

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.

SENATE ENROLLED ACT No. 1

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

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

SECTION 1. IC 5-14-1.5-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 7. (a) An action may be filed by any person in any court of competent jurisdiction to:

- (1) obtain a declaratory judgment;
- (2) enjoin continuing, threatened, or future violations of this chapter; or
- (3) declare void any policy, decision, or final action:
 - (A) taken at an executive session in violation of section 3(a) of this chapter;
 - (B) taken at any meeting of which notice is not given in accordance with section 5 of this chapter;
 - (C) that is based in whole or in part upon official action taken at any executive session in violation of section 3(a) of this chapter or at any meeting of which notice is not given in accordance with section 5 of this chapter; or
 - (D) taken at a meeting held in a location in violation of section 8 of this chapter.

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

(b) **Regardless of whether a formal complaint or an informal**

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inquiry is pending before the public access counselor, any action to declare any policy, decision, or final action of a governing body void, or to enter an injunction which would invalidate any policy, decision, or final action of a governing body, based on violation of this chapter occurring before the action is commenced, shall be commenced:

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

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

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

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

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

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

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

(1) The extent to which the violation:

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

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

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

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

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

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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.

(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.

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(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 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

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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.

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**

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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.

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.

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- (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 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.

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(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.

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**

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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.

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