Public Access Laws in Indiana

Presented by
Luke Britt, Indiana Public Access Counselor

Public Access Counselor

The Public Access Counselor provides advice and assistance concerning Indiana's public access laws (the Access to Public Records Act and the Open Door Law) to members of the public and government officials and employees.

Governor Frank O'Bannon created the office by executive order in 1998 after a statewide collaboration of seven newspapers found great obstacles in obtaining government information in Indiana.

In 1999, the General Assembly created the office statutorily.

2013-2014 Fiscal Year

Received 3003 inquiries
302 Formal Complaints Filed
56 Informal Complaints Filed

Opinions found at www.in.gov/pac

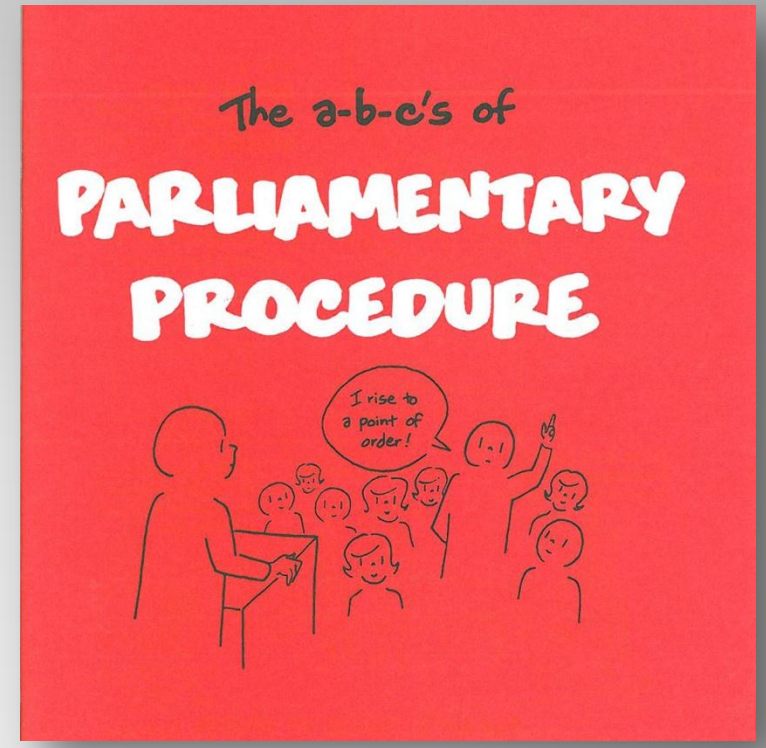
The Indiana Open Door Law (ODL)

"…It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed…" IC 5-14-1.5-1.

Official Action vs. Final Action

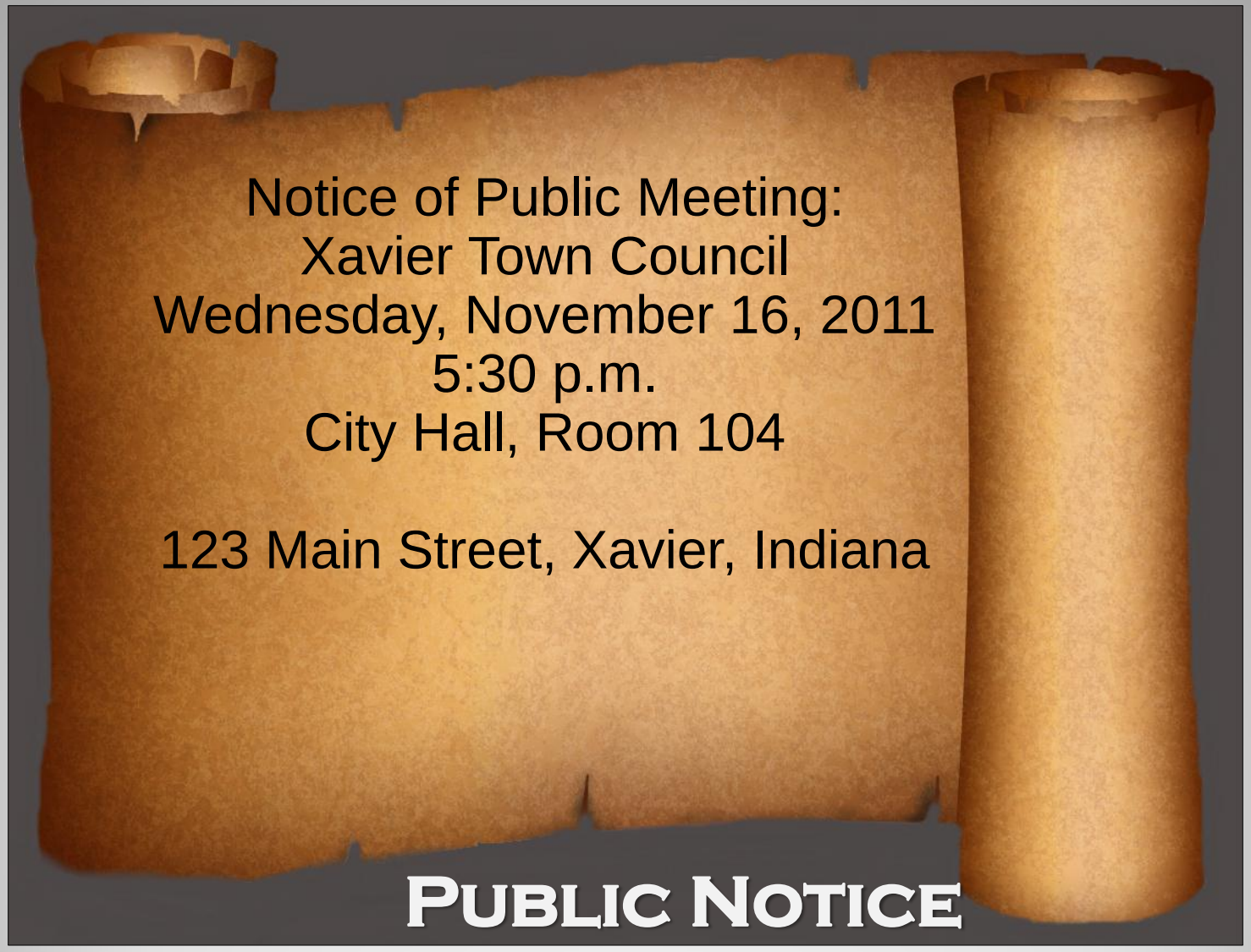
- Official Action:
  - Discussions
  - Deliberations
  - Receiving Information
  - Giving Information

  ✓Final Actions
  - ✓Voting
  - ✓Decisions



What Kind of Notice is Required

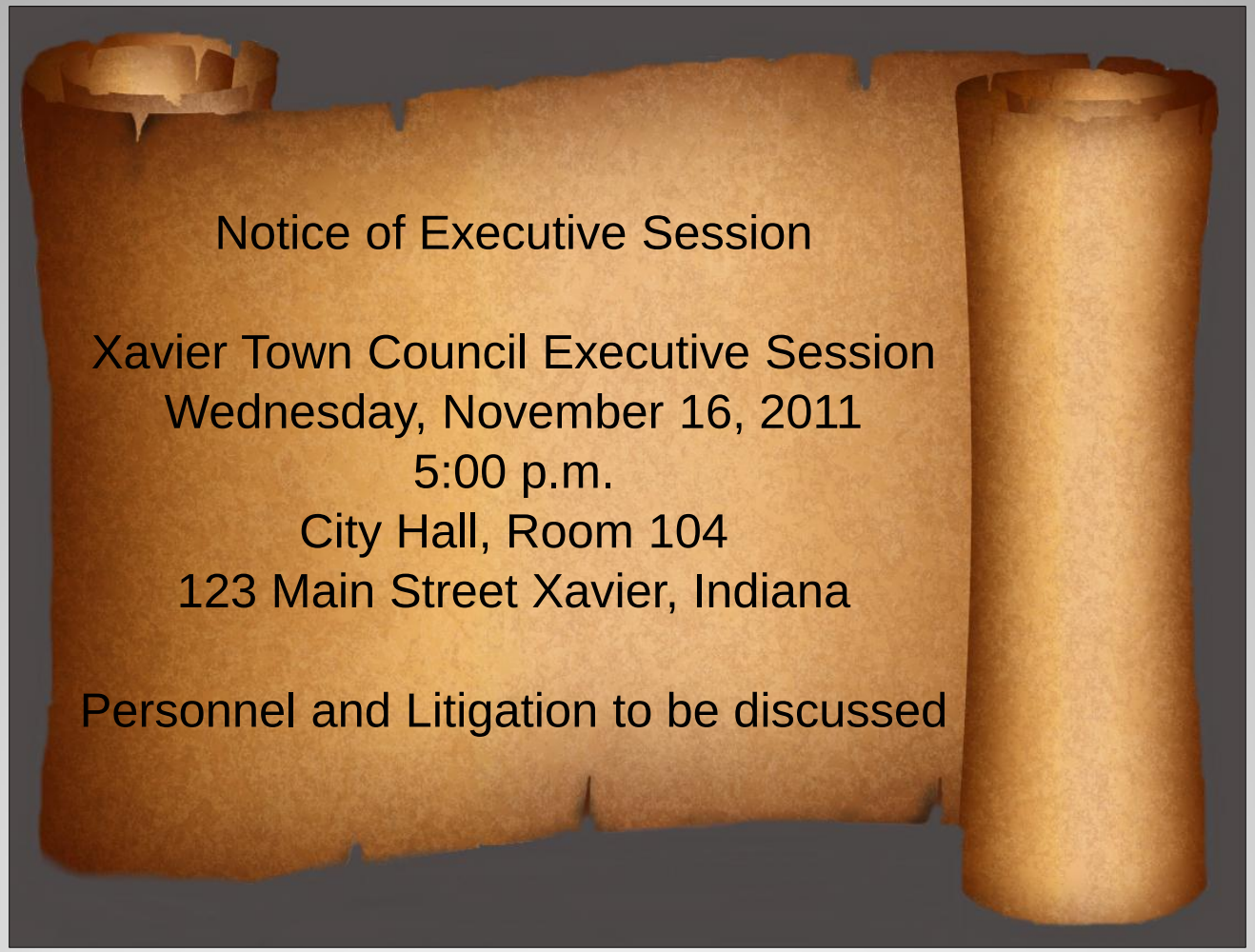
- 48 business hours in advance
- Date, time and place where Governing Body will meet
- Generally, no requirements to publish in newspaper
- Annual notices are permitted
- Emergency meetings are exception to 48 hour notice requirement
- Must post at principal place of business or meeting location
- Special meetings of County Executives IC 36-2-2-8 (six days unless emergency exists)
- Prohibition on serial meetings


Notice of Public Meeting:
Xavier Town Council
Wednesday, November 16, 2011
5:30 p.m.
City Hall, Room 104
123 Main Street, Xavier, Indiana
Public Notice

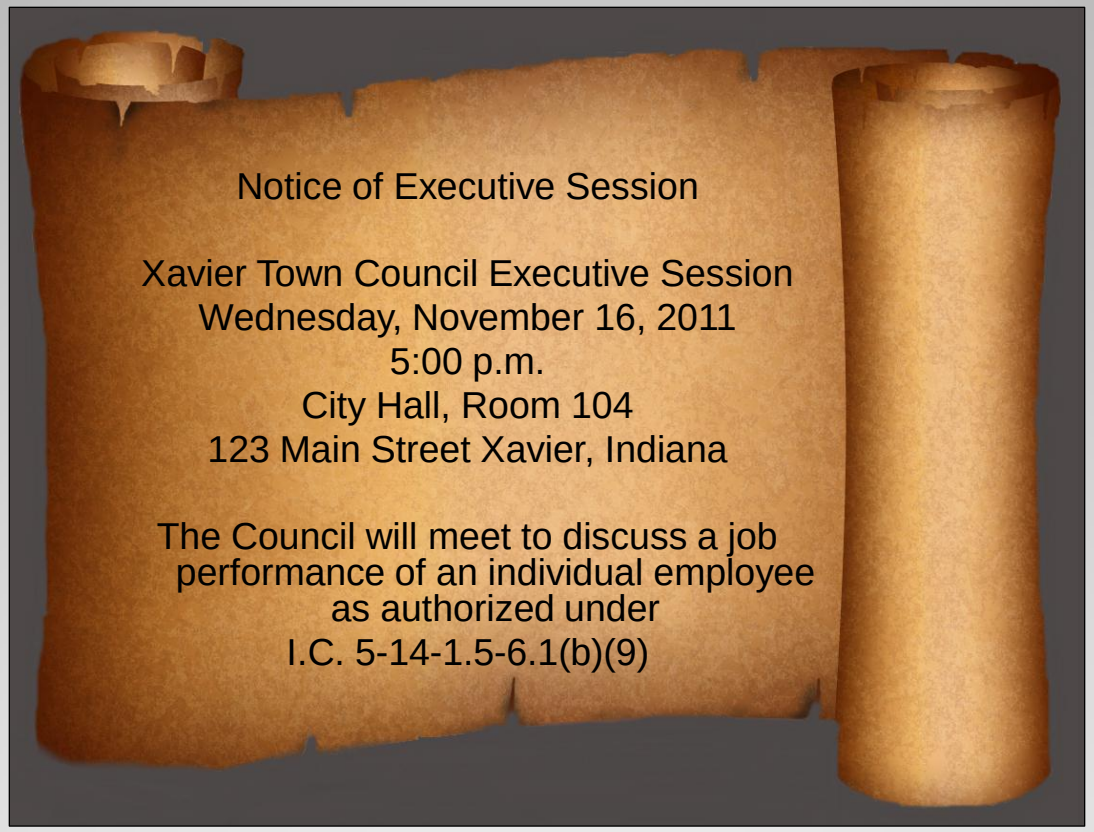
Executive Sessions-I.C. 5-14-1.5-6.1

- The “exception” to meetings that are open to the public
- Notice must include statutory purpose(s) for the meeting excluding the public.
- Meeting minutes or memoranda must include **certification** that only the topics permitted under the ODL for executive session were discussed.
- NO FINAL ACTION

Improper Executive Session Notice



Executive Session Public Notice



Executive Session Exceptions under the ODL

To discuss records classified as confidential by state or federal statute

To discuss the alleged misconduct of an employee

To receive information and interview prospective employees

To discuss strategy with respect to pending litigation or litigation threatened in writing

To discuss information and intelligence intended to prevent, mitigate or response to threat of terrorism

Meetings under the ODL

No right to speak under ODL unless some other statute requires it (i.e. public hearings)

Minutes/Memoranda (Draft copies)

Electronic Meetings of State Agencies

No secret ballots when voting

Access to Public Records Act (APRA)

- Indiana Code § 5-14-3-1 through 5-14-3-10
- Enacted in 1983 (“APRA”)

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master.

Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.

This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.”

What is a public record

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

Indiana Code § 5-14-3-2(n)

Responding to APRA Requests

Time frames for responding to APRA Requests depends on the manner in which the public agency receives the request.

IC 5-14-3-9:

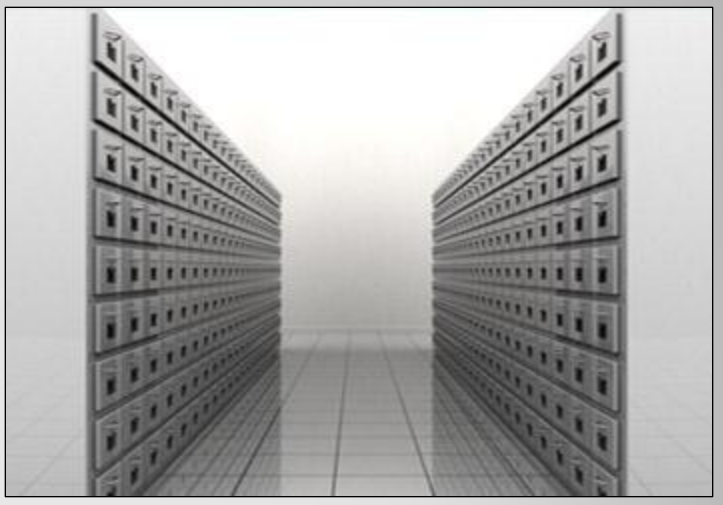
- If requestor is **physically present** in the office of the agency, makes the request by **telephone**, or requests **enhanced access** to a document, the agency has twenty-four (24) hours to respond ***(enhanced access=on disk or through remote computer).***
- If the request is made by **mail or by facsimile** the public agency has 7 days from the date the public agency received the request to respond.
- Important: Production of documents is not required in these time frames, but within a reasonable time.
- Copy fees

Reasonable Period of Time

All records must be provided within a “reasonable period of time” after the request is received

Factors considered:

- How broad is the request
- Where are the records located
- How much redaction is necessary
- Busy time at the agency
- Common sense factors



What I like to see:

- Communication – Status Updates
- Piecemeal disclosures

Reasonable Particularity

A request from the public must be reasonably particular – a subjective standard

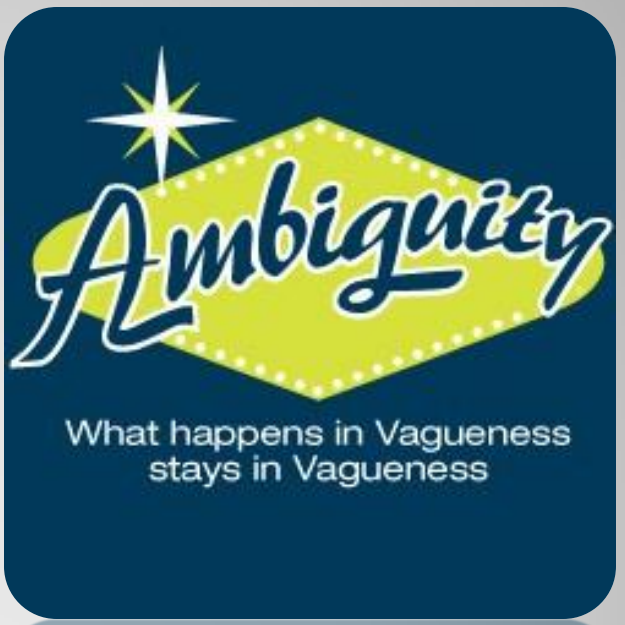
Two conflicting cases

Can you find it?; or

Are there objective elements in the query?

What I like to see:

- No blanket denial;
- Cooperate to narrow request



Three Categories of Public Records

Must be disclosed

Confidential

Released at the discretion of the public agency

Confidential Public Records

Those confidential by state statute or federal law (i.e. IC 4-6-9-4)

Social Security Numbers contained in public records

Patient medical records unless the patient gives written consent

Trade secret information

Certain foreclosure information

Grade transcripts/license exam scores in licensure process

Discretionary Categories I.C. 5-14-3-4(b)

Investigatory records of law enforcement agencies

The work product of an attorney representing, pursuant to state employment or an appointment by a public agency, a public agency, the state or an individual.

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Personnel files of public employees and files of applicants for public employment, however, certain information must be provided upon request including compensation, business telephone number, dates of first and last employment, etc..

Denials

IC §5-14-3-9 provides procedure for denying a request under the APRA:

If a request is made orally, the agency may deny the request orally.

If request is made in writing, the agency may deny the request if the denial is in writing, the denial includes the specific exemption authorizing the withholding of all or part of the record, and the name and title/position of the person responsible for the denial.

Before the trial court, the burden is on the agency to demonstrate that the denial complied with the APRA. The agency may not simply rely on a conclusory statement or affidavit.

Court may review the records in-camera; the court may review the records if redaction of the record has occurred.

Access to Public Records Act

Electronic Mail

- A public record is any record, including electronic media, that is created received, retained, maintained, or filed by or with a public agency.
- Electronic mail must be available for inspection and copying by the governing body unless an exception to disclosure, based on the content of the email, applies.
- Electronic mail must be maintained in accordance with records retention schedules, pursuant to I.C. 5-15.
  - Most agencies have their own retention schedules.

Remedies and penalties for noncompliance

Fix it

Complaint to Public Access Counselor

Bad press and damage to public perception

Court action seeking order to produce records and potentially order to pay attorney's fees

Fines for knowing and intentional withholding of public records or violation of the ODL

Common Misconceptions Of Citizens

A public agency has to answer my questions under APRA.

A public agency has to keep public records forever so it is not appropriate to respond that the record no longer exists.

A public agency must handle public records requests before handling other matters of the public agency.

A public agency must keep public records in a format that is most convenient for me.

Common misconceptions of Agencies

Offering to allow inspection is always sufficient.

All disclosable records requested must be produced within 7 days of receiving the request. ***See* 11-FC-74**

Denials do not have to be explained with specificity.

Any document containing confidential information may be omitted from public records response. ***See* 10-FC-7**

Thank You

Contact Information:

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Public Access Handbook:

http://www.in.gov/pac/files/pac_handbook.pdf

Public Access Counselor Website:

http://www.in.gov/pac/