

# COMMITTEE REPORT

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## 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:

- 1 Page 1, delete lines 1 through 11.
- 2 Page 2, line 16, after "or" insert "**an**".
- 3 Page 3, delete lines 12 through 42, begin a new line block indented
- 4 and insert:
- 5 "following factors outweighs the other:
- 6 (A) The remedial benefits gained by effectuating the public
- 7 policy of the state declared in section 1 of this chapter.
- 8 (B) The prejudice likely to accrue to the public if the policy,
- 9 decision, or final action is voided, including the extent to
- 10 which persons have relied upon the validity of the challenged
- 11 action and the effect declaring the challenged action void
- 12 would have on them.
- 13 **(4) Whether the defendant acted in compliance with an**
- 14 **informal inquiry response or advisory opinion issued by the**
- 15 **public access counselor concerning the violation.**
- 16 (e) If a court declares a policy, decision, or final action of a
- 17 governing body of a public agency void, the court may enjoin the

1 governing body from subsequently acting upon the subject matter of  
 2 the voided act until it has been given substantial reconsideration at a  
 3 meeting or meetings that comply with this chapter.

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

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

9 (2) the defendant prevails and the court finds that the action is  
 10 frivolous and vexatious.

11 **The plaintiff is not eligible for the awarding of attorney's fees,**  
 12 **court costs, and other reasonable expenses if the plaintiff filed the**  
 13 **action without first seeking and receiving an informal inquiry**  
 14 **response or advisory opinion from the public access counselor,**  
 15 **unless the plaintiff can show the filing of the action was necessary**  
 16 **to prevent a violation of this chapter.**

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

19 SECTION 2. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS  
 20 [EFFECTIVE JULY 1, 1999]: Sec. 9. (a) A denial of disclosure by a  
 21 public agency occurs when the person making the request is physically  
 22 present in the office of the agency, makes the request by telephone, or  
 23 requests enhanced access to a document and:

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

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

31 whichever occurs first.

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

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

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:

16 (1) that a request for release of the public record has been denied;

17 **and**

18 **(2) whether the denial was in compliance with an informal**  
19 **inquiry response or advisory opinion of the public access**  
20 **counselor.**

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

25 (e) The court shall determine the matter de novo, with the burden of  
26 proof on the public agency to sustain its denial. If the issue in de novo  
27 review under this section is whether a public agency properly denied  
28 access to a public record because the record is exempted under section  
29 4(a) of this chapter, the public agency meets its burden of proof under  
30 this subsection by establishing the content of the record with adequate  
31 specificity and not by relying on a conclusory statement or affidavit.

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

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

37 (A) proving that the record falls within any one (1) of the  
38 categories of exempted records under section 4(b) of this

- 1 chapter; and  
 2 (B) establishing the content of the record with adequate  
 3 specificity and not by relying on a conclusory statement or  
 4 affidavit; and  
 5 (2) a person requesting access to a public record meets the  
 6 person's burden of proof under this subsection by proving that the  
 7 denial of access is arbitrary or capricious.

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

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

- 13 (1) the plaintiff substantially prevails; ~~and the court finds the~~  
 14 ~~defendant's violation was knowing or intentional;~~ or  
 15 (2) the defendant substantially prevails and the court finds the  
 16 action was frivolous or vexatious.

17 **The plaintiff is not eligible for the awarding of attorney's fees,**  
 18 **court costs, and other reasonable expenses if the plaintiff filed the**  
 19 **action without first seeking and receiving an informal inquiry**  
 20 **response or advisory opinion from the public access counselor,**  
 21 **unless the plaintiff can show the filing of the action was necessary**  
 22 **because the denial of access to a public record under this chapter**  
 23 **would prevent the plaintiff from presenting that public record to**  
 24 **a public agency preparing to act on a matter of relevance to the**  
 25 **public record whose disclosure was denied.**

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

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

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

38 (c) A public employee, a public official, or an employee or officer

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

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

8 SECTION 4. IC 5-14-4 IS ADDED TO THE INDIANA CODE AS  
 9 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY  
 10 1, 1999]:

11 **Chapter 4. Public Access Counselor**

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

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

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

17 (1) IC 5-14-1.5;

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

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

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

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

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

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

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

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

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

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

37 **(b) The counselor shall apply the counselor's full efforts to the**  
 38 **duties of the office and may not be actively engaged in any other**

1 occupation, practice, profession, or business.

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

3 (1) To establish and administer a program to train public  
4 officials and educate the public on the rights of the public and  
5 the responsibilities of public agencies under the public access  
6 laws. The counselor may contract with a person or a public or  
7 private entity to fulfill the counselor's responsibility under  
8 this subdivision.

9 (2) To conduct research.

10 (3) To prepare interpretive and educational materials and  
11 programs in cooperation with the office of the attorney  
12 general.

13 (4) To distribute to newly elected or appointed public officials  
14 the public access laws and educational materials concerning  
15 the public access laws.

16 (5) To respond to informal inquiries made by the public and  
17 public agencies by telephone, in writing, in person, by  
18 facsimile, or by electronic mail concerning the public access  
19 laws.

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

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

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

30 **Sec. 12. The counselor shall submit a report not later than June**  
31 **30 of each year to the legislative services agency concerning the**  
32 **activities of the counselor for the previous year. The report must**  
33 **include the following information:**

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

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

37 (3) The number of inquiries and complaints that were  
38 resolved.

- 1           **(4) The number of complaints received about each of the**  
 2           **following:**
- 3           **(A) State agencies.**
  - 4           **(B) County agencies.**
  - 5           **(C) City agencies.**
  - 6           **(D) Town agencies.**
  - 7           **(E) Township agencies.**
  - 8           **(F) School corporations.**
  - 9           **(G) Other local agencies.**
- 10          **(5) The number of complaints received concerning each of the**  
 11          **following:**
- 12          **(A) Public records.**
  - 13          **(B) Public meetings.**
- 14          **(6) The total number of written advisory opinions issued and**  
 15          **pending.**
- 16          **Sec. 13. An informal inquiry or other request for assistance**  
 17          **under this chapter does not delay the running of a statute of**  
 18          **limitation that applies to a lawsuit under IC 5-14-1.5 or IC 5-14-3**  
 19          **concerning the subject matter of the inquiry or other request.**
- 20          SECTION 5. IC 5-14-5 IS ADDED TO THE INDIANA CODE AS  
 21          A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY  
 22          1, 1999]:
- 23          **Chapter 5. Formal Complaint Procedure**
- 24          **Sec. 1. As used in this chapter, "counselor" refers to the public**  
 25          **access counselor appointed under IC 5-14-4-6.**
- 26          **Sec. 2. As used in this chapter, "person" means an individual, a**  
 27          **business, a corporation, an association, or an organization. The**  
 28          **term does not include a public agency.**
- 29          **Sec. 3. As used in this chapter, "public agency" has the meaning**  
 30          **set forth in:**
- 31               **(1) IC 5-14-1.5-2, for purposes of matters concerning public**  
 32               **meetings; and**
  - 33               **(2) IC 5-14-3-2, for purposes of matters concerning public**  
 34               **records.**
- 35          **Sec. 4. A person or a public agency is not required to file a**  
 36          **complaint under this chapter before filing an action under**  
 37          **IC 5-14-1.5 or IC 5-14-3.**
- 38          **Sec. 5. A public agency shall cooperate with the counselor in any**

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 under the  
10 procedure prescribed by this chapter or may make an informal  
11 inquiry under IC 5-14-4-10(5).

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

15 (1) the denial; or

16 (2) the person filing the complaint receives notice in fact that  
17 a meeting was held by a public agency, if the meeting was  
18 conducted secretly or without notice.

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

20 (1) received by the counselor; or

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

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

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

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

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

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

37 **Sec. 12. The filing of a formal complaint under this chapter does**  
38 **not delay the running of a statute of limitation that applies to a**

1        **lawsuit under IC 5-14-1.5 or IC 5-14-3 concerning the subject**  
2        **matter of the complaint."**

3        Delete pages 4 through 10.

4        Renumber all SECTIONS consecutively.

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

**and when so amended that said bill do pass.**

Committee Vote: Yeas 9, Nays 0.

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**Senator Merritt, Chairperson**