
SENATE BILL No. 232

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-14.

Synopsis: Public access issues. Requires a public agency to give notice of the agency's meetings to any person who makes an annual request for notice. Allows a court to assess a civil penalty of up to \$1,000 against each of the following for violating the public records law or the open door law: (1) The officer of a public agency. (2) Employee of a public agency. (3) The public agency. Requires (rather than allows) a court to review public records in camera to determine whether redaction of the records violates the public records act. If a formal complaint is filed, requires the public access counselor to review public records in camera to determine whether redaction of the records violated the access to public records act. Creates an education fund for a program administered by the public access counselor 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. Makes a continuous appropriation.

Effective: July 1, 2009.

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January 7, 2009, read first time and referred to Committee on Local Government.

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First Regular Session 116th General Assembly (2009)

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 2008 Regular Session of the General Assembly.

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SENATE BILL No. 232



A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration and to make an appropriation.

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

1 SECTION 1. IC 5-14-1.5-5, AS AMENDED BY P.L.177-2005,
2 SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2009]: Sec. 5. (a) Public notice of the date, time, and place of
4 any meetings, executive sessions, or of any rescheduled or reconvened
5 meeting, shall be given at least forty-eight (48) hours (excluding
6 Saturdays, Sundays, and legal holidays) before the meeting. This
7 requirement does not apply to reconvened meetings (not including
8 executive sessions) where announcement of the date, time, and place
9 of the reconvened meeting is made at the original meeting and recorded
10 in the memoranda and minutes thereof, and there is no change in the
11 agenda.

12 (b) Public notice shall be given by the governing body of a public
13 agency by:

- 14 (1) posting a copy of the notice at the principal office of the
15 public agency holding the meeting or, if no such office exists, at
16 the building where the meeting is to be held; and
- 17 (2) delivering notice to ~~all news media which deliver by January~~



1 ~~†~~ **any person who delivers** an annual written request for ~~such the~~
2 notices **not later than December 31** for the next succeeding
3 calendar year to the governing body of the public agency. The
4 governing body shall give notice by one (1) of the following
5 methods, **which shall be determined by the governing body:**

6 (A) Depositing the notice in the United States mail with
7 postage prepaid.

8 (B) Transmitting the notice by electronic mail.

9 (C) Transmitting the notice by facsimile (fax).

10 If a governing body comes into existence after ~~January †,~~
11 **December 31**, it shall comply with this subdivision upon receipt
12 of a written request for notice.

13 In addition, a state agency (as defined in IC 4-13-1-1) shall provide
14 electronic access to the notice through the computer gateway
15 administered by the office of technology established by IC 4-13.1-2-1.

16 (c) Notice of regular meetings need be given only once each year,
17 except that an additional notice shall be given where the date, time, or
18 place of a regular meeting or meetings is changed. This subsection does
19 not apply to executive sessions.

20 (d) If a meeting is called to deal with an emergency involving actual
21 or threatened injury to person or property, or actual or threatened
22 disruption of the governmental activity under the jurisdiction of the
23 public agency by any event, then the time requirements of notice under
24 this section shall not apply, but:

25 (1) ~~news media which~~ **persons who** have requested notice of
26 meetings **under subsection (b)(2)** must be given the same notice
27 as is given to the members of the governing body; and

28 (2) the public must be notified by posting a copy of the notice
29 according to this section.

30 (e) This section shall not apply where notice by publication is
31 required by statute, ordinance, rule, or regulation.

32 (f) This section shall not apply to:

33 (1) the department of local government finance, the Indiana board
34 of tax review, or any other governing body which meets in
35 continuous session, except that this section applies to meetings of
36 these governing bodies which are required by or held pursuant to
37 statute, ordinance, rule, or regulation; or

38 (2) the executive of a county or the legislative body of a town if
39 the meetings are held solely to receive information or
40 recommendations in order to carry out administrative functions,
41 to carry out administrative functions, or confer with staff
42 members on matters relating to the internal management of the

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1 unit. "Administrative functions" do not include the awarding of
2 contracts, the entering into contracts, or any other action creating
3 an obligation or otherwise binding a county or town.

4 (g) This section does not apply to the general assembly.

5 (h) Notice has not been given in accordance with this section if a
6 governing body of a public agency convenes a meeting at a time so
7 unreasonably departing from the time stated in its public notice that the
8 public is misled or substantially deprived of the opportunity to attend,
9 observe, and record the meeting.

10 SECTION 2. IC 5-14-1.5-7, AS AMENDED BY P.L.179-2007,
11 SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
12 JULY 1, 2009]: Sec. 7. (a) An action may be filed by any person in any
13 court of competent jurisdiction to:

- 14 (1) obtain a declaratory judgment;
- 15 (2) enjoin continuing, threatened, or future violations of this
16 chapter; or
- 17 (3) declare void any policy, decision, or final action:
 - 18 (A) taken at an executive session in violation of section 3(a) of
19 this chapter;
 - 20 (B) taken at any meeting of which notice is not given in
21 accordance with section 5 of this chapter;
 - 22 (C) that is based in whole or in part upon official action taken
23 at any:
 - 24 (i) executive session in violation of section 3(a) of this
25 chapter;
 - 26 (ii) meeting of which notice is not given in accordance with
27 section 5 of this chapter; or
 - 28 (iii) series of gatherings in violation of section 3.1 of this
29 chapter; or
 - 30 (D) taken at a meeting held in a location in violation of section
31 8 of this chapter.

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

34 (b) Regardless of whether a formal complaint or an informal inquiry
35 is pending before the public access counselor, any action to declare any
36 policy, decision, or final action of a governing body void, or to enter an
37 injunction which would invalidate any policy, decision, or final action
38 of a governing body, based on violation of this chapter occurring before
39 the action is commenced, shall be commenced:

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

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1 (2) with respect to any other subject matter, within thirty (30)
 2 days of either:
 3 (A) the date of the act or failure to act complained of; or
 4 (B) the date that the plaintiff knew or should have known that
 5 the act or failure to act complained of had occurred;
 6 whichever is later. If the challenged policy, decision, or final action is
 7 recorded in the memoranda or minutes of a governing body, a plaintiff
 8 is considered to have known that the act or failure to act complained of
 9 had occurred not later than the date that the memoranda or minutes are
 10 first available for public inspection.

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

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

18 (1) The extent to which the violation:
 19 (A) affected the substance of the policy, decision, or final
 20 action;
 21 (B) denied or impaired access to any meetings that the public
 22 had a right to observe and record; and
 23 (C) prevented or impaired public knowledge or understanding
 24 of the public's business.

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

28 (3) Whether the public interest will be served by voiding the
 29 policy, decision, or final action by determining which of the
 30 following factors outweighs the other:
 31 (A) The remedial benefits gained by effectuating the public
 32 policy of the state declared in section 1 of this chapter.
 33 (B) The prejudice likely to accrue to the public if the policy,
 34 decision, or final action is voided, including the extent to
 35 which persons have relied upon the validity of the challenged
 36 action and the effect declaring the challenged action void
 37 would have on them.

38 (4) Whether the defendant acted in compliance with an informal
 39 inquiry response or advisory opinion issued by the public access
 40 counselor concerning the violation.

41 (e) If a court declares a policy, decision, or final action of a
 42 governing body of a public agency void, the court may enjoin the

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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 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; or

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

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

16 **(g) A court may assess a civil penalty against the public agency
 17 and the public officers and employees of the public agency under
 18 section 7.5 of this chapter.**

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

21 SECTION 3. IC 5-14-1.5-7.5 IS ADDED TO THE INDIANA
 22 CODE AS A NEW SECTION TO READ AS FOLLOWS
 23 [EFFECTIVE JULY 1, 2009]: **Sec. 7.5. (a) In addition to any other
 24 civil or criminal penalty imposed, if an officer or employee of a
 25 public agency knowingly or intentionally:**

26 **(1) attends a meeting (not including an executive session) from
 27 which the public is excluded;**

28 **(2) attends one (1) or more of a series of gatherings in
 29 violation of section 3.1 of this chapter; or**

30 **(3) participates in final action taken at an executive session in
 31 violation of section 6.1(c) of this chapter;**

32 **a court may impose a civil penalty under subsection (b).**

33 **(b) A court may impose a civil penalty for a violation under
 34 subsection (a) against one (1) or more of the following:**

35 **(1) The officer or employee of the public agency who
 36 committed the violation.**

37 **(2) The public agency.**

38 **A court may impose a civil penalty of not more than one thousand
 39 dollars (\$1,000) against each entity listed in subdivisions (1)
 40 through (2).**

41 **(c) A court shall distribute monthly to the auditor of state any
 42 penalties collected under this section for deposit in the education**

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fund established by IC 5-14-4-14.

(d) An officer or employee of a public agency is personally liable for a civil penalty imposed under this section. A civil penalty imposed against a public agency shall be paid from the public agency's budget.

SECTION 4. IC 5-14-3-9, AS AMENDED BY P.L.22-2005, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: 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.

(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) This subsection applies to a board, a commission, a department, a division, a bureau, a committee, an agency, an office, an instrumentality, or an authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state. If an agency receives a request to inspect or copy a record that the agency considers to be excepted from disclosure under section 4(b)(19) of this chapter, the agency may consult with the counterterrorism and security council established by

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1 IC 10-19-8-1. If an agency denies the disclosure of a record or a part of
 2 a record under section 4(b)(19) of this chapter, the agency or the
 3 counterterrorism and security council shall provide a general
 4 description of the record being withheld and of how disclosure of the
 5 record would have a reasonable likelihood of threatening the public
 6 safety.

7 (e) A person who has been denied the right to inspect or copy a
 8 public record by a public agency may file an action in the circuit or
 9 superior court of the county in which the denial occurred to compel the
 10 public agency to permit the person to inspect and copy the public
 11 record. Whenever an action is filed under this subsection, the public
 12 agency must notify each person who supplied any part of the public
 13 record at issue:

- 14 (1) that a request for release of the public record has been denied;
 15 and
 16 (2) whether the denial was in compliance with an informal inquiry
 17 response or advisory opinion of the public access counselor.

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

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

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

- 32 (1) the public agency meets its burden of proof under this
 33 subsection by:
 34 (A) proving that the record falls within any one (1) of the
 35 categories of exempted records under section 4(b) of this
 36 chapter; and
 37 (B) establishing the content of the record with adequate
 38 specificity and not by relying on a conclusory statement or
 39 affidavit; and
 40 (2) a person requesting access to a public record meets the
 41 person's burden of proof under this subsection by proving that the
 42 denial of access is arbitrary or capricious.

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1 (h) The court may review the public record in camera to determine
 2 whether any part of it may be withheld under this chapter. **However,**
 3 **if the complaint alleges that a public agency denied disclosure of a**
 4 **public record by redacting information in the public record, the**
 5 **court shall conduct an in camera inspection of the public record**
 6 **without the information redacted.**

7 (i) In any action filed under this section, a court shall award
 8 reasonable attorney's fees, court costs, and other reasonable expenses
 9 of litigation to the prevailing party if:

10 (1) the plaintiff substantially prevails; or

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

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

22 **(j) A court may assess a civil penalty against the public officers**
 23 **and employees of a public agency under section 9.5 of this chapter.**

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

26 SECTION 5. IC 5-14-3-9.5 IS ADDED TO THE INDIANA CODE
 27 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 28 1, 2009]: **Sec. 9.5. (a) In addition to any other civil or criminal**
 29 **penalty imposed, if an officer or employee of a public agency**
 30 **knowingly or intentionally:**

31 **(1) denies or interferes with a person's request for inspection**
 32 **or copying of a public record if:**

33 **(A) the person's request meets the requirements of this**
 34 **chapter; and**

35 **(B) the record is subject to disclosure by law;**

36 **(2) charges a copying fee that exceeds the amount permitted**
 37 **by this chapter; or**

38 **(3) discloses without authorization or fails to protect**
 39 **information classified as confidential by state statute;**

40 **a court may impose a civil penalty under subsection (b).**

41 **(b) A court may impose a civil penalty for a violation under**
 42 **subsection (a) against one (1) or more of the following:**

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1 (1) The officer or employee of the public agency who
 2 committed the violation.
 3 (2) The public agency.
 4 A court may impose a civil penalty of not more than one thousand
 5 dollars (\$1,000) against each entity listed in subdivisions (1)
 6 through (2).
 7 (c) A court shall distribute monthly to the auditor of state any
 8 penalties collected under this section for deposit in the education
 9 fund established by IC 5-14-4-14.
 10 (d) An officer or employee of a public agency is personally liable
 11 for a civil penalty imposed under this section. A civil penalty
 12 imposed against a public agency shall be paid from the public
 13 agency's budget.
 14 SECTION 6. IC 5-14-4-14 IS ADDED TO THE INDIANA CODE
 15 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 16 1, 2009]: **Sec. 14. (a) An education fund is established to fund a
 17 program under section 10(1) of this chapter.**
 18 **(b) The fund consists of the following:**
 19 (1) Civil penalties collected under IC 5-14-1.5-7.5 and
 20 IC 5-14-3-9.5.
 21 (2) Money appropriated by the general assembly.
 22 (3) Grants, gifts, contributions, and money received from any
 23 other source.
 24 **(c) The budget agency shall administer the fund. The following
 25 may be paid from money in the fund:**
 26 (1) Expenses of administering the fund.
 27 (2) Nonrecurring administrative expenses incurred to carry
 28 out the purposes of this section.
 29 **(d) Money in the fund at the end of a state fiscal year does not
 30 revert to the state general fund. Money in the fund is continually
 31 appropriated to the public access counselor for the purposes
 32 specified in this section.**
 33 **(e) The treasurer of state shall invest the money in the fund not
 34 currently needed to meet the obligations of the fund in the same
 35 manner as other public funds may be invested. Interest that
 36 accrues from these investments shall be deposited in the fund.**
 37 SECTION 7. IC 5-14-5-9 IS AMENDED TO READ AS FOLLOWS
 38 [EFFECTIVE JULY 1, 2009]: **Sec. 9. Except as provided in section 10
 39 of this chapter, the counselor shall issue an advisory opinion on the
 40 complaint not later than thirty (30) days after:**
 41 (1) the complaint is filed; or
 42 (2) an in camera inspection is completed under section 10.5 of

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this chapter.

SECTION 8. IC 5-14-5-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: 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:

- (1) the complaint is filed; or
- (2) **an in camera inspection is completed under section 10.5 of this chapter.**

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

SECTION 9. IC 5-14-5-10.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: **Sec. 10.5. (a) If a formal complaint is filed alleging that a public agency denied disclosure of a public record by redacting information in the public record, the counselor shall conduct an in camera inspection of the public record without the information redacted.**

(b) Both parties to the dispute shall be notified of the in camera inspection. However, neither the parties nor their representatives may be present during the inspection.

(c) The counselor shall provide a written notice to the public agency that includes the following:

- (1) A statement of the date, time, place, and nature of the inspection.**
- (2) The documents to be inspected.**
- (3) The manner in which the documents must be presented to the counselor for inspection.**
- (4) Any other information the counselor considers relevant.**

(d) The public agency shall:

- (1) deliver the documents specified under subsection (c)(2) to the counselor for inspection in a sealed envelope; and**
- (2) deliver to the counselor and the complainant:**
 - (A) a certification signed by the custodian of the documents stipulating that the copies of the documents delivered to the counselor are true and complete copies of the documents in question with no alterations or redactions; and**
 - (B) an in camera inspection index that:**
 - (i) gives the title or name of each document, or any part of the document, claimed to be exempt from disclosure;**
 - (ii) provides a description of each document that is general enough to explain the exemptions without**

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1 **compromising the alleged reason for the exemption from**
 2 **disclosure;**
 3 **(iii) lists the reasons that each document, or any part of**
 4 **the document, is alleged to be exempt from disclosure;**
 5 **and**
 6 **(iv) fully explains why the alleged reason for exemption**
 7 **from disclosure applies to each document.**
 8 **(e) The counselor or anyone else authorized to inspect the**
 9 **documents may not make copies of the documents or take notes**
 10 **making reference to specific information contained in the**
 11 **documents. Upon completion of an in camera inspection, the**
 12 **counselor shall seal the documents and return them to the**
 13 **custodian of the documents.**
 14 **(f) An advisory opinion issued on the complaint may not discuss**
 15 **the specific contents of the documents and may refer only to the**
 16 **assigned reference number or the general descriptions of the**
 17 **documents listed in the in camera inspection index.**

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