

"(F) School corporations."

Page 6, line 41, delete "(F)" and insert "(G)".

Page 7, delete line 6, begin a new paragraph, and insert:

"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."

Page 7, line 35, after "chapter" insert **"or may make an informal inquiry under IC 5-14-4-10(5)"**.

Page 7, line 36, delete "shall" and insert **"that chooses to"**.

Page 7, line 37, after "counselor" insert **"must file the complaint"**.

Page 8, delete line 18, 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."

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 1 as introduced.)

MERRITT, Chairperson

Committee Vote: Yeas 8, Nays 0.

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