

Office of the Treasurer of State Richard E. Mourdock

Internal Guide to the Access to Public Records Act

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General Counsel



Office of the Treasurer of State's Internal Guide to the Access to Public Records Act

Under Indiana Code § 5-14-3, records held by government agencies are presumed to be accessible for inspection or copying by any member of the public unless exempted by law.

We are fully committed to upholding the public policy of the Access to Public Records Act (APRA) because providing members of the public with access to records is an essential function in our form of representative government.

It is for this purpose that we are pleased to provide this quick reference guide to our public access records policy.

While there are several exceptions in the law, this guide will provide a basic description of our most common public access requests and how they are typically answered.

Due to the varied nature of public access requests, however, this guide is not exhaustive regarding our policy.

If you have questions about our internal policy please contact our office:

Indiana State Treasurer's Office
242 State House
Indianapolis, Indiana 46204
317-232-6386
fax: 317-233-1780

Sincerely,

Richard E. Mourdock
Treasurer of State

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REQUEST FOR PUBLIC RECORDS

This internal guide may be used as a quick reference for the public and office staff when applying the Access to Public Records Act (APRA) to records requests made by the public. Moreover, the purpose of this guide is to establish a certain expectation of service for the public as it relates to records request and of openness to procedures within the Office of the Treasurer.

I. DEFINING PUBLIC RECORDS

A public record means any writing, paper, report, study, map photography, book, card tape, recording, or other material that is created, received, retained, maintained, or filed by or with a public agency.¹ In 2005, the definition of a public record was expanded to include any material created for or on behalf of a public agency. To the extent that a request for records neither created, received, retained, maintained, or filed by or with the Office of the Treasurer or required to be created, received, retained, maintained, or filed by or with the office, members of the Treasurer's staff are not required to create records or perform new analysis of existing information to satisfy a public access request.² The office may accommodate a requestor by generating new records when it makes sense and is practical under the circumstances.

II. SUBMITTING AN APRA REQUEST

For the purposes of this office, a request for records must be in writing. While not all government offices require written request, putting a request in writing will ensure that the requestor and the office will have documentation regarding what specific records are sought. Written requests can be submitted via email, fax, through the Treasurer's website, or by letter.

III. COMMUNICATION PROCEDURES

A. Initial Response from the Treasurer's Office

When the Treasurer's office receives an APRA request, a response acknowledging the receipt of the request is sent to the requestor within 7 business days. For requests made in-person, or over the phone, the response is given within 24 hours. Please note that if an APRA request is made "over the phone" the requestor will be asked to submit it in writing.

B. Timeframe Estimate Letter

After an initial review of the request, the Timeframe Estimate Letter is sent outlining the details of disclosure or applicable exceptions to the APRA, in addition to the amount of time the office estimates it will take to gather, review, or redact the releasable materials. The APRA does not prescribe timeframes

¹ I.C. §5-14-3-2(a)(n)

² Opinion of the Public Access Counselor 07-FC-236

for the actual production of records. For guidance, the Public Access Counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances.

“Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether [the office] has produced records within a reasonable timeframe.”³ It is important to understand that the APRA does not require the Office of the Treasurer to stop business to respond to a public records request. However, this office will regulate any material interference with the regular discharge of the functions of the office, while effectively communicating office procedures and the status of the request.

C. Letter of Clarification

Following the Timeframe Estimate Letter, a “Letter of Clarification” may be sent if, after review of the initial request, the office cannot identify with certainty the specific records being sought. Typically, the office will assist the requestor in revising the request by informing the requestor of state resources such as the State Information Center, the Office of the Public Access Counselor, or the Indiana State Transparency Portal, or by supplying the requestor with the applicable APRA statute or Opinion of the Public Access Counselor to address sufficient clarity. To provide further aid in identifying records, the office will advise the requestor to provide as much description and background information proportional to the complexity and breadth of the request. The more information provided by the requestor, the greater the chances the office will have of locating the records in a timely manner.

D. Update letters/Notice of Fee and Complete Review

Once the office’s review of records is complete, a notice for the copying fee is sent via U.S. mail to the requestor. Indiana law permits the office to recoup a copying fee of ten cents (\$.10) per page.⁴ If the requestor chooses to receive copies of the records, he or she must send a cashier’s check, money order, or company check for the full amount made payable to the Office of the Treasurer of State. Documents will not be released until payment has been received. If circumstances arise that will prevent the office from meeting the estimated timeframe projected in earlier correspondence, or an exception to the APRA will apply to the request, an update letter will be sent to the requestor via U.S. mail.

IV. DENIAL OR REDACTION OF RECORDS

A denial of access to public records occurs when a public agency either affirmatively denies a request or fails to respond to a public records request in the timeframe mandated by the APRA.⁵ Any denial of public records requested must include an explanation, including legal authority, and the name and title or position of the person responsible for the denial. All explanations will be made in writing. The APRA also requires an agency to separate and/or redact confidential information in public records before

³ See Opinion of the Public Access Counselor 07-FC-268

⁴ I.C. §5-14-3-8(d)(1)

⁵ Opinion of the Public Access Counselor 12-INF-18.

making the disclosable information available for inspection and copy.⁶ If there are any redactions made to a record, the requestor will be notified of the redactions and the specific exemption or exemptions authorizing the withholding of the information.

V. OBTAINING LEGAL ASSISTANCE

Public access to this internal guide or assistance or advice provided in correspondence to the requestor is not intended to be a substitute for seeking advice from legal counsel. A person seeking records may also consider consulting with the Office of the Public Access Counselor. The Public Access Counselor maintains a website with detailed information on the APRA and the Open Door Law, as well as opinions that apply to particular categories of records. The website is updated periodically to reflect changes in the law, and is a great resource for understanding public access laws.

REMAINDER PAGE IS LEFT BLANK INTENTIONALLY

⁶ See I.C. § 5-14-3-6(a).

MOST COMMON RECORDS REQUEST TO THE OFFICE OF THE TREASURER

EMAIL

A. REASONABLE PARTICULARITY

Example Request: I seek copies of any and all email from Samantha Smith's state e-mail account in 2002.

The Access to Public Records Act (the "APRA") is a series of laws designed to give the public access to public records at all levels of Indiana state government. Public records include agency related e-mail conducted on government computers. Typically, when the Office of the Treasurer ("office") receives a request for e-mail from a state employee account, this type of request is not defined with reasonable particularity pursuant to Indiana Code § 5-14-3-3(a). While the APRA does not define reasonable particularity, Public Access Counselors have provided that "e-mail is a method of communication and not a type of record and requests for records that only identify the records by method of communication are not defined with reasonable particularity."⁷

With respect to the above example, the language "any and all email" is not particular. Former Public Access Counselor Neal stated that a blanket request for "all email" is universal in that such a request calls for an entire category of records sent or received using a certain form of communication.⁸ As a result, the Treasurer's staff would advise the requestor that the public access request be defined with reasonable particularity and resubmitted. Generally a request for e-mail is more successful when it is narrowed to reflect the sender, recipient, and a particular range of dates; the office should comply with requests reflecting this information unless an exception to the APRA permits or requires withholding all or part of any records responsive to the request.⁹ Typically, the more specific the request, the more likely it will be effective, generate a timely response, and avoid the requestor unnecessary fees.

⁷ See Opinion of the Public Access Counselor: 08-INF-23, 09-FC-24, 09-FC-104, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, and 11-FC-80.

⁸ Opinion of the Public Access Counselor 12-FC-44.

⁹ See Opinion of the Public Access Counselor 12-FC-44.

B. INTER/INTRA-AGENCY DELIBRATIVE MATERIAL

Example Request: Pursuant to the Indiana Access to Public Records Act (IC 5-14-3), I would like to obtain a copy of all email between the Treasurer of State staff regarding discussions to invest the Heritage Fund.

Request for correspondence between members of the Treasurer’s staff or correspondence between Treasurer’s staff and other state offices/agencies may fall into the deliberative material exception.¹⁰ The Access to Public Records Act (APRA) states:

“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 may be withheld from disclosure.”

Deliberative material has been described as information that reflects one’s ideas, consideration and recommendations on a subject or issue for use in the decision making process.¹¹ It has been well documented that use of the exemption is purposed “to prevent injury to the quality of agency decisions.”¹² Like many other government offices, the Treasurer’s Office encourages an environment that welcomes diverse thought and the distribution of opinions. Without this freedom “frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result.”¹³

In light of the goal for an open forum, the office would more than likely deny the request for correspondence between the Treasurer’s staff regarding decisions to invest. However, it is important to note that should any of the correspondence contain factual matters that are not inextricably linked to non-disclosable material; the office would redact records to reflect disclosable information.

C. ATTORNEY-CLIENT PRIVILEGE

Example Request: Please provide me with copies of communication between general counsel and the investment manager regarding the decision to hire a third-party investment manager for the tobacco fund.

Communication, particularly those written or sent electronically, between an attorney and staff should be meticulously reviewed before being made available to the public for inspection or copy. Any

¹⁰ See Indiana Code § 5-14-3-4(b)(6).

¹¹ See Opinion of the Public Access Counselor 05-FC-206.

¹² Id.

¹³ Id.

person has the right to inspect and copy the records, however, Indiana law also provides that one category of public records are confidential.¹⁴ Communication between attorney and client is privileged.

The Indiana Supreme Court explained the privilege as follows:

“...when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential...The privilege applies to all communications made to an attorney for the purpose of professional advice or aid, upon the subject of the client’s rights or liabilities.”¹⁵

The aforementioned request seeks to obtain a copy of communication involving general counsel when the attorney is consulted on business within the scope of the legal profession. When the attorney-client privilege is applicable, the office will choose to exercise the privilege to prevent waiving the right to withhold privileged information.¹⁶

D. WORK PRODUCT DOCTRINE

Example Request: I seek to obtain any and all records of Rebecca Allen, General Counsel, related to City Group Homestead v. Indiana State Treasurer.

The work product of an attorney, namely any writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories, prepared in anticipation of a realistic possibility of litigation is protected from disclosure. Moreover, Indiana Rules of Professional Conduct prohibit a lawyer from revealing any information related to representation.¹⁷ This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.

The records sought in the aforementioned request relate to a litigated matter and as a result, may call for documents reflecting Rebecca Allen’s exercise of professional judgment. As counsel, Ms. Allen more than likely researched, strategized, and prepared documents in anticipation for litigation. Consequently, the request for Rebecca Allen’s records related to work product prepared for City Group Homestead v. Indiana State Treasurer would be reviewed and denied if disclosable information was absent from the records.

¹⁴ See Indiana Code § 34-46-3-1.

¹⁵ Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992)

¹⁶ See The Indianapolis Star v. Trustees of Indiana University, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003).

¹⁷ Indiana Rules of Professional Conduct Rule 1.6. Comment 9

CALENDARS

Example Request: I seek to obtain copies of Treasurer John Monroe's scheduled May 2008 activities.

Generally, schedules or records of activities are reflected in an employee or a state official's calendar and shall be excepted from the right of the public to inspect or copy.¹⁸ In regards to the above request, the APRA provides that at the discretion of the agency, the following (among others) may be withheld from disclosure: Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.¹⁹

Several Public Access Counselors have addressed the issue of whether calendars of public officials must be disclosed upon request. Public Access Counselor Davis, Counselor O'Connor, and Counselor Neal have interpreted the exemption to apply to an entire record that meets the exemption in section 4(b)(7), in spite of the general requirement that an agency separate disclosable information from non-disclosable information.²⁰ Like other state agencies, as reflected in the Opinions of the Public Access Counselors, the office chooses to exercise its discretion pursuant to I.C. § 5-14-3-4(b)(7). Therefore, a request for an employee or Treasurer John Monroe's calendar will be denied.

BUDGET REQUEST

Example Request: I respectfully request access to budget requests made by the Office of the Treasurer from June 2008 to the present.

The Office of the Treasurer prepares its budget in order to provide an opinion to another state authority for the purpose of approval. According to I. C. § 5-14-3-4(b)(6), or the deliberative material exception, records may be excepted from disclosure if such records contain expressions of opinions or speculative in nature and communicated interagency or intra-agency for the purpose of decision making. More recently, we have maintained that while we have the right to withhold our budget requests pursuant to the deliberative material exception, we have made them available to the public.

¹⁸ See I.C. § 5-14-3-4(b)(7).

¹⁹ Id.

²⁰ See Opinion of the Public Access Counselor 01-FC-42; IC 5-14-3-6(a); 05-FC-152; 01-FC-41 or Informal inquiry 09-INF-7.

PERSONNEL FILES

Example Request: Please provide copies of all requests for time off, including sick leave, vacation and leave without pay, and discipline documentation located in Mary Johnson's personnel file.

The Office of the Treasurer recognizes, pursuant to I.C. 5-14-3-4(b), that certain information in personnel files of public employees and files of applicants for public employment shall be excepted from the right of the public to inspect and copy. However, the General Assembly has mandated the disclosure of the following information upon a request under the APRA:

- (A) The names, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) Information concerning any disciplinary actions in which has been taken and that resulted in the employee being disciplined or discharged.²¹

The example request for Mary Johnson's "requests for time off" does not fall within the General Assembly's mandated guidelines of information that must be released to the public upon request. As a result, this request may be disclosed at the discretion of the office. For legal purposes, a request for leave without pay and requests for sick leave are always denied by our office pursuant to the privacy provisions of the Health Insurance and Accountability Act ("HIPPA").

As to the request for records reflecting discipline of a state employee, the office is required to disclose information related to any disciplinary actions in which have been taken and that resulted in the employee being disciplined or discharged. Please note that under the requirements of APRA, this office is mandated to only release "information" and not the public record. As a result, the office would supply the requestor with a digest of information to fulfill the request and not actual copies of documents located in Mary Johnson's file.²²

²¹ I.C. § 5-14-3-4(b)(8).

²² Opinion of the Public Access Counselor 02-FC-22

Resources

Office of the Public Access Counselor

W470, Indiana Government Center South
402 West Washington Street
Indianapolis, IN 46204
(317) 234-0906
(800) 228-6013
Fax (317) 233-3091
www.in.gov/pac

State Information Center

402 W. Washington Street
Indianapolis, IN 46204
Chat with a Live State Information Center Counselor
(317) 233-0800
(800) 457-8283
stinfo@sic.IN.gov
www.in.gov/help.htm

The State Information Center (SIC) is your single point of contact for questions about the state. This agency maintains a website to help the public search state documents. If you cannot find what you are looking for on the SIC's website, you can contact a SIC representative.

Indiana Transparency Portal

Office of the Auditor of State
www.in.gov/itp/

This is a website aimed to provide the public with complete access to information about how Indiana is utilizing taxpayer resources. Recently, the Federation of State Public Interest Research Groups and the Sunshine Review, two non-profit organizations dedicated to state and local government transparency, rated the Indiana Transparency Portal grade "A."

Indiana Department of Administration

402 W. Washington St., Room W-478
Indianapolis, IN 46204
(317) 232-3150
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www.in.gov/idoa

The Indiana Department of Administration (IDOA) is an umbrella agency that provides support services to other state agencies to help assure the smooth functioning of state government. The IDOA has a website link that provides the public access to search the database for state contracts