



February 6, 2013

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## SENATE BILL No. 369

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DIGEST OF SB 369 (Updated February 5, 2013 12:12 pm - DI 71)

**Citations Affected:** IC 4-23; IC 5-14.

**Synopsis:** Public records. Allows a public agency to withhold from public disclosure records criminal intelligence information. Allows a public agency to refuse to confirm or deny the existence of investigatory records of law enforcement agencies or criminal intelligence information, if the fact of the existence of the information would: (1) impede or compromise an ongoing law enforcement investigation or endanger an individual; or (2) reveal information that would have a reasonable likelihood of threatening public safety. Allows a public agency to refuse to confirm or deny the existence of a record the disclosure of which would expose vulnerability to terrorist attack, if the fact of the record's existence or nonexistence would reveal information that would have a reasonable likelihood of threatening public safety. Allows a person to file an action in court to appeal an agency's refusal to confirm or deny the existence of a record.

**Effective:** Upon passage; July 1, 2013.

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### Wyss, Arnold J

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January 8, 2013, read first time and referred to Committee on Homeland Security, Transportation and Veterans Affairs.  
February 5, 2013, amended, reported favorably — Do Pass.

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SB 369—LS 6958/DI 87+



February 6, 2013

First Regular Session 118th General Assembly (2013)

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 2012 Regular Session of the General Assembly.

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## SENATE BILL No. 369

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 4-23-7.3-2, AS ADDED BY P.L.198-2007,  
2 SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
3 JULY 1, 2013]: Sec. 2. As used in this chapter, "electronic map" has  
4 the meaning set forth in ~~IC 5-14-3-2(d)~~. **IC 5-14-3-2.**

5 SECTION 2. IC 5-14-3-2, AS AMENDED BY P.L.51-2008,  
6 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
7 JULY 1, 2013]: Sec. 2. (a) The definitions set forth in this section apply  
8 throughout this chapter.

9 (b) "Copy" includes transcribing by handwriting, photocopying,  
10 xerography, duplicating machine, duplicating electronically stored data  
11 onto a disk, tape, drum, or any other medium of electronic data storage,  
12 and reproducing by any other means.

13 (c) "**Criminal intelligence information**" means data that has  
14 been evaluated to determine that the data is relevant to:

15 (1) the identification of; and  
16 (2) the criminal activity engaged in by;  
17 an individual who or organization that is reasonably suspected of

SB 369—LS 6958/DI 87+



- 1 **involvement in criminal activity.**  
 2 ~~(c)~~ **(d)** "Direct cost" means one hundred five percent (105%) of the  
 3 sum of the cost of:  
 4 (1) the initial development of a program, if any;  
 5 (2) the labor required to retrieve electronically stored data; and  
 6 (3) any medium used for electronic output;  
 7 for providing a duplicate of electronically stored data onto a disk, tape,  
 8 drum, or other medium of electronic data retrieval under section 8(g)  
 9 of this chapter, or for reprogramming a computer system under section  
 10 6(c) of this chapter.  
 11 ~~(d)~~ **(e)** "Electronic map" means copyrighted data provided by a  
 12 public agency from an electronic geographic information system.  
 13 ~~(e)~~ **(f)** "Enhanced access" means the inspection of a public record by  
 14 a person other than a governmental entity and that:  
 15 (1) is by means of an electronic device other than an electronic  
 16 device provided by a public agency in the office of the public  
 17 agency; or  
 18 (2) requires the compilation or creation of a list or report that does  
 19 not result in the permanent electronic storage of the information.  
 20 ~~(f)~~ **(g)** "Facsimile machine" means a machine that electronically  
 21 transmits exact images through connection with a telephone network.  
 22 ~~(g)~~ **(h)** "Inspect" includes the right to do the following:  
 23 (1) Manually transcribe and make notes, abstracts, or memoranda.  
 24 (2) In the case of tape recordings or other aural public records, to  
 25 listen and manually transcribe or duplicate, or make notes,  
 26 abstracts, or other memoranda from them.  
 27 (3) In the case of public records available:  
 28 (A) by enhanced access under section 3.5 of this chapter; or  
 29 (B) to a governmental entity under section 3(c)(2) of this  
 30 chapter;  
 31 to examine and copy the public records by use of an electronic  
 32 device.  
 33 (4) In the case of electronically stored data, to manually transcribe  
 34 and make notes, abstracts, or memoranda or to duplicate the data  
 35 onto a disk, tape, drum, or any other medium of electronic  
 36 storage.  
 37 ~~(h)~~ **(i)** "Investigatory record" means information compiled in the  
 38 course of the investigation of a crime.  
 39 ~~(i)~~ **(j)** "Offender" means a person confined in a penal institution as  
 40 the result of the conviction for a crime.  
 41 ~~(j)~~ **(k)** "Patient" has the meaning set out in IC 16-18-2-272(d).  
 42 ~~(k)~~ **(l)** "Person" means an individual, a corporation, a limited

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1 liability company, a partnership, an unincorporated association, or a  
 2 governmental entity.  
 3 ~~(m)~~ **(m)** "Provider" has the meaning set out in IC 16-18-2-295(b) and  
 4 includes employees of the state department of health or local boards of  
 5 health who create patient records at the request of another provider or  
 6 who are social workers and create records concerning the family  
 7 background of children who may need assistance.  
 8 ~~(m)~~ **(n)** "Public agency", except as provided in section 2.1 of this  
 9 chapter, means the following:  
 10 (1) Any board, commission, department, division, bureau,  
 11 committee, agency, office, instrumentality, or authority, by  
 12 whatever name designated, exercising any part of the executive,  
 13 administrative, judicial, or legislative power of the state.  
 14 (2) Any:  
 15 (A) county, township, school corporation, city, or town, or any  
 16 board, commission, department, division, bureau, committee,  
 17 office, instrumentality, or authority of any county, township,  
 18 school corporation, city, or town;  
 19 (B) political subdivision (as defined by IC 36-1-2-13); or  
 20 (C) other entity, or any office thereof, by whatever name  
 21 designated, exercising in a limited geographical area the  
 22 executive, administrative, judicial, or legislative power of the  
 23 state or a delegated local governmental power.  
 24 (3) Any entity or office that is subject to:  
 25 (A) budget review by either the department of local  
 26 government finance or the governing body of a county, city,  
 27 town, township, or school corporation; or  
 28 (B) an audit by the state board of accounts that is required by  
 29 statute, rule, or regulation.  
 30 (4) Any building corporation of a political subdivision that issues  
 31 bonds for the purpose of constructing public facilities.  
 32 (5) Any advisory commission, committee, or body created by  
 33 statute, ordinance, or executive order to advise the governing  
 34 body of a public agency, except medical staffs or the committees  
 35 of any such staff.  
 36 (6) Any law enforcement agency, which means an agency or a  
 37 department of any level of government that engages in the  
 38 investigation, apprehension, arrest, or prosecution of alleged  
 39 criminal offenders, such as the state police department, the police  
 40 or sheriff's department of a political subdivision, prosecuting  
 41 attorneys, members of the excise police division of the alcohol  
 42 and tobacco commission, conservation officers of the department

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1 of natural resources, gaming agents of the Indiana gaming  
 2 commission, gaming control officers of the Indiana gaming  
 3 commission, and the security division of the state lottery  
 4 commission.

5 (7) Any license branch staffed by employees of the bureau of  
 6 motor vehicles commission under IC 9-16.

7 (8) The state lottery commission established by IC 4-30-3-1,  
 8 including any department, division, or office of the commission.

9 (9) The Indiana gaming commission established under IC 4-33,  
 10 including any department, division, or office of the commission.

11 (10) The Indiana horse racing commission established by IC 4-31,  
 12 including any department, division, or office of the commission.

13 ~~(m)~~ (o) "Public record" means any writing, paper, report, study, map,  
 14 photograph, book, card, tape recording, or other material that is  
 15 created, received, retained, maintained, or filed by or with a public  
 16 agency and which is generated on paper, paper substitutes,  
 17 photographic media, chemically based media, magnetic or machine  
 18 readable media, electronically stored data, or any other material,  
 19 regardless of form or characteristics.

20 ~~(n)~~ (p) "Standard-sized documents" includes all documents that can  
 21 be mechanically reproduced (without mechanical reduction) on paper  
 22 sized eight and one-half (8 1/2) inches by eleven (11) inches or eight  
 23 and one-half (8 1/2) inches by fourteen (14) inches.

24 ~~(p)~~ (q) "Trade secret" has the meaning set forth in IC 24-2-3-2.

25 ~~(q)~~ (r) "Work product of an attorney" means information compiled  
 26 by an attorney in reasonable anticipation of litigation. The term  
 27 includes the attorney's:

28 (1) notes and statements taken during interviews of prospective  
 29 witnesses; and

30 (2) legal research or records, correspondence, reports, or  
 31 memoranda to the extent that each contains the attorney's  
 32 opinions, theories, or conclusions.

33 This definition does not restrict the application of any exception under  
 34 section 4 of this chapter.

35 SECTION 3. IC 5-14-3-4, AS AMENDED BY P.L.134-2012,  
 36 SECTION 18, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 37 UPON PASSAGE]: Sec. 4. (a) The following public records are  
 38 excepted from section 3 of this chapter and may not be disclosed by a  
 39 public agency, unless access to the records is specifically required by  
 40 a state or federal statute or is ordered by a court under the rules of  
 41 discovery:

42 (1) Those declared confidential by state statute.

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- 1 (2) Those declared confidential by rule adopted by a public
- 2 agency under specific authority to classify public records as
- 3 confidential granted to the public agency by statute.
- 4 (3) Those required to be kept confidential by federal law.
- 5 (4) Records containing trade secrets.
- 6 (5) Confidential financial information obtained, upon request,
- 7 from a person. However, this does not include information that is
- 8 filed with or received by a public agency pursuant to state statute.
- 9 (6) Information concerning research, including actual research
- 10 documents, conducted under the auspices of a state educational
- 11 institution, including information:
  - 12 (A) concerning any negotiations made with respect to the
  - 13 research; and
  - 14 (B) received from another party involved in the research.
- 15 (7) Grade transcripts and license examination scores obtained as
- 16 part of a licensure process.
- 17 (8) Those declared confidential by or under rules adopted by the
- 18 supreme court of Indiana.
- 19 (9) Patient medical records and charts created by a provider,
- 20 unless the patient gives written consent under IC 16-39 or as
- 21 provided under IC 16-41-8.
- 22 (10) Application information declared confidential by the board
- 23 of the Indiana economic development corporation under
- 24 IC 5-28-16.
- 25 (11) A photograph, a video recording, or an audio recording of an
- 26 autopsy, except as provided in IC 36-2-14-10.
- 27 (12) A Social Security number contained in the records of a
- 28 public agency.
- 29 (13) The following information that is part of a foreclosure action
- 30 subject to IC 32-30-10.5:
  - 31 (A) Contact information for a debtor, as described in
  - 32 IC 32-30-10.5-8(d)(2)(B).
  - 33 (B) Any document submitted to the court as part of the debtor's
  - 34 loss mitigation package under IC 32-30-10.5-10(a)(3).
- 35 (b) Except as otherwise provided by subsection (a), the following
- 36 public records shall be excepted from section 3 of this chapter at the
- 37 discretion of a public agency:
  - 38 (1) Investigatory records of law enforcement agencies. However,
  - 39 certain law enforcement records must be made available for
  - 40 inspection and copying as provided in section 5 of this chapter.
  - 41 (2) The work product of an attorney representing, pursuant to
  - 42 state employment or an appointment by a public agency:

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- 1 (A) a public agency;  
 2 (B) the state; or  
 3 (C) an individual.
- 4 (3) Test questions, scoring keys, and other examination data used  
 5 in administering a licensing examination, examination for  
 6 employment, or academic examination before the examination is  
 7 given or if it is to be given again.
- 8 (4) Scores of tests if the person is identified by name and has not  
 9 consented to the release of the person's scores.
- 10 (5) The following:
- 11 (A) Records relating to negotiations between the Indiana  
 12 economic development corporation, the ports of Indiana, the  
 13 Indiana state department of agriculture, the Indiana finance  
 14 authority, an economic development commission, a local  
 15 economic development organization (as defined in  
 16 IC 5-28-11-2(3)), or a governing body of a political  
 17 subdivision with industrial, research, or commercial prospects,  
 18 if the records are created while negotiations are in progress.
- 19 (B) Notwithstanding clause (A), the terms of the final offer of  
 20 public financial resources communicated by the Indiana  
 21 economic development corporation, the ports of Indiana, the  
 22 Indiana finance authority, an economic development  
 23 commission, or a governing body of a political subdivision to  
 24 an industrial, a research, or a commercial prospect shall be  
 25 available for inspection and copying under section 3 of this  
 26 chapter after negotiations with that prospect have terminated.
- 27 (C) When disclosing a final offer under clause (B), the Indiana  
 28 economic development corporation shall certify that the  
 29 information being disclosed accurately and completely  
 30 represents the terms of the final offer.
- 31 (6) Records that are intra-agency or interagency advisory or  
 32 deliberative material, including material developed by a private  
 33 contractor under a contract with a public agency, that are  
 34 expressions of opinion or are of a speculative nature, and that are  
 35 communicated for the purpose of decision making.
- 36 (7) Diaries, journals, or other personal notes serving as the  
 37 functional equivalent of a diary or journal.
- 38 (8) Personnel files of public employees and files of applicants for  
 39 public employment, except for:
- 40 (A) the name, compensation, job title, business address,  
 41 business telephone number, job description, education and  
 42 training background, previous work experience, or dates of

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- 1 first and last employment of present or former officers or  
 2 employees of the agency;  
 3 (B) information relating to the status of any formal charges  
 4 against the employee; and  
 5 (C) the factual basis for a disciplinary action in which final  
 6 action has been taken and that resulted in the employee being  
 7 suspended, demoted, or discharged.  
 8 However, all personnel file information shall be made available  
 9 to the affected employee or the employee's representative. This  
 10 subdivision does not apply to disclosure of personnel information  
 11 generally on all employees or for groups of employees without the  
 12 request being particularized by employee name.  
 13 (9) Minutes or records of hospital medical staff meetings.  
 14 (10) Administrative or technical information that would  
 15 jeopardize a record keeping or security system.  
 16 (11) Computer programs, computer codes, computer filing  
 17 systems, and other software that are owned by the public agency  
 18 or entrusted to it and portions of electronic maps entrusted to a  
 19 public agency by a utility.  
 20 (12) Records specifically prepared for discussion or developed  
 21 during discussion in an executive session under IC 5-14-1.5-6.1.  
 22 However, this subdivision does not apply to that information  
 23 required to be available for inspection and copying under  
 24 subdivision (8).  
 25 (13) The work product of the legislative services agency under  
 26 personnel rules approved by the legislative council.  
 27 (14) The work product of individual members and the partisan  
 28 staffs of the general assembly.  
 29 (15) The identity of a donor of a gift made to a public agency if:  
 30 (A) the donor requires nondisclosure of the donor's identity as  
 31 a condition of making the gift; or  
 32 (B) after the gift is made, the donor or a member of the donor's  
 33 family requests nondisclosure.  
 34 (16) Library or archival records:  
 35 (A) which can be used to identify any library patron; or  
 36 (B) deposited with or acquired by a library upon a condition  
 37 that the records be disclosed only:  
 38 (i) to qualified researchers;  
 39 (ii) after the passing of a period of years that is specified in  
 40 the documents under which the deposit or acquisition is  
 41 made; or  
 42 (iii) after the death of persons specified at the time of the

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acquisition or deposit.  
However, nothing in this subdivision shall limit or affect contracts entered into by the Indiana state library pursuant to IC 4-1-6-8.  
(17) The identity of any person who contacts the bureau of motor vehicles concerning the ability of a driver to operate a motor vehicle safely and the medical records and evaluations made by the bureau of motor vehicles staff or members of the driver licensing medical advisory board regarding the ability of a driver to operate a motor vehicle safely. However, upon written request to the commissioner of the bureau of motor vehicles, the driver must be given copies of the driver's medical records and evaluations.  
(18) School safety and security measures, plans, and systems, including emergency preparedness plans developed under 511 IAC 6.1-2-2.5.  
(19) A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. A record described under this subdivision includes:  
(A) a record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2;  
(B) vulnerability assessments;  
(C) risk planning documents;  
(D) needs assessments;  
(E) threat assessments;  
(F) intelligence assessments;  
(G) domestic preparedness strategies;  
(H) the location of community drinking water wells and surface water intakes;  
(I) the emergency contact information of emergency responders and volunteers;  
(J) infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water, and wastewater systems; and  
(K) detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems, whether in paper or electronic form, of any building or facility located on an airport (as defined in IC 8-21-1-1) that is owned, occupied, leased, or maintained by a public agency. A record described in this clause may not be released for public inspection by any public agency without the prior approval of

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the public agency that owns, occupies, leases, or maintains the airport. The public agency that owns, occupies, leases, or maintains the airport:

(i) is responsible for determining whether the public disclosure of a record or a part of a record has a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack; and

(ii) must identify a record described under item (i) and clearly mark the record as "confidential and not subject to public disclosure under IC 5-14-3-4(b)(19)(J) without approval of (insert name of submitting public agency)".

This subdivision does not apply to a record or portion of a record pertaining to a location or structure owned or protected by a public agency in the event that an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2 has occurred at that location or structure, unless release of the record or portion of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability of other locations or structures to terrorist attack.

(20) The following personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1):

- (A) Telephone number.
- (B) Address.
- (C) Social Security number.

(21) The following personal information about a complainant contained in records of a law enforcement agency:

- (A) Telephone number.
- (B) The complainant's address. However, if the complainant's address is the location of the suspected crime, infraction, accident, or complaint reported, the address shall be made available for public inspection and copying.

(22) Notwithstanding subdivision (8)(A), the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first employment of a law enforcement officer who is operating in an undercover capacity.

(23) Records requested by an offender that:

- (A) contain personal information relating to:
  - (i) a correctional officer (as defined in IC 5-10-10-1.5);
  - (ii) a law enforcement officer (as defined in IC 35-31.5-2-185);
  - (iii) a judge (as defined in IC 33-38-12-3);

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1 (iv) the victim of a crime; or  
 2 (v) a family member of a correctional officer, law  
 3 enforcement officer (as defined in IC 35-31.5-2-185), judge  
 4 (as defined in IC 33-38-12-3), or victim of a crime; or  
 5 (B) concern or could affect the security of a jail or correctional  
 6 facility.  
 7 (24) Information concerning an individual less than eighteen (18)  
 8 years of age who participates in a conference, meeting, program,  
 9 or activity conducted or supervised by a state educational  
 10 institution, including the following information regarding the  
 11 individual or the individual's parent or guardian:  
 12 (A) Name.  
 13 (B) Address.  
 14 (C) Telephone number.  
 15 (D) Electronic mail account address.  
 16 **(25) Criminal intelligence information.**  
 17 (c) Nothing contained in subsection (b) shall limit or affect the right  
 18 of a person to inspect and copy a public record required or directed to  
 19 be made by any statute or by any rule of a public agency.  
 20 (d) Notwithstanding any other law, a public record that is classified  
 21 as confidential, other than a record concerning an adoption or patient  
 22 medical records, shall be made available for inspection and copying  
 23 seventy-five (75) years after the creation of that record.  
 24 (e) Only the content of a public record may form the basis for the  
 25 adoption by any public agency of a rule or procedure creating an  
 26 exception from disclosure under this section.  
 27 (f) Except as provided by law, a public agency may not adopt a rule  
 28 or procedure that creates an exception from disclosure under this  
 29 section based upon whether a public record is stored or accessed using  
 30 paper, electronic media, magnetic media, optical media, or other  
 31 information storage technology.  
 32 (g) Except as provided by law, a public agency may not adopt a rule  
 33 or procedure nor impose any costs or liabilities that impede or restrict  
 34 the reproduction or dissemination of any public record.  
 35 (h) Notwithstanding subsection (d) and section 7 of this chapter:  
 36 (1) public records subject to IC 5-15 may be destroyed only in  
 37 accordance with record retention schedules under IC 5-15; or  
 38 (2) public records not subject to IC 5-15 may be destroyed in the  
 39 ordinary course of business.  
 40 SECTION 4. IC 5-14-3-4.4 IS ADDED TO THE INDIANA CODE  
 41 AS A **NEW SECTION TO READ AS FOLLOWS [EFFECTIVE**  
 42 **UPON PASSAGE]: Sec. 4.4. (a) This section applies to a request for**

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a record that the public agency considers to be excepted from disclosure under section 4(b)(1) or 4(b)(25) of this chapter. The public agency may do either of the following:

(1) Deny disclosure of the record or a part of the record. The person requesting the information may appeal the denial under section 9 of this chapter.

(2) Refuse to confirm or deny the existence of the record, regardless of whether the record exists or does not exist, if the fact of the record's existence or nonexistence would reveal information that would:

(A) impede or compromise an ongoing law enforcement investigation or result in danger to an individual's safety, including the safety of a law enforcement officer or a confidential source; or

(B) reveal information that would have a reasonable likelihood of threatening public safety.

(b) This subsection applies to a request for a record that the public 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 IC 10-19-8-1 in formulating a response. The public agency may do either of the following:

(1) Deny disclosure of the record or a part of the record. The agency or the counterterrorism and security council shall provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. The person requesting the information may appeal the denial under section 9 of this chapter.

(2) Refuse to confirm or deny the existence of the record regardless of whether the record exists or does not exist, if the fact of the record's existence or nonexistence would reveal information that would have a reasonable likelihood of threatening public safety.

(c) A person who has received a refusal from an agency to confirm or deny the existence of a record may file an action in the circuit or superior court of the county in which the response was received:

(1) to compel the public agency to confirm whether the record exists or does not exist; and

(2) if the public agency confirms that the record exists, to

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compel the agency to permit the person to inspect and copy the record.

(d) The court shall determine the matter de novo, with the burden of proof on the public agency to sustain its refusal to confirm or deny the existence of the record. The public agency meets its burden of proof by filing a public affidavit with the court that provides with reasonable specificity of detail, and not simply conclusory statements, the basis of the agency's claim that it cannot be required to confirm or deny the existence of the requested record. If the public agency meets its burden of proof, the burden of proof shifts to the person requesting access to the record. The person requesting access to the record meets the person's burden of proof by proving any of the following:

- (1) The agency's justifications for not confirming the existence of the record contradict other evidence in the trial record.
- (2) The agency is withholding the record in bad faith.
- (3) An official with authority to speak for the agency has acknowledged to the public in a documented disclosure that the record exists. The person requesting the record must prove that the information requested:
  - (A) is as specific as the information previously disclosed; and
  - (B) matches the previously disclosed information.

(e) Either party may make an interlocutory appeal of the trial court's determination on whether the agency's refusal to confirm or deny the existence of the record was proper.

(f) If the court, after the disposition of any interlocutory appeals, finds that the agency's refusal to confirm or deny was improper, the court shall order the agency to disclose whether the record exists or does not exist. If the record exists and the agency claims that the record is exempt from disclosure under this chapter, the court may review the public record in camera to determine whether any part of the record may be withheld.

(g) In an action filed under this section, the court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

- (1) the plaintiff substantially prevails; or
- (2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

A plaintiff is eligible for the awarding of attorney's fees, court costs, and other reasonable expenses regardless of whether the plaintiff filed the action without first seeking and receiving an

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1 **informal inquiry response or advisory opinion from the public**  
2 **access counselor.**

3 **(h) A court that hears an action under this section may not**  
4 **assess a civil penalty under section 9.5 of this chapter in connection**  
5 **with the action.**

6 SECTION 5. IC 5-14-3-9, AS AMENDED BY P.L.134-2012,  
7 SECTION 19, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
8 UPON PASSAGE]: Sec. 9. **(a) This section does not apply to a**  
9 **request for information under section 4.4 of this chapter.**

10 **(a) (b)** A denial of disclosure by a public agency occurs when the  
11 person making the request is physically present in the office of the  
12 agency, makes the request by telephone, or requests enhanced access  
13 to a document and:

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

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

21 whichever occurs first.

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

25 **(e) (d)** If a request is made orally, either in person or by telephone,  
26 a public agency may deny the request orally. However, if a request  
27 initially is made in writing, by facsimile, or through enhanced access,  
28 or if an oral request that has been denied is renewed in writing or by  
29 facsimile, a public agency may deny the request if:

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

31 (2) the denial includes:

32 (A) a statement of the specific exemption or exemptions  
33 authorizing the withholding of all or part of the public record;  
34 and

35 (B) the name and the title or position of the person responsible  
36 for the denial.

37 **(d)** This subsection applies to a board; a commission; a department;  
38 a division; a bureau; a committee; an agency; an office; an  
39 instrumentality; or an authority; by whatever name designated;  
40 exercising any part of the executive, administrative, judicial, or  
41 legislative power of the state. If an agency receives a request to inspect  
42 or copy a record that the agency considers to be excepted from

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

9 (e) 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 inquiry
- 19 response or advisory opinion of the public access counselor.

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

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

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

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



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1 person's burden of proof under this subsection by proving that the  
 2 denial of access is arbitrary or capricious.  
 3 (h) The court may review the public record in camera to determine  
 4 whether any part of it may be withheld under this chapter. However, if  
 5 the complaint alleges that a public agency denied disclosure of a public  
 6 record by redacting information in the public record, the court shall  
 7 conduct an in camera inspection of the public record with the redacted  
 8 information included.  
 9 (i) In any action filed under this section, a court shall award  
 10 reasonable attorney's fees, court costs, and other reasonable expenses  
 11 of litigation to the prevailing party if:  
 12 (1) the plaintiff substantially prevails; or  
 13 (2) the defendant substantially prevails and the court finds the  
 14 action was frivolous or vexatious.  
 15 The plaintiff is not eligible for the awarding of attorney's fees, court  
 16 costs, and other reasonable expenses if the plaintiff filed the action  
 17 without first seeking and receiving an informal inquiry response or  
 18 advisory opinion from the public access counselor, unless the plaintiff  
 19 can show the filing of the action was necessary because the denial of  
 20 access to a public record under this chapter would prevent the plaintiff  
 21 from presenting that public record to a public agency preparing to act  
 22 on a matter of relevance to the public record whose disclosure was  
 23 denied.  
 24 (j) A court may assess a civil penalty under section 9.5 of this  
 25 chapter only if the plaintiff obtained an advisory opinion from the  
 26 public access counselor before filing an action under this section as set  
 27 forth in section 9.5 of this chapter.  
 28 (k) A court shall expedite the hearing of an action filed under this  
 29 section.  
 30 **SECTION 6. An emergency is declared for this act.**

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## COMMITTEE REPORT

Madam President: The Senate Committee on Homeland Security, Transportation and Veterans Affairs, to which was referred Senate Bill No. 369, 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 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 4-23-7.3-2, AS ADDED BY P.L.198-2007, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 2. As used in this chapter, "electronic map" has the meaning set forth in ~~IC 5-14-3-2(d)~~. **IC 5-14-3-2.**

SECTION 2. IC 5-14-3-2, AS AMENDED BY P.L.51-2008, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 2. (a) The definitions set forth in this section apply throughout this chapter.

(b) "Copy" includes transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any other means.

**(c) "Criminal intelligence information" means data that has been evaluated to determine that the data is relevant to:**

**(1) the identification of; and**

**(2) the criminal activity engaged in by;**

**an individual who or organization that is reasonably suspected of involvement in criminal activity.**

~~(c)~~ **(d)** "Direct cost" means one hundred five percent (105%) of the sum of the cost of:

(1) the initial development of a program, if any;

(2) the labor required to retrieve electronically stored data; and

(3) any medium used for electronic output;

for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

~~(d)~~ **(e)** "Electronic map" means copyrighted data provided by a public agency from an electronic geographic information system.

~~(e)~~ **(f)** "Enhanced access" means the inspection of a public record by a person other than a governmental entity and that:

(1) is by means of an electronic device other than an electronic device provided by a public agency in the office of the public

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agency; or

(2) requires the compilation or creation of a list or report that does not result in the permanent electronic storage of the information.

~~(f)~~ **(g)** "Facsimile machine" means a machine that electronically transmits exact images through connection with a telephone network.

~~(g)~~ **(h)** "Inspect" includes the right to do the following:

(1) Manually transcribe and make notes, abstracts, or memoranda.

(2) In the case of tape recordings or other aural public records, to listen and manually transcribe or duplicate, or make notes, abstracts, or other memoranda from them.

(3) In the case of public records available:

(A) by enhanced access under section 3.5 of this chapter; or

(B) to a governmental entity under section 3(c)(2) of this chapter;

to examine and copy the public records by use of an electronic device.

(4) In the case of electronically stored data, to manually transcribe and make notes, abstracts, or memoranda or to duplicate the data onto a disk, tape, drum, or any other medium of electronic storage.

~~(h)~~ **(i)** "Investigatory record" means information compiled in the course of the investigation of a crime.

~~(i)~~ **(j)** "Offender" means a person confined in a penal institution as the result of the conviction for a crime.

~~(j)~~ **(k)** "Patient" has the meaning set out in IC 16-18-2-272(d).

~~(k)~~ **(l)** "Person" means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

~~(l)~~ **(m)** "Provider" has the meaning set out in IC 16-18-2-295(b) and includes employees of the state department of health or local boards of health who create patient records at the request of another provider or who are social workers and create records concerning the family background of children who may need assistance.

~~(m)~~ **(n)** "Public agency", except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(2) Any:

(A) county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee,

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office, instrumentality, or authority of any county, township, school corporation, city, or town;

(B) political subdivision (as defined by IC 36-1-2-13); or

(C) other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.

(3) Any entity or office that is subject to:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) an audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

(7) Any license branch staffed by employees of the bureau of motor vehicles commission under IC 9-16.

(8) The state lottery commission established by IC 4-30-3-1, including any department, division, or office of the commission.

(9) The Indiana gaming commission established under IC 4-33, including any department, division, or office of the commission.

(10) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

~~(n)~~ (o) "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes,

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photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

(p) "Standard-sized documents" includes all documents that can be mechanically reproduced (without mechanical reduction) on paper sized eight and one-half (8 1/2) inches by eleven (11) inches or eight and one-half (8 1/2) inches by fourteen (14) inches.

(q) "Trade secret" has the meaning set forth in IC 24-2-3-2.

(r) "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

This definition does not restrict the application of any exception under section 4 of this chapter."

Page 7, delete lines 7 through 19, begin a new line block indented and insert:

**"(25) Criminal intelligence information."**

Page 8, delete lines 1 through 22.

Page 8, line 28, delete "any" and insert "either".

Page 8, delete line 42.

Page 9, delete line 1.

Page 9, line 2, delete "This subsection applies to a board, a commission, a".

Page 9, delete lines 3 through 5.

Page 9, line 6, delete "legislative power of the state."

Page 9, line 7, after "the" insert "public".

Page 9, line 10, after "The" insert "public".

Page 9, line 10, delete "any" and insert "either".

Page 9, delete lines 25 through 26.

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 369 as introduced.)

WYSS, Chairperson

Committee Vote: Yeas 8, Nays 0.

SB 369—LS 6958/DI 87+



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