

Indiana's Public Access Laws

Open Door Law

Access to Public Records Act (APRA)

Presented by:

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Open Door Law (I.C. § 5-14-1.5)

- With the exception of Executive Sessions, “all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.” (I.C. § 5-14-1.5-3(a)).
- The ODL also requires 48-hour advanced notice of meetings. (I.C. § 5-14-1.5-5).

Open Door Law (I.C. § 5-14-1.5)

What about committees?

- A committee must comply with the Open Door Law if the committee has been appointed directly by a governing body or its presiding officer. (I.C. § 5-14-1.5-2(b)(3)).

Open Door Law (I.C. § 5-14-1.5)

What is a Meeting?

- A gathering of a majority of the governing body for the purpose of taking official action upon public business.
(I.C. § 5-14-1.5-2(c)).

Open Door Law (I.C. § 5-14-1.5)

What is “Official Action?”

Any *one* of these items constitutes official action:

- receiving information
- deliberating
- making recommendations
- establishing policy
- making decisions
- taking final action (i.e. voting)

(I.C. § 5-14-1.5-2(d)).

Open Door Law (I.C. § 5-14-1.5)

What is NOT a Meeting?

- Any social or chance gatherings not intended to avoid ODL;
- On-site inspections of a project or program;
- Traveling to and attending meetings of organizations devoted to the betterment of government;
- Board orientation or a gathering for the purpose of administering the oath of office

(I.C. § 5-14-1.5-2(c))

Open Door Law (I.C. § 5-14-1.5)

Serial Meetings (I.C. § 5-15-1.5-3.1)

- Three members but less than a quorum meet
- subsequent meetings involve at least 2 members
- sum of all meeting attendees constitutes a quorum
- all meetings held within 7 days & concern same topic
- Held to take official action on public business

Open Door Law (I.C. § 5-14-1.5)

Executive Sessions (I.C. § 5-14-1.5-6.1)

- The instances are narrowly construed
- The governing body may NOT take final action (i.e., vote) in an executive session but may make preliminary decisions in the executive session.
See Baker v. Town of Middlebury, 753 N.E.2d 67 (Ind. Ct. App. 2001).

Open Door Law (I.C. § 5-14-1.5)

Permissible Executive Session Topics

Discussion of strategy with respect to:

- Initiation of litigation or litigation that is pending or has been threatened in writing
- Implementation of security systems
- A real property transaction

Open Door Law (I.C. § 5-14-1.5)

Permissible Executive Session Topics ctd.

- To receive information about and interview prospective employees
- Receive information about an employee or contractor's misconduct and discuss before a determination the individual's status as an employee
- To discuss records classified as confidential by law
- To discuss a job performance evaluation

Open Door Law (I.C. § 5-14-1.5)

Notice Requirements (I.C. § 5-14-1.5-5)

- Notice requirements apply to all meetings, including executive sessions
- Requirements: date, time and location of meeting posted 48 hours in advance of meeting
 - 48 hours does not include weekends or holidays
 - TIP: Specific time is required

Open Door Law (I.C. § 5-14-1.5)

Executive Session Notice:

- Must contain the same information as for an open meeting but must also state the subject matter by specific reference to the enumerated instance(s) for which executive sessions may be held.
 - TIP: There is no executive session instance to “discuss personnel matters” or to “meet with the board’s attorney.”

(I.C. § 5-14-1.5-6.1(d))

Sample Executive Session Notice

Notice of Executive Session

Bird Community School Corporation

July 14, 2010

Administration Building Boardroom

1306 North Anderson St., Bird, IN 46998

7:15 p.m.

The Bird Community School Corporation will meet pursuant to I.C. § 5-14-1.5-6.1(b)(5) to receive information about and interview prospective employees.

Open Door Law (I.C. § 5-14-1.5)

Meeting Notice Requirements, ctd.

- TIP: Notice requirement does not apply to reconvened meetings (except executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and is recorded in the memoranda or minutes thereof and there is no change in the agenda

Open Door Law (I.C. § 5-14-1.5)

Posting & Delivery of Notice

- Notice must be posted at agency's principal office or at meeting place
- The agency must also deliver notice to all news media that deliver by December 31st an annual written request for such notices.
 - Tip: The delivery of notice to news media is not "posting" even if the media publish the notice or advertises the meeting.

Open Door Law (I.C. § 5-14-1.5)

Posting & Delivery of Notice, ctd.

- IF Library adopts policy: the library must also deliver notice to any person (other than news media) who delivers by December 31st an annual written request for such notices.
- library decides if these notices will be provided via email or by publishing notice 48 hours in advance on library website

Open Door Law (I.C. § 5-14-1.5)

Agenda (I.C. § 5-14-1.5-4(a))

- The ODL does not require use of an agenda.
- If the governing body uses an agenda, the agenda must be posted outside the meeting before the meeting begins.

Open Door Law (I.C. § 5-14-1.5)

Agenda ctd.

- An agency may deviate from its posted agenda unless a specific statute, board bylaws, or parliamentary procedures provide otherwise.
- TIP: A final action adopted by reference to agenda number or item alone is void (i.e. “All in favor of item IV?”)

Open Door Law (I.C. § 5-14-1.5)

Meeting Memoranda (I.C. § 5-14-1.5-4(a))

Memoranda must be kept as the meeting progresses and must contain:

- Date, time, and location of meeting
- Members present and absent
- The general substance of all matters, proposed, discussed, or decided
- A record of all votes taken, by individual members if there is a roll call

Open Door Law (I.C. § 5-14-1.5)

Meeting Memoranda Executive Sessions

- Date, time and location of meeting
- Members present and absent
- The subject matter considered must be identified by specific citation to the law that was in the executive session meeting notice.
- The memoranda / minutes must certify no other matter was discussed.

(I.C. § 5-14-1.5-6.1(d))

Open Door Law (I.C. § 5-14-1.5)

Meeting Memoranda Electronic Attendees

Memoranda must also include:

- Name of each member who was physically present at the meeting;
- Name of each member who participated electronically;
- Name of those who were absent; and
- Type of electronic technology/program used for meeting

(I.C. § 5-14-1.5-3.5(e) & I.C. § 5-14-1.5-3.7(d))

Open Door Law (I.C. § 5-14-1.5)

Meeting Memoranda ctd.

- The memoranda/minutes are to be available within a reasonable period of time after the meeting for inspection and copying. (IC 5-14-1.5-4(c))
- Draft minutes of a public meeting are subject to disclosure despite not being in final form or adopted by the governing body. (*Formal Opinion 98-FC-8*)

Open Door Law (I.C. § 5-14-1.5)

Electronic Meetings

- Permissible with technology that allows the board and the public to simultaneously hear and see each other
- Can be 100% virtual during disaster emergencies and partially virtual otherwise – must have a quorum present in person
- Create a policy

(I.C. § 5-14-1.5-3.5 & 3.7)

Open Door Law (I.C. § 5-14-1.5)

May not do electronic meeting if taking final action to:

- Adopt a budget
- Make a reduction in personnel
- Establish or increase a fee or penalty of some sort
- Initiate referendum
- Use eminent domain authority or
- Establish, raise or renew a tax

Open Door Law (I.C. § 5-14-1.5)

Violations (I.C. § 5-14-1.5-7 & 7.5)

- Anyone can file a complaint in court or with the public access counselor
- Must file within 30 days
- Court can impose financial penalties against the individuals involved, award attorney's fees to the prevailing party, prohibit future violations, and declare void any policy, decision, or final action

Open Door Law (I.C. § 5-14-1.5)

General Information:

- The public has the right to record meetings
I.C. § 5-14-1.5-3(a)
- Public comment period is recommended but not required under the ODL
- Voting by secret ballot is not permitted
I.C. § 5-14-1.5-3(b)
- Email isn't considered a meeting

APRA (I.C. § 5-14-3)

Access to Public Records Act (“APRA”)

APRA permits all “persons” access to public records.

The word “Person” includes individuals, businesses, other governmental entities, etc.

APRA (I.C. § 5-14-3)

What is a Public Record (I.C. § 5-14-3-2)

- “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 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 Court of Appeals has added to this definition materials created *for or on behalf of a public agency.*“

APRA (I.C. § 5-14-3)

General Rules (I.C. § 5-14-3-3(a))

- Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 (confidential records).
- A request (1) must identify the record(s) with *reasonable particularity*; and (2) may be, at the discretion of the agency, in writing or on agency form.

APRA (I.C. § 5-14-3)

General Rules ctd. (I.C. § 5-14-3-3(b) & (j))

- The agency shall either make the requested copy (if the agency has reasonable access to a copy machine) or allow the person to make a copy on the agency's equipment or on the person's own equipment.
- Electronic data storage systems--agency shall make reasonable efforts to provide copy of data to a person if medium requested is compatible with agency's system.

APRA (I.C. § 5-14-3)

Response Requirements (I.C. § 5-14-3-9)

- Respond to requests in person or over telephone within 24 hours of receipt
- Respond to mailed, faxed, or e-mailed requests within 7 calendar days of receipt
- Best practice is to respond in writing to all requests

APRA (I.C. § 5-14-3)

Response Requirements ctd.

- Produce records in reasonable time; communication with person requesting is key
- If time for production will be lengthy, provide groups of records in the interim as they are available.

APRA (I.C. § 5-14-3)

Denying Access to Records

- respond to applicant in writing
- state reason for denial with citation to authority
- give name and title or position of person responsible for denial.

(I.C. § 5-14-3-9)

APRA (I.C. § 5-14-3)

Exemptions to Disclosure (I.C. § 5-14-3-4)

- 4(a) Mandatory Confidential Categories
 - Declared confidential by state statute
 - Declared confidential by federal law
 - Declared confidential by public agency rule
 - Confidential financial information
 - Records containing a vendor's trade secrets

APRA (I.C. § 5-14-3)

Exemptions to Disclosure (I.C. § 5-14-3-4)

- 4(b) Discretionary categories:
 - Attorney work product
 - Inter or intra-agency advisory or deliberative material that are expressions of opinion or speculative in nature *and communicated for* purpose of decision-making
 - Materials prepared for executive session (with some exceptions)

APRA (I.C. § 5-14-3)

- **4(b) Discretionary categories ctd.:**
 - Library or archival records:
 - Which can be used to identify any library patron, or
 - Which are deposited with or acquired by a library upon a condition that the records be disclosed only
 - to qualified researchers after the passing of a period of years; or
 - after the death of person.

Tip: Create a policy!

APRA (I.C. § 5-14-3)

- 4(b) Discretionary categories ctd.:
 - Personnel file information may be withheld, but some portions must be disclosed:
 - name, compensation, job title, business address, business telephone number, job description, education and training, previous work experience, dates of first and last employment;

APRA (I.C. § 5-14-3)

- information relating to status of formal charges against employee; and
- the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

* Personnel file must always be made available to the affected employee or applicant

APRA (I.C. § 5-14-3)

Fees (I.C. § 5-14-3-8)

- May not charge to search or inspect records
- Board determines copy fee under I.C. § 5-14-3-8 guidelines
- Library may require advance payment

APRA (I.C. § 5-14-3)

Common Problems

- Improperly requiring a subpoena from the requester
- Denying access to entire record when records contain partially disclosable and partially non-disclosable information
- Not responding within prescribed time
- Denying access to records but not indicating the statutory authority

APRA (I.C. § 5-14-3)

Common Problems, ctd.

- Not regularly communicating with requester when the request is large and agency is taking time to review and compile records
- Requiring requester to indicate why he/she wants the records
- Assuming certain records are confidential or proprietary absent legal authority

APRA (I.C. § 5-14-3)

Violations (I.C. § 5-14-3-9.5)

- Anyone can file a complaint in court or with the public access counselor
- Must file within 30 days
- Court can impose financial penalties against the individuals involved and award attorney's fees to the prevailing party

APRA (I.C. § 5-14-3)

Violations, ctd. (I.C. § 5-14-3-9.5)

- Management level employee protected if acting at the direction of officer; also
- It is a defense to the imposition of a civil penalty if the individual was acting in reliance of:
 - Opinion of attorney
 - Opinion of Indiana Attorney General
 - (I.C. § 5-14-1.5-7; I.C. § 5-14-3-9)

APRA (I.C. § 5-14-3)

PAC Enforcement Authority

- PAC Opinions are advisory only
- Library is required to cooperate with PAC in any investigation or proceeding (I.C. § 5-14-5-5)
- Will typically need an opinion from PAC to get award of attorney's fees in court

Public Access Counselor

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Visit www.in.gov/pac for the *Handbook on Indiana's Public Access Laws*, advisory opinions, and other resources.