

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

INDIANA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# INDIANA

*Prepared by:*  
Jan M. Carroll  
Kara M. Kapke  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Telephone: 317-231-7265  
e-mail: jan.carroll@btlaw.com



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## INDIANA

**SIXTH EDITION**  
**2011**

Previously Titled  
Tapping Officials' Secrets

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### **EDITORS**

Gregg Leslie, Legal Defense Director  
Mark Caramanica, Freedom of Information Director

### **ASSISTANT EDITORS**

Christine Beckett, Jack Nelson Legal Fellow  
Aaron Mackey  
Emily Peterson

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



**Prepared by:**

Jan M. Carroll  
 Kara M. Kapke  
 BARNES & THORNBURG LLP  
 11 South Meridian Street  
 Indianapolis, Indiana 46204  
 Telephone: 317-231-7265  
 e-mail: jan.carroll@btlaw.com

**FOREWORD**

The Indiana General Assembly has given the public and the news media broad access to meetings of public agencies and to records of the public's business through the Indiana Open Door Law and the Indiana Access to Public Records Act. Recent amendments have attempted to provide quicker resolution of access questions through the creation of a state public access counselor and have beefed up the right to recover attorney fees when access requests are denied. In addition, the law now deals with the increasing computerization of public records and the shift to privatization of traditional governmental services. Indiana's access laws resulted from pressure from the news media and the public for greater access to the public's business at various levels of government. Both acts also find their conceptual genesis in the wide-ranging demand for openness in government after Watergate. In the current world of terrorism threats and identity theft, however, the scope of openness may be narrowing to make room for the expanding areas of homeland security and informational privacy. Those who draft and interpret legislation currently face the challenge of striking a balance between the dueling values of disclosure and privacy, openness and security.

The Open Door Law was enacted in 1977 and repealed a portion of the Hughes Anti-Secrecy Act as it related to open meetings. Although there is no official legislative history in Indiana, the intent of the legislators in enacting The Open Door Law is contained in the preamble. The General Assembly declared:

[T]his state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. 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. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.

Ind. Code § 5-14-1.5-1; available at [www.in.gov/legislative/ic/code](http://www.in.gov/legislative/ic/code).

The Open Door Law assumes that a meeting of an agency considering the public's business *must* be open to the public, unless there is a specific statute permitting closure. Indeed, the Indiana Court of Appeals has noted that Indiana's Open Door Law "is the broadest and most sweeping we have found." *Riggin v. Board of Trustees of Ball State Univ.*, 489 N.E.2d 616 (Ind. App. 1986).

Six years after enacting the Open Door Law, the General Assembly followed with a sweeping overhaul of what remained of the Hughes Anti-Secrecy Act — its open records provisions. The Hughes Anti-Secrecy Act, which applied to state and local administrative agencies, defined public records as "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation." The Indiana Court of Appeals noted in a 1980 case that the Anti-Secrecy Act's definition of public records was more conservative than that of the common law. The common law definition considered a record to be a public record if it was created in "the discharge of a duty imposed by law." *Gallagher v. Marion County Victim Advocate Program, Inc.*, 401 N.E.2d 1362, 1366 (Ind. App. 1980). The Anti-Secrecy Act's definition had prompted endless debates over whether a particular record was "required to be kept." The 1983 statute was the product of a legislative study committee which examined the need for revision to the open records law and considered similar laws in other states. The committee's final report noted that the new law is

intended "to cover nearly every document that is generated by every public agency."

As with the Open Door Law, the General Assembly expressed its intent with respect to public records in the language of the statute. The lawmakers found that

[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 non-disclosure 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.

Ind. Code § 5-14-3-1.

Though the law's initial broad scope and intent for openness remain intact, recent amendments have narrowed public access in some respects. For example, in 2003, the definition of "public record" was amended to include material that "is created, received, retained, maintained, or filed by or with a public agency." Ind. Code § 5-14-3-2. The prior definition also included the word "used" in the string of actions performed by an agency that would qualify material as a "public record." See Ind. P.L. 261-2003. In practice, however, this small change to the definition of public record does not seem to have curtailed the public's broad right to access public agency materials.

But other recent changes may produce a more substantial impact. These changes have expanded the types of records exempted from public access, largely in response to the nation's growing concerns about terrorism and informational privacy. The first of these changes were homeland security provisions, adopted in 2003. Mirroring similar changes made to the federal Freedom of Information Act (FOIA) in the wake of the terrorist attacks of Sept. 11, 2001, these amendments permit agencies to deny access to any record or part of a record "which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to a terrorist attack." Ind. Code § 5-14-3-4(b)(19). Procedures an agency must follow to deny an information request under the new anti-terrorism exemption were added at the same time. See Ind. Code § 5-14-3-9(d).

In addition to responding to growing terrorism concerns, the General Assembly also has been receptive to concerns about informational privacy. Recent amendments to the Access to Public Records Act have exempted from disclosure the personal information (telephone number, address and Social Security number) of customers of municipally owned utilities. Ind. Code § 5-14-3-4(b)(20). Originally enacted as a mandatory exemption, this category was amended shortly thereafter to its current status as a discretionary exemption.

Another significant change is reflected in Indiana Administrative Rule 9, which governs access to court records. In 2004, the Indiana Supreme Court substantially amended this rule, which went into effect Jan. 1, 2005. The rule's stated objective is to recognize both the societal benefits of public access and the core values of individual privacy. See Commentary to Ind. Admin. R. 9(A) (available at <http://www.in.gov/judiciary>). The rule calls for balancing these competing interests, providing that if courts prohibit access to certain information, they must "use the least restrictive means and duration" when doing so. Ind. Admin. R. 9(H)(3). However, the rule's many exemptions to disclosure have the potential to swallow the rule's proclaimed policy of "presumptive access" and run afoul of constitutional and common law rights of access to judicial records. See Ind. Admin. R. 9(G) (enumerating exemptions to public access under the rule). Though many

of these exemptions pertain to specific types of records, the revamped rule also contains “catch-all provisions,” which exempt from disclosure any information “excluded from public access by specific court order,” or any information “otherwise ordered sealed by the trial court.” Ind. Admin. R. 9(G)(1)(c) and 9(D)(1). Pursuant to Ind. Code § 5-14-3-4(a)(8), the exemptions in Rule 9, promulgated by the Indiana Supreme Court, must be excluded from public access.

Effective July 1, 2005, subject to specific statutory exceptions, “a state agency may not disclose an individual’s Social Security number.” Ind. Code § 4-1-10. This statute authorizes the attorney general to investigate alleged violations, and imposes criminal penalties for such violations. Though not a part of the Indiana Access to Public Records Act, it is found in the part of the Indiana Code addressing fair information practices for agency collection and use of personal information, the new Social Security number law may affect substantial types of records that agencies can disclose. However, because the Access to Public Records Act provides that access must be granted if confidential information can be redacted, the impact of Social Security number confidentiality on public records as a whole may be minimized. Although the law’s impact on public access remains to be seen, its passage reflects a growing awareness among legislators of the ways in which personal information can be abused, and the corresponding need to ensure that such information is protected.

This tension between privacy on the one hand and openness of government on the other is a balancing act that is played out in the federal Freedom of Information Act (FOIA), as well. One commentator has noted the similarities between Indiana’s Access to Public Records Act and the federal FOIA. See Eric J. Graninger, Note, *Indiana Opens Public Records: But (b)(6) May Be the Exception That Swallows the Rule*, 17 Ind. L. Rev. 555 (1984). Both statutes generally authorize access to a wide variety of documents created, received or maintained by public agencies, and then provide specific exceptions to that general rule of access. The exemptions in the Access to Public Records Act and the Freedom of Information Act are not identical, but they do overlap. Recent amendments to each act, such as the anti-terrorism provisions, show a continuation of this trend. As a result, when interpreting the Indiana statute, Indiana courts may find guidance in federal case law on the Freedom of Information Act. *Id.* at 558 n.10; See, e.g., *Pigman v. Evansville Press*, 537 N.E.2d 547 (Ind. App. 1989); *Indiana Civil Liberties Union v. Indiana Gen. Assembly*, 512 N.E.2d 432 (Ind. App. 1987).

## Open Records

### I. STATUTE -- BASIC APPLICATION

#### A. Who can request records?

##### 1. Status of requestor.

“Any person may inspect and copy the public records of any public agency during the regular business hours of the agency. . .” Ind. Code § 5-14-3-3(a). See *City of Elkhart v. Agenda: Open Gov’t Inc.*, 683 N.E.2d 622 (Ind. App. 1997) (city had no discretion to deny or condition access to office phone records). Governmental entities are “persons” under the statute. See *Knox County Council v. Sievers*, 895 N.E.2d 1263 (Ind. Ct. App. 2008).

##### 2. Purpose of request.

“No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.” Ind. Code § 5-14-3-3(a).

##### 3. Use of records.

Commercial use of public records obtained on disk or tape under the 1995 “enhanced access amendments” may be restricted by state agency rule or local ordinance adopted under Ind. Code § 5-14-3-3(e). Use of such records for news purposes, nonprofit activities, or academic research is not prohibited. Ind. Code § 5-14-3-3(e).

#### B. Whose records are and are not subject to the act?

##### 1. Executive branch.

Because of the expansive definition of public agency and public records, Ind. Code § 5-14-3-2, the records of the executive branch are subject to the Act unless they are covered by a specific statutory exemption.

###### a. Records of the executives themselves.

The Act does not differentiate between records of the office-holder and other public records. If the record is one that is “created, received, maintained, or filed by or with a public agency,” Ind. Code § 5-14-3-2, it should be subject to access. Although this definition of public records remains quite broad, it used to be even wider in its scope. Before 2003, the definition included any record that had been “created, received, maintained, *used*, or filed by or with a public agency.” Ind. Code § 5-14-3-2 (2001) (emphasis added). Indiana Public Law 261-2003, Sec. 5 deleted “used” from the definition

###### b. Records of certain but not all functions.

The Act does not limit itself to certain executive branch functions.

##### 2. Legislative bodies.

Unless covered by a specific exemption, all records of legislative bodies are subject to the Act. Ind. Code § 5-14-3-2. However, in a bizarre decision, the Indiana Supreme Court has held that separation of powers considerations prevent the courts from enforcing the access statutes against the Indiana General Assembly. *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993).

##### 3. Courts.

Unless covered by a specific exemption (or by a properly issued protective order in litigation), all records of courts are covered by the Access to Public Records Act. Ind. Code § 5-14-3-2. The Act, however, provides for mandatory exemption from disclosure for any information that is “declared confidential by or under rules adopted by the supreme court of Indiana.” Ind. Code § 5-14-3-4(a)(8). In 2004, the Indiana Supreme Court adopted amendments to Administrative Rule 9, which governs access to court records. The stated objective of the rule is to “provide maximum public accessibility to court records, taking into account public policy interests that are not always fully compatible with unrestricted access.” See Commentary to Ind.

Admin. R. 9(A). Though many of the rule's provisions simply reiterate exemptions provided by the Access to Public Records Act, *see, e.g.*, Ind. Admin. R. 9(G)(2)(b)(i)-(ix), the rule also exempts from disclosure many additional types of information. *See* Ind. Admin. R. 9(G) (providing a non-exclusive list of exemptions from disclosure, including, among others, records relating to adoption; Acquired Immune Deficiency Syndrome; child abuse; drug tests; grand jury proceedings; paternity records; medical, mental health or tax records; account numbers or personal identification numbers (PINs); and expungement orders entered in criminal or juvenile proceedings). This exclusion can occur without a hearing and without a balancing of the competing interests involved. *See Bobrow v. Bobrow*, 810 N.E.2d 726 (Ind. App. 2004) ("When public records fall within a mandatory exception under Ind. Code § 5-14-3-4(a), a trial court can seal those records without holding . . . a hearing and balancing the competing interests.") Administrative Rule 9 in many respects is contrary to constitutional and common law rights of access to judicial records, adopting statutory exceptions without regard to whether such records were traditionally public when the First Amendment was adopted. For example, juvenile proceedings were not closed to the public at the time the Bill of Rights and the Indiana constitution were adopted. At common law, juvenile proceedings were not conducted in secret but were part of the public record, as Justice Sullivan explained in his article tracing the roots of Indiana's juvenile court system. *See* Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 Ind. L. Rev. 279, 279 (1997). Yet by statute and under Admin. R. 9, juvenile court proceedings are closed, except in limited circumstances.

In addition to specifying certain types of documents that are exempt from disclosure, Rule 9 also includes a "catch-all provision," which allows for exemption of any information "excluded from public access by specific court order." Ind. Admin. R. 9(G)(1)(c). Litigants seeking to exclude material from public access under this provision must follow Administrative Rule 9(H), which requires a public hearing before sealing records. *See Travelers Casualty & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 114 (Ind. 2008) (vacating court order sealing materials). Thus, although state courts are subject to Indiana's Access to Public Records Act, § 5-14-3-4(a)(8) provides the judiciary with the opportunity to set its own rules, which it has done with its revamping of Rule 9. These rule changes went into effect Jan. 1, 2005.

In addition to Rule 9, Indiana case law and certain statutes provide additional guidelines for access to court records. *See, e.g.*, Ind. Code § 31-39-1-2 (except under certain circumstances, juvenile court records are confidential even though juveniles were tried in public when the First Amendment was adopted. *See* Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 Ind. L. Rev. 279, 279 (1997)); *Woolley v. Washington Township Small Claims Court*, 804 N.E.2d 761 (Ind. App. 2004) (Washington Township Small Claims Court was a "public agency" under the Access to Public Records Act, but because an affidavit signed by a judge was not a "public record," the court was not required to follow the Access to Public Records Act with regard to the timeliness of its response and a reason for denying a citizen's request).

#### 4. Nongovernmental bodies.

##### a. Bodies receiving public funds or benefits.

The definition of "public agency" includes any entity or office that is subject to budget review by the State Board of Tax Commissioners or the governing body of a county, city, town, township or school corporation, or subject to an audit by the State Board of Accounts. Under this definition, non-governmental bodies supported or maintained by public funds (as distinguished from receiving payment for measurable goods or services) are subject to the Act. Ind. Code § 5-14-3-2.

The State Board of Accounts is empowered to "examine all accounts and all financial affairs of every public . . . entity." Ind. Code § 5-11-1-9. A "public entity" is any provider of goods, services, or other benefits that is: (1) maintained in whole or in part at public expense; or (2) supported in whole or part by appropriations or public funds or

by taxation. *Indianapolis Convention & Visitors Ass'n Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991) (not-for-profit corporation which received a percentage of county hotel/motel tax revenues to promote Indianapolis tourism is a public agency subject to the Access to Public Records Act).

In 2007, the statute was amended to clarify that providers of goods and services are not public agencies if they meet the following criteria: (1) the provider receives public funds through an agreement with the public entity, in exchange for services, goods, or other benefits; (2) the amount of fees received "does not involve a consideration of the tax revenues or receipts" of the governmental entity; (3) the public entity negotiates the fee; (4) the public entity is billed for services or goods actually provided; and (5) the provider is not required to be audited by the state board of accounts. Ind. Code § 5-14-3-2.1.

##### b. Bodies whose members include governmental officials.

Unless the group exercises any part of the executive, administrative, judicial or legislative power of the state or its political subdivisions or is subject to budget review or governmental audit, it is not subject to the Act. Ind. Code § 5-14-3-2.

#### 5. Multi-state or regional bodies.

If the body meets the statute's definition of public agency, by exercising the executive, administrative, judicial, or legislative power of the state or its political subdivisions, or is subject to budget review or governmental audit for the receipt of public funds, it would be subject to the Act. Ind. Code § 5-14-3-2.

#### 6. Advisory boards and commissions, quasi-governmental entities.

The definition of public agency includes "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." Ind. Code § 5-14-3-2.

#### 7. Others.

*Lane v. Frankfort Cmty. Sch. Bldg. Trades Corp.*, 747 N.E.2d 1172 (Ind. App. 2001) (Building Trades Corporation's exemption from Access to Public Records Act and Open Door Law on account of not being a "public agency" under those statutes was a relevant factor in the court's determination that the Corporation also was not a "government entity" entitled to protections afforded to such entities by the Indiana Tort Claims Act and the Comparative Fault Act); *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. App. 1999) (whether development corporation working closely with the county was a "public agency" under the Act was an issue appropriate for resolution by the trial court).

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

A public record is "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 . . ." Ind. Code § 5-14-3-2. This broad definition used to be even broader, having extended to all material "created, received, retained, maintained, *used*, or filed by or with a public agency." Ind. Code § 5-14-3-2 (2001) (emphasis added). In 2003, however, Indiana Public Law 261-2003 § 5, dropped the word "used." The law does, however, exempt confidential records, Ind. Code § 5-14-3-4(a), and also gives public agencies the discretion to deny access to enumerated categories of records, Ind. Code § 5-14-3-4(b).

#### 2. What physical form of records are covered?

The definition of "public record" includes anything 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. Ind. Code § 5-14-3-2. The 1995 amendments providing “enhanced access” to electronic records effectively nullified *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700 (Ind. App. 1992), which upheld the board’s refusal to produce computer tapes containing Marion County’s voter registration list.

### 3. Are certain records available for inspection but not copying?

In general, all public records are available for inspection and copying (not just one or the other). Ind. Code § 5-14-3-3(a). However, if a public agency does not have reasonable access to a machine capable of reproducing the record, or if the person cannot reproduce the record by “enhanced access” under Ind. Code § 5-14-3-3.5, then the person seeking access may only inspect and manually transcribe the record. Ind. Code § 5-14-3-8(e)(2).

#### D. Fee provisions or practices.

##### 1. Levels or limitations on fees.

The statute authorizes the Indiana Department of Administration to establish a uniform copying fee for state agencies. The fee may not exceed the average cost of copying records by state agencies or 10 cents per page, whichever is greater. Ind. Code § 5-14-3-8(c). A public agency that is not a state agency may establish a fee schedule for certification, copying or fax machine transmission of documents. The fee may not exceed the actual cost of copying, etc., and must be uniform throughout the agency and to all purchasers. Ind. Code § 5-14-3-8(d). “Actual costs” means the cost of the paper and the per-page cost to use copying or facsimile equipment and does not include labor or overhead costs. *Id.*

Certain scattered statutes also establish fees for public records. *See, e.g.*, Ind. Code § 9-29-11-1 (setting a minimum fee of \$3 as fee for accident reports); Ind. Code § 33-19-6-(b) (establishing a clerk’s fee of \$1 for copies of court records); Ind. Code § 36-2-7-10 (setting fee for county recorders).

##### 2. Particular fee specifications or provisions.

###### a. Search.

The statute generally prohibits public agencies from charging any fee to inspect, search for, examine or review a record to determine whether the record may be disclosed. Ind. Code § 5-14-3-8(b)(1)-(2). The sole exception is that a “reasonable” fee is authorized “for permitting a governmental agency to inspect public records by means of an electronic device.” Ind. Code § 5-14-3-8(i).

###### b. Duplication.

For providing a duplicate of a computer tape, computer disk, microfilm or similar record system containing information, a public agency may charge a fee that does not exceed the sum of the agency’s direct cost of supplying the information in that form and the standard cost for selling the same information in the form of a publication. Ind. Code § 5-14-3-8(g). In the case of the Legislative Services Agency, the non-partisan support arm of the Indiana General Assembly, the fee may be a reasonable percentage of the agency’s direct cost of maintaining the system in which the information is stored. However, that fee cannot exceed the sum of the agency’s direct cost of supplying the information in that form and the standard cost for selling the same information in the form of a publication. *Id.* “Direct cost” means 105 percent of the cost of initial program development, labor required for retrieval, and the medium for electronic output. Ind. Code § 5-14-3-2. A 1993 amendment authorized “enhanced access” to public records through electronic devices other than those provided by the public agency. Ind. Code § 5-14-3-3.5. This cleared the way for outside vendors to provide electronic access to public records for a fee. Enhanced access may be provided only if the requester or a third party has en-

tered into a contract with the agency. Agencies may restrict the use to which the information obtained through enhanced access may be put. Ind. Code § 5-14-3-3(e). The agency may charge “any reasonable fee agreed on in the contract.” Ind. Code § 5-14-3-8(h).

###### c. Other.

No other fees are authorized under the Act.

##### 3. Provisions for fee waivers.

As of 2011, there are no mandatory fee waivers under the Act. However, public agencies are authorized to waive fees at their discretion in many instances. For example, public agencies may waive the fees for providing electronic maps to users for a noncommercial purpose, including journalism, academic research, nonprofit activities and public agency program support. Ind. Code § 5-14-3-8(k). A public agency also may waive the fee for permitting a governmental entity to inspect public records by means of an electronic device. Ind. Code § 5-14-3-8(i). While the statute requires public agencies to set copying fees, there is nothing that expressly requires the agencies to charge the fees. Ind. Code § 5-14-3-8.

##### 4. Requirements or prohibitions regarding advance payment.

The law allows a public agency to request advance payment of copying costs. Ind. Code § 5-14-3-8(e).

##### 5. Have agencies imposed prohibitive fees to discourage requesters?

Because of the statutory fee limitations, there has been no apparent effort to “gouge” persons seeking access.

#### E. Who enforces the act?

Violations of the Access to Public Records Act are enforced in the courts.

##### 1. Attorney General’s role.

Aggrieved parties under the Act seek remedy by filing a lawsuit in any court of competent jurisdiction in the state. The attorney general has no role in the enforcement of public access.

##### 2. Availability of an ombudsman.

The office of the Indiana Public Access Counselor was created in 1999. Ind. Code § 5-14-4. The Public Access Counselor is appointed by the governor for a four-year term, and is responsible for conducting research, preparing educational materials, responding to informal inquiries made by the public and public agencies concerning the public access laws, and issuing advisory opinions to interpret the public access laws upon the request of person or a public agency. Ind. Code 5-14-4-6 and -10. The Public Access Counselor’s advisory opinions are available online at <http://www.in.gov/pac/2330.htm>, and its informal opinions are available online at <http://www.in.gov/pac/2329.htm>.

Public agencies must cooperate with the Public Access Counselor in any investigation or proceeding. Ind. Code § 5-14-5-5. However, seeking the opinion of the Public Access Counselor is separate from the enforcement process that occurs in the courts. Consulting the Public Access Counselor is not required, Ind. Code § 5-14-5-4, but is advisable because failing to do so precludes a prevailing plaintiff from collecting attorney fees if litigation becomes necessary. Ind. Code § 5-14-3-9(i).

##### 3. Commission or agency enforcement.

The Act neither requires nor provides for enforcement procedures by a commission or agency. A person denied access should seek the intervention of the state Public Access Counselor, not only to facilitate access but also to lay the foundation for entitlement to attorney fees if litigation is required. Ind. Code § 5-14-3-9(i).

## F. Are there sanctions for noncompliance?

In addition to authorizing a lawsuit to compel the public agency to release a record, Ind. Code § 5-14-3-9(e), the statute also provides for disciplinary consequences to employees who violate the Act. Except as provided by Ind. Code § 4-15-10 (the state employees' Bill of Rights), an employee or officer of a public agency who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor. Ind. Code § 5-14-3-10(a). Furthermore, if a public employee intentionally, knowingly or recklessly discloses or fails to protect information classified as confidential by state statute, that employee may be disciplined in accordance with the personnel policies of the agency that employs him. Ind. Code § 5-14-3-10(b). If, however, a public employee "unintentionally or unknowingly" discloses confidential or erroneous information in response to a request under the Access to Public Records Act, or if the public employee discloses confidential information in reliance on an advisory opinion by the public access counselor, then that employee is "immune from liability" for such a disclosure. Ind. Code § 5-14-3-10(c).

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

##### a. General or specific?

The statute specifies the categories of records that are exempt. Ind. Code § 5-14-3-4.

##### b. Mandatory or discretionary?

The Act has both mandatory and discretionary exemptions. There are mandatory exemptions for confidential records and discretionary exemptions for a laundry list of records. Ind. Code §§ 5-14-3-4(a) and (b). Recent amendments to §§ 5-14-3-4(a) and (b) have added exemptions for autopsy records, personal information of municipal utility customers, and, perhaps most notably, exceptions for records "which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack." Ind. Code § 5-14-3-4(a)(11) and (b)(19)-(20).

##### c. Patterned after federal Freedom of Information Act?

In general, the exemptions are patterned after the Freedom of Information Act (FOIA); but over time, the list has been expanded to meet the concerns of various interest groups. The 2003 addition of Ind. Code § 5-14-3-4(b)(19), creating a detailed discretionary exemption for information relating to terrorist attacks, mirrors a similar curtailment of FOIA in response to the post-Sept. 11 homeland security initiative.

#### 2. Discussion of each exemption.

Twelve categories of records specified by the Act are not subject to disclosure unless access is required by state or federal statute or access is ordered by a court under the rules of discovery. Ind. Code §§ 5-14-3-4(a)(1)-(12):

- (i) Those declared confidential by state statute.
- (ii) Those declared confidential by administrative rule under specific statutory authority to classify public records as confidential.
- (iii) Those required to be kept confidential by federal law.
- (iv) Records containing trade secrets. Trade secrets are defined as: "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure and use; and (2) is the subject of efforts that are reasonable under the circumstances

to maintain its secrecy." Ind. Code § 24-2-3-2. Whether information constitutes "trade secrets" is an issue subject to judicial interpretation. *See Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 810 N.E.2d 1179 (Ind. App. 2004) (telephone service providers' responses to an Indiana agency's survey were public records, not protected by trade secret exemption, where not all providers requested response confidentiality and where most of the information was very general).

(v) Confidential financial information obtained, upon request, from a person. This does not include information that is filed with or received by a public agency pursuant to state statute.

(vi) Information concerning research, including actual research documents, conducted under the auspices of a college or university.

(vii) Grade transcripts and license examination scores obtained as part of a licensure process. This provision is limited to test results to the extent that the individual student can be identified. Att'y Gen. Op. 85-10 (1985).

(viii) Records declared confidential by or under rules adopted by the Supreme Court of Indiana. *See* Ind. Admin. R. 9.

(ix) Patient medical records and charts created by a provider, unless the patient gives written consent under Ind. Code § 16-39.

(x) Application information declared confidential by board of the Indiana economic development corporation under Ind. Code § 5-28-16.

(xi) A photograph, video recording or audio recording of an autopsy, except as provided in Ind. Code § 36-2-14-10 (pertaining to coroners' use of autopsy records). This exemption was added to the Indiana Code in 2002. *See* Ind. P.L. 1-2002, § 17.

(xii) A Social Security number contained in the records of a public agency.

Twenty-three categories of documents may be disclosed at the discretion of the public agency. Ind. Code §§ 5-14-3-4(b)(1)-(23):

- (i) Investigatory records of law enforcement agencies. However, under Ind. Code § 5-14-3-5, certain law enforcement information must be made available. This includes information about an individual who is arrested or jailed and also police logs of crimes, accidents and complaints.
- (ii) The work product of an attorney who, pursuant to state employment or appointment to a public agency, represents a public agency, the state, or an individual.
- (iii) Test questions, scoring keys and other examination data used in administering a licensing, employment or academic examination.
- (iv) Scores of tests if the person is identified by name and has not consented to the release of his scores.
- (v) Records relating to pending *negotiations* involving certain enumerated agencies and commissions with industrial, research or commercial prospects. Final offers must be released.
- (vi) Intra-agency or inter-agency advisory or deliberative materials that are expressions of opinion or are of a speculative nature and are communicated for purposes of decision-making.
- (vii) Diaries, journals or other personal notes serving as the functional equivalent of a diary or a journal.
- (viii) Personnel files of public employees and files of applicants for public employment. However, the following information must be disclosed: the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment of present or former officers or employees of the agency, information relating to the status of any formal charge against the employee, and information about disciplinary actions in which final action has been

taken and resulted in the employee being disciplined. All personnel file information is available to the affected employee or his representative. *See* Att’y Gen. Op. 87-16 (1987) (employment contract of any public official or employee available for inspection or copying upon request). This subsection does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

- (ix) Minutes or records of hospital medical staff meetings.
- (x) Administrative or technical information that would jeopardize a record-keeping or security system.
- (xi) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it.
- (xii) Records specifically prepared for discussion or developed during discussion in an executive session authorized by the Indiana Open Door Law, Ind. Code § 5-14-1.5-6.1. However, this subsection does not apply to information required to be available under subsection (viii) above, pertaining to personnel files of public employees.
- (xiii) The work product of the Legislative Services Agency under personnel rules approved by the Legislative Council.
- (xiv) The work product of individual members and the partisan staffs of the General Assembly.
- (xv) The identity of a donor of a gift made to a public agency if non-disclosure is requested as a condition of the gift.
- (xvi) Library or archival records that can be used to identify library patrons or have been acquired by a library with conditions on disclosure.
- (xvii) The identity of persons who contact the Bureau of Motor Vehicles about a driver’s ability to safely operate a motor vehicle, and related records of the Drivers License Advisory Committee.
- (xviii) School safety and security measures, plans and systems.
- (xix) A record or 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. This section was added in 2003. *See* Ind. P.L. 173-2003, § 5. The section includes a list of ten types of records included under this description. *See* Ind. Code § 5-14-3-4(b)(19)(A)-(J); *see also* § II(E) of this outline (Homeland Security Measures).
- (xx) The following information concerning a customer of a municipally owned utility (as defined in Ind. Code § 8-1-2-1): telephone number, address and Social Security number. This section was added in 2002 as a mandatory exception to the Act under § 5-14-3-4(a), but was changed to a discretionary exemption, listed under § 5-14-3-4(b), in 2003. *See* Ind. P.L. 1-2002, § 17 and Ind. P.L. 173-2003, § 5.
- (xxi) The telephone number and address of a complainant in the records of a law enforcement agency, except if the address must be available if it is the location of the suspected crime or accident.
- (xxii) The name, compensation, job title, and other information about a law enforcement officer working in an undercover capacity.
- (xxiii) Records requested by an offender relating to a correctional officer, the victim of a crime, a family member of either, or that concern the security of a jail or correctional facility.

## B. Other statutory exclusions.

The Act prohibits commercial use of lists of employees of a public agency, persons attending conferences or meetings at a state institution of higher education or persons involved in programs or activities conducted or supervised by such an institution, and students enrolled in public schools, if the school corporation has adopted a policy restricting the use of such lists. Ind. Code § 5-14-3-3(f). State agen-

cies by administrative rule and other governmental units by ordinance may restrict the commercial use of information obtained through “enhanced access.” Ind. Code § 5-14-3-3(e).

Additionally, if a document is declared confidential by state statute, this declaration overrides the general provisions of the Access to Public Records Act. The Public Access Counselor has provided a “nonexclusive list” of statutes that restrict access to certain records. The most current version of the list is available on Page 52 of the Indiana Public Access Handbook, which is available to the public on the Public Access Counselor’s Web site at [http://www.in.gov/pac/files/pac\\_handbook.pdf](http://www.in.gov/pac/files/pac_handbook.pdf). The list, prepared jointly by the offices of the Public Access Counselor and the Attorney General, also contains a non-exclusive list of records that are statutorily required to be disclosed. A few examples of access *restrictions* from the list include: complaints and correspondence with Consumer Protection Division of the Attorney General’s Office are confidential with certain exceptions (Ind. Code § 4-6-9-4); criminal intelligence information is confidential (Ind. Code § 5-2-4-6); the Department of Revenue shall not divulge any information disclosed concerning inheritance taxes, with exceptions (Ind. Code § 6-4.1-12-12).

## C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

If the document is a public record, the Access to Public Records Act applies and overrides common law prohibitions in cases where there is a conflict between a statute and the common law.

With respect to court-derived exclusions, the Act prescribes a mandatory exemption from disclosure for materials that are “declared confidential by or under rules adopted by the supreme court of Indiana.” In 2004, the Indiana Supreme Court adopted amendments to Administrative Rule 9, governing access to court records. The rule’s intent is to balance the societal benefits of public access with the values of individual privacy. *See* Commentary to Ind. Admin. R. 9(A). However, the changes which took effect Jan. 1, 2005, carve out exceptions to public access that have the potential to swallow the rule’s proclaimed framework of “presumptive openness.” *See* Ind. Admin. R. 9(G) (enumerating a non-exclusive list of information to which courts are authorized or required to bar public access). Among the myriad exemptions under the amended Rule 9 is an additional “catch-all” provision, which prohibits the disclosure of any information which is “excluded from public access by specific court order.” Ind. Admin. R. 9(G)(1)(c); *see also* Ind. Admin. R. 9(D)(1) (providing that access to court records “is required except as provided by subsections (G) and (H), or as otherwise ordered sealed by the trial court.” Nonetheless, Rule 9 does require that, if the court prohibits access to a record, it must “use the least restrictive means and duration.” Ind. Admin. R. 9(H)(3). Thus, although the potential effect of the Rule 9 amendment is quite large, more time must pass before its practical implications are known, and certain provisions of the rule may work to minimize the impact of the public access exemptions.

## D. Are segregable portions of records containing exempt material available?

Yes. Under Ind. Code § 5-14-3-6, if a public record contains disclosable and non-disclosable information, the public agency must separate the material that may be disclosed and make it available for inspection and copying. *See Unincorporated Operating Div. of Indiana Newspapers v. Trs. of Indiana Univ.*, 787 N.E.2d 893 (Ind. App. 2003) (Most of a state university’s investigatory materials regarding a controversial basketball coach were protected from public access, but a newspaper could access certain materials after student and deliberative information were redacted; *but see Journal Gazette v. Bd. of Trustees of Purdue Univ.*, 698 N.E.2d 826 (Ind. Ct. App. 1998) (denying access to grievances about alleged NCAA violations)

## E. Homeland Security Measures.

In 2003, the General Assembly amended Ind. Code § 5-14-3-4(b) to include an additional discretionary exemption for information “which

would have a reasonable likelihood of threatening public safety by exposing vulnerability to terrorist attack.” See Ind. P.L. 173-2003 § 17. This section authorizes public agencies, at their discretion, to bar public disclosure of the following:

- (A) a record assembled, prepared or maintained to prevent, mitigate, or respond to an act of terrorism or an act of agricultural terrorism;
- (B) vulnerability assessments;
- (C) risk planning documents;
- (D) needs assessments;
- (E) threat assessments;
- (F) domestic preparedness strategies;
- (G) the location of community drinking water wells and surface water intakes;
- (H) the emergency contact information of emergency responders and volunteers;
- (I) infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water and wastewater systems; and
- (J) detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility located on an airport that is owned, occupied, leased, or maintained by a public agency.

Shortly after adopting the above exemption for materials whose disclosure would threaten public safety, the General Assembly added statutory guidelines that agencies must follow when using the § 5-14-3-4(b)(19) exception to deny requests for records. The statute authorizes the agency to consult with the counterterrorism and security council, established under Ind. Code § 4-3-20, prior to the denial. It further provides that, if the agency does deny the request under § 5-14-3-4(b)(19), either the agency or the counterterrorism and security council must provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening the public safety. Ind. Code § 5-14-3-9(d).

### III. STATE LAW ON ELECTRONIC RECORDS

The definition of “public record” includes information generated on “magnetic or machine-readable media, electronically stored data, or any other material, regardless of form or characteristics.” Ind. Code § 5-14-3-2. The statute was amended in 1993 and 1995 to provide “enhanced access” to electronically stored information if the public agency provides access in that manner. Ind. Code § 5-14-3-3.5. “Enhanced access” is the inspection of a public record (a) by means of an electronic device other than one provided in the office of the public agency, or (b) which requires compiling or creating a list that doesn’t result in permanent electronic storage of that information. Ind. Code § 5-14-3-2. A state agency or public agency “may or may not” provide enhanced access solely at its discretion. Ind. Code § 5-14-3-3(c)(1); see also Ind. Code § 5-14-3-3.6(b) (“As an additional means of inspecting and copying public records, a public agency may provide enhanced access to public records maintained by the public agency.”); and § 5-14-3-3.5(a)-(b) (authorizing the same for a state agency, as defined in Ind. Code § 4-13-1-1).

#### A. Can the requester choose a format for receiving records?

If the public agency agrees to provide enhanced access, the requester could theoretically choose a format, because the definition of “direct cost” includes the cost of developing a program for retrieving the electronic records. Ind. Code § 5-14-3-2. A person seeking enhanced access directly from a public agency (instead of an intermediate pro-

vider) must enter into a contract with that agency. Ind. Code § 5-14-3-3.5(c)(1). Presumably the format could be one of the contract terms.

However, since 2003, public agencies submitting reports to the general assembly, *must* do so electronically. Paper submission of such reports is prohibited, and no state funds may be used to duplicate, print, distribute or mail a report to the General Assembly. Ind. Code §§ 5-14-6-3 and 5-14-6-4.

#### B. Can the requester obtain a customized search of computer databases to fit particular needs?

In theory a requester may obtain a customized search. However, “a public agency is not required to reprogram a computer system to provide enhanced access.” Ind. Code § 5-14-3-6(d).

#### C. Does the existence of information in electronic format affect its openness?

No. In fact, the statutory mandate to separate disclosable from non-disclosable records applies with equal force to electronic records. Ind. Code § 5-14-3-6(b). See also Ind. Admin. R. 9(D)(2) (rules for public access to court records apply to *all* court records, no matter how the information was created, collected or submitted to the court, and independent of the technology or format of the information).

#### D. How is e-mail treated?

##### 1. Does e-mail constitute a record?

The statute does not specifically address e-mail. However, there is no reason to treat e-mail any differently from any other record under the statute. *But see* Ind. Admin. R. 9(G)(1)(h) (excluding from public access all “personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDAs) or organizers and personal calendars”).

With respect to e-mail addresses, rules promulgated by the Indiana Supreme Court suggest that e-mail addresses and mailing addresses should be treated the same. See, e.g., Commentary to Ind. Admin. R. 9(G) (noting that the prohibition of public access to “addresses” in Rule 9(G) “includes, without limitation, mail and e-mail addresses”).

##### 2. Public matter on government e-mail or government hardware

There is no statutory or case law addressing this issue.

##### 3. Private matter on government e-mail or government hardware

There is no statutory or case law addressing this issue.

##### 4. Public matter on private e-mail

There is no statutory or case law addressing this issue.

##### 5. Private matter on private e-mail

There is no statutory or case law addressing this issue.

#### E. How are text messages and instant messages treated?

##### 1. Do text messages and/or instant messages constitute a record?

The statute does not specifically address text messages or instant messages. However, there is no reason to treat these messages any differently from any other record under the statute.

##### 2. Public matter message on government hardware.

There is no statutory or case law addressing this issue.

##### 3. Private matter message on government hardware.

There is no statutory or case law addressing this issue.

#### 4. Public matter message on private hardware.

There is no statutory or case law addressing this issue.

#### 5. Private matter message on private hardware.

There is no statutory or case law addressing this issue.

#### F. How are social media postings and messages treated?

There is no statutory or case law addressing this issue.

#### G. How are online discussion board posts treated?

There is no statutory or case law addressing this issue.

#### H. Computer software

##### 1. Is software public?

“Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency” may be exempted from disclosure at the agency’s discretion. Ind. Code § 5-14-3-4(b)(11).

##### 2. Is software and/or file metadata public?

“A public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency’s data storage system.” Ind. Code § 5-14-3-3(d). No reported case law interpreting this provision of the Act or addressing metadata.

##### I. How are fees for electronic records assessed?

Public agencies may charge fees for assessing electronic records. For providing a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the public agency or entrusted to it, a public agency may charge a fee, uniform to all purchasers, that does not exceed the agency’s direct cost of supplying the information in that form and the standard cost for selling the same information to the public in the form of a publication. Ind. Code § 5-14-3-8(g). In addition, a public agency may charge a person the direct cost of reprogramming a computer system if the agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information. Ind. Code § 5-14-3-6(c).

##### J. Money-making schemes.

A state agency and political subdivisions may enact rules prescribing the conditions under which a person who receives electronic information may not use the information for commercial purposes. Ind. Code § 5-14-3-3.

##### 1. Revenues.

The statute does not specifically address revenues, but this is the type of information that would be subject to public access. However, an agency may argue this information is encompassed by the exception for “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.” Ind. Code § 5-14-3-4(b)(6).

##### 2. Geographic Information Systems.

Ind. Code § 4-23-7.3-16 provides that GIS data and framework data shall be available through the computer gateway administered under Ind. Code § 4-13.1-2-2(a)(5) by the office of technology and through the state data center.

##### K. On-line dissemination.

There is no statutory or case law addressing this issue.

## IV. RECORD CATEGORIES -- OPEN OR CLOSED

### A. Autopsy reports.

In 2001, a mandatory exception was added to bar disclosure of “a photograph, a video recording, or an audio recording of an autopsy, except as provided in [Ind. Code §] 36-2-14-10.” Ind. Code § 5-14-3-4(a)(11). The same law also amended Ind. Code § 36-2-14-10 to declare autopsy photographs, video recordings, or audio recordings confidential for the purposes of § 5-14-3-4(a)(1), except in certain instances involving a surviving spouse, a government agent acting in an official capacity, or a coroner using the materials for training or educational purposes. Ind. Code § 36-2-14-10(b)-(e); *see also* Ind. P.L. 271-2001, §§ 1, 3, and 4 (enumerating permitted and prohibited disclosures of autopsy records under Ind. Code §§ 5-14-3-4(a)(1), 16-39-7.1 and 36-2-14-10).

Notwithstanding these exceptions, and also notwithstanding the investigative records exception § 5-14-3-4(b)(1), Ind. Code § 36-2-14-18 requires that coroners must make certain information available, effectively mooted *Althaus v. Evansville Courier Co.*, 615 N.E.2d 441 (Ind. App. 1993), and *Heltzel v. Thomas*, 516 N.E.2d 103 (Ind. App. 1987) (coroner’s office is a law enforcement agency, Lake County coroner did not act arbitrarily or capriciously in refusing to disclose autopsy reports).

### B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

The statute does not specifically address worker safety and health inspections or accident investigations by agencies other than law enforcement agencies. However, Ind. Code § 22-3-4-3 denies public access to industrial accident reports and reports of attending physicians, unless the Indiana Industrial Board decides access is required in the public interest.

#### 1. Rules for active investigations.

The statute does not specifically address active investigations. However, an agency may argue this information is encompassed by the exception for “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.” Ind. Code § 5-14-3-4(b)(6).

#### 2. Rules for closed investigations.

The statute does not specifically address active investigations. However, an agency may argue this information is encompassed by the exception for “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.” Ind. Code § 5-14-3-4(b)(6).

### C. Bank records.

Bank records of a public agency are subject to disclosure under the general provisions of the statute. Bank records of private entities may be disclosed if they are “filed with or received by a public agency pursuant to state statute.” Ind. Code § 5-14-3-4(a)(5).

### D. Budgets.

The Act does not specifically address budgets, which are subject to disclosure under the general provisions of the statute.

### E. Business records, financial data, trade secrets.

Records containing trade secrets are confidential. Ind. Code § 5-14-3-4(a)(4). Confidential financial business information obtained, filed with a public agency pursuant to state statute, is subject to disclosure.

Ind. Code § 5-14-3-4(a)(5). Administrative or technical information that would jeopardize a record-keeping or security system may not be disclosed by public agency unless specifically required by law or court order. Ind. Code § 5-14-3-4(a)(10). See section II(A)(2)(iv) of this outline for further discussion of the Act's trade secret exemption.

#### F. Contracts, proposals and bids.

The statute does not specifically address such items, which are subject to disclosure under the general provisions of the statute. However, state bidding laws require sealed bids. Ind. Code §§ 4-13.3-5-2 and 4-13.6-5-8. After the bids are opened, they are subject to public inspection and copying. Ind. Code §§ 4-13.4-2-7 and 4-13.4-5-2(b). Records of negotiations with certain enumerated agencies need not be disclosed while negotiations are in progress. Ind. Code § 5-14-3-4(b)(5). After negotiations have terminated, the terms of a final offer shall be disclosed. *Id.*

#### G. Collective bargaining records.

The statute does not specifically address collective bargaining records. However, under the Open Door Law, a public agency may meet in executive session to discuss collective bargaining strategy, Ind. Code § 5-14-1.5-6.1(b)(2)(A), and records prepared for or developed during discussion in executive session may be withheld. Ind. Code § 5-14-3-4(b)(12).

#### H. Coroners reports.

There is no specific provision relating to coroner reports in the public records act. But under Ind. Code § 36-2-14-10, coroners must disclose their reports and verdicts, effectively mooting *Altbaus v. Evansville Courier Co.*, 615 N.E.2d 441 (Ind. App. 1993), and *Heltzel v. Thomas*, 516 N.E.2d 103 (Ind. App. 1987) (coroner's office is a law enforcement agency, Lake County coroner did not act arbitrarily or capriciously in refusing to disclose autopsy reports). Ind. Code § 36-2-14-10 also provides that autopsy photographs, video recordings or audio recordings in the custody of a medical examiner are confidential under § 5-14-3-4(a)(1), except in certain instances involving surviving spouses, government agents acting in their official capacity, or a coroner using the material for training or educational purposes, so long as all identifying information is removed from the disclosed material. Ind. Code § 36-2-14-10(b)-(e). "Identifying information" includes the deceased person's name, address, Social Security number, a full view of the face, or identifying marks on the body that are unrelated to the medical condition or medical status. Ind. Code § 36-2-14-10(e)(1)-(5).

#### I. Economic development records.

The Indiana economic development corporation may declare application information exempt from disclosure under the Act. Ind. Code § 5-14-3-4(a)(10). Records of negotiations with the Indiana economic development corporation need not be disclosed while negotiations are in progress. Ind. Code § 5-14-3-4(b)(5). After negotiations have terminated, the terms of a final offer shall be disclosed. *Id.*

#### J. Election records.

There is no specific provision relating to election records. However under Ind. Code § 3-7-30, certain information about those who register under the National Voter Registration Act (the "motor voter law") is confidential.

##### 1. Voter registration records.

Access to statewide voter registration information is governed by Ind. Code § 3-7-26.3-1 *et seq* and Ind. Code § 3-7-26.4-1 *et seq*.

##### 2. Voting results.

Access to voting results is governed by Ind. Code § 3-12-4-8 through -10.

#### K. Gun permits.

Under Ind. Code § 35-47-2-3(l), applications for gun permits and the permits themselves are confidential, except for law enforcement

personnel seeking to determine the validity of a license to carry a handgun, or to persons conducting journalistic or academic work, but the only if all personal identifying information is redacted.

#### L. Hospital reports.

Minutes or records of hospital medical staff meetings may be disclosed at the discretion of the hospital. Ind. Code § 5-14-3-4(b)(9). Patient medical records and charts may not be disclosed unless the patient gives written consent under Ind. Code § 16-39. Ind. Code § 5-14-3-4(a)(9).

#### M. Personnel records.

Public agencies have the discretion to refuse to disclose personnel records to anyone other than the employee or his representative. Ind. Code § 5-14-3-4(b)(8). However, the following certain information must be disclosed: : the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment of present or former officers or employees of the agency, information relating to the status of any formal charge against the employee, and information about disciplinary actions in which final action has been taken and resulted in the employee being disciplined. All personnel file information is available to the affected employee or his representative. See Att'y Gen. Op. 87-16 (1987) (employment contract of any public official or employee available for inspection or copying upon request). This subsection does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

##### 1. Salary.

Salary information is subject to public access. Ind. Code § 5-14-3-4(b)(8).

##### 2. Disciplinary records.

Information relating to the status of any formal charge against the employee, and information about disciplinary actions in which final action has been taken and resulted in the employee being disciplined are subject to public access. Ind. Code § 5-14-3-4(b)(8).

##### 3. Applications.

Access to the files of applicants for public employment may be provided or denied at the discretion of the public agency. Ind. Code § 5-14-3-4(b)(8).

##### 4. Personally identifying information.

Certain personally identifiable personnel information must be provided under . Ind. Code § 5-14-3-4(b)(8): the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment of present or former officers or employees of the agency, information relating to the status of any formal charge against the employee, and information about disciplinary actions in which final action has been taken and resulted in the employee being disciplined.

##### 5. Expense reports.

Expense reports are not specifically addressed in the statute. However, expense reports would typically not be contained in personnel files, but rather would be submitted to the agency's financial officer for payment, and thus would be subject to public access under the general provisions of the Access to Public Records Act.

##### 6. Other.

The job title, business address, business telephone number, job description, education and training background, previous work experience, and the dates of first and last employment of present or former officers or employees of the agency are among the categories of information subject to public access, even if an agency exercises its discre-

tion to deny access to personnel files of public employees or officials. Ind. Code § 5-14-3-4(b)(8).

## N. Police records.

If a person is arrested or summoned for an offense, information that identifies the person, describes any charges on which the arrest or summons is based, and relates to the circumstances of the arrest or the issuance of the summons must be disclosed. If a person is received in a jail or lock-up, information that identifies the person, the reason for being placed in lock-up, including the name of the person on whose order the person is being held, the time and date that the person was received, the time and date of the person's discharge, and the amount of the person's bail or bond, if fixed, shall be disclosed.

### 1. Accident reports.

Accident reports are not specifically addressed. Under Ind. Code § 5-14-3-4(b)(1), access to investigatory records of law enforcement agencies may be provided or denied at the agency's discretion. However, under Ind. Code § 5-14-3-5, certain law enforcement information must be made available. This includes information about an individual who is arrested or jailed and also police logs of crimes, accidents and complaints.

### 2. Police blotter.

The statute requires police agencies to maintain a daily log or record that lists suspected crimes, accidents, or complaints. The record containing the information must be created not later than twenty-four hours after the suspected crime, accident, or complaint has been reported to the agency. Ind. Code § 5-14-3-5.

### 3. 911 tapes.

There is no statutory or case law addressing this issue. Several Public Access Counselor advisory opinions have held that these are law enforcement investigatory records, which under Ind. Code § 5-14-3-4(b)(1) may be provided or denied at the agency's discretion. Earlier opinions from other Public Access Counselors have held that 911 tapes are public records.

### 4. Investigatory records.

Under Ind. Code § 5-14-3-4(b)(1), access to investigatory records of law enforcement agencies may be provided or denied at the agency's discretion. However, under Ind. Code § 5-14-3-5, certain law enforcement information must be made available. This includes information about an individual who is arrested or jailed and also police logs of crimes, accidents and complaints. Criminal intelligence information is confidential under Ind. Code § 5-2-4-6.

#### a. Rules for active investigations.

The statute does not distinguish between active or closed investigations.

#### b. Rules for closed investigations.

The statute does not distinguish between active or closed investigations.

### 5. Arrest records.

If a person is arrested or summoned for an offense, information that identifies the person, describes any charges on which the arrest or summons is based, and relates to the circumstances of the arrest or the issuance of the summons must be disclosed. If a person is received in a jail or lock-up, information that identifies the person, the reason for being placed in lock-up, including the name of the person on whose order the person is being held, the time and date that the person was received, the time and date of the person's discharge, and the amount of the person's bail or bond, if fixed, shall be disclosed.

### 6. Compilations of criminal histories.

Access to criminal histories is governed by Ind. Code § 10-13-2-27. Access is permitted only in fourteen instances, including if the indi-

vidual has applied for employment with the requestor; is a candidate for public office or is a public official; has been or is in the process of being arrested; or has been convicted of major felonies; is a volunteer at a public school or at an organization where contact with children is expected; is being sought by a parent locator service; is a registered sex or violent offender.

### 7. Victims.

Ind. Code § 5-14-3-5(c)(3)(B) requires law enforcement agencies to provide the name and age of victims of crimes or infractions, unless the person is a victim of the sex crimes enumerated in Ind. Code § 35-42-4-1 *et seq.*, including rape, criminal deviate conduct, child molesting, child seduction, child solicitation, and sexual battery.

### 8. Confessions.

Under Ind. Code § 5-14-3-4(b)(1), access to investigatory records of law enforcement agencies may be provided or denied at the agency's discretion. If the confession is admitted at evidence at a court hearing or trial, the public is entitled to access under the First Amendment and common law rights of access to judicial records.

### 9. Confidential informants.

Ind. Code § 4-2-7-8 provides that the identity of any individual who discloses in good faith to the inspector general information alleging a violation of a state or federal statute, rule, regulation, or ordinance is confidential and may not be disclosed to anyone other than the governor, the staff of the office of the inspector general, or an authority to whom the investigation is subsequently referred or certified, unless: (1) the inspector general determines in writing disclosure is in the public interest, or the individual consents to disclosure. Otherwise, this would be encompassed by Ind. Code § 5-14-3-4(b)(1), which gives law enforcement agencies discretion to provide or deny access to investigatory records.

### 10. Police techniques.

There is no statutory or case law addressing this issue, except the general exception under Ind. Code § 5-14-3-4(b)(1) for law enforcement investigatory records, which may be released at the agency's discretion. Criminal intelligence information is confidential under Ind. Code § 5-2-4-6.

### 11. Mug shots.

There is no statutory or case law addressing this issue. Some police agencies have invoked the exception for law enforcement investigatory records, which under Ind. Code § 5-14-3-4(b)(1) may be provided or denied at the agency's discretion.

### 12. Sex offender records.

Access to criminal histories is governed by Ind. Code § 10-13-2-27. Ind. Code § 11-8-8-1 requires sex offenders to register with the state. The Indiana Sheriffs' Association maintains the searchable Indiana Sex and Violent Registry at <http://www.icrimewatch.net/indiana.php>

### 13. Emergency medical services records.

Patient medical records and charts created by a provider are exempt from disclosure under Ind. Code § 5-14-3-4(a)(9), unless the patient consents in writing. Ind. Code § 5-14-3-5(c) requires agencies to maintain a daily log or record of accidents much must include the time, substance, and location of all requests for assistance, and the time and nature of the agency's response.

## O. Prison, parole and probation reports.

The Indiana Department of Correction maintains a searchable offender registry at <http://www.in.gov/apps/indcorrection/ofs/ofs>

## P. Public utility records.

Under Ind. Code § 5-14-3-4(b)(20), access to the telephone number, address, and Social Security number of a customer of a municipally

owned utility may be provided or denied at the discretion of the municipal utility. By implication, the customer's name and billing information must be provided.

## Q. Real estate appraisals, negotiations.

### 1. Appraisals.

Under Ind. Code §8-23-2-6(c), appraisals conducted by or for the Indiana Department of Transportation are confidential. Other agencies often try to rely on the more general language of Ind. Code §5-14-3-4(b)(6), which permits them to provide or deny access, in their discretion, to records that are advisory or deliberative material that are expressions of opinion or are speculative, and are communicated for decision-making purposes.

### 2. Negotiations.

Access to records relating to pending *negotiations* involving certain enumerated agencies and commissions with industrial, research or commercial prospects may be released or denied at the discretion of the agency, under Ind. Code §5-14-3-4(b)(5). Final offers must be released.

### 3. Transactions.

The Access to Public Records Act does not specifically address transactions, but there is no exception that would deny access to records of completed transactions by a public agency. Under Ind. Code §32-21-5-1 *et seq.*, publicly filed disclosure forms are required for many residential real estate sales transactions.

### 4. Deeds, liens, foreclosures, title history.

The Access to Public Records Act does not specifically address deeds, liens, foreclosures or title histories. Deeds and liens are filed with the county recorder's office for the county in which the property is located, and thus would be subject to public access under the general provisions of the Act. Foreclosure records are available from the court in which the foreclosure is pending.

### 5. Zoning records.

The Access to Public Records Act does not specifically address zoning records, but there is no exception that would deny access to them.

## R. School and university records.

### 1. Athletic records.

The Access to Public Records Act does not specifically address such records. However, the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, prohibits the release of student-identifying information by schools that receive federal funds. Thus such records are also confidential under Ind. Code §5-14-3-4(a)(3), which denies access to records which are confidential under federal law.

### 2. Trustee records.

The Access to Public Records Act does not specifically address such records, but universities often try to rely on the more general language of Ind. Code §5-14-3-4(b)(6), which permits them to provide or deny access, in their discretion, to records that are advisory or deliberative material that are expressions of opinion or are speculative, and are communicated for decision-making purposes, or attempt to characterize them as diaries, journals or other personal notes. Ind. Code §5-14-3-4(b)(7).

### 3. Student records.

Grade transcripts are confidential under Ind. Code §5-14-3-4(a)(7). The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, prohibits the release of student-identifying information by schools that receive federal. Thus such records are also confidential under Ind. Code §5-14-3-4(a)(3), which denies access to records which are confidential under federal law.

### 4. Other.

Information concerning research, including actual research documents, conducted under the auspices of a college or university is confidential. Ind. Code §5-14-3-4(a)(6).

Test questions, scoring keys and other examination data used in administering a licensing, employment or academic examination is exempted. Ind. Code §5-14-3-4(b)(3).

Test scores may be released or withheld at the agency's discretion if the person is identified by name and has not consented to the release of his scores. Ind. Code §5-14-3-4(b)(4). It is doubtful this is permitted under FERPA.

School safety and security measures may be released or withheld at the agency's discretion. Ind. Code §5-14-3-4(b)(18).

## S. Vital statistics.

### 1. Birth certificates.

Birth certificates are not public records. However, Ind. Code §16-37-2-9 requires local health offices to make a permanent record of and provide access to the following information from birth certificates: name, sex, date and place of birth, parents' names and birthplaces, and the date the birth certificate was filed. The birth record of an adopted child, however, remains confidential under this statute.

### 2. Marriage & divorce.

Marriage licenses, applications for marriage licenses, and marriage certificates are public records maintained by the clerk of each circuit court. Ind. Code §31-11-4-4(b). The State Department of Health is required to prepare an annual index of all marriages solemnized in Indiana and provide at least one copy of the index to the Indiana State Library. Ind. Code §31-11-4-18. Statistical data derived from marriage records are open to public inspection. Ind. Code §31-11-4-19.

### 3. Death certificates.

Death certificates are not public records. However, Ind. Code §16-37-3-9 requires local health offices to make a permanent record of and provide access to the following information from death certificates: name, sex, age, residence addresses for the decedent for two years before the death, and the place of death.

### 4. Infectious disease and health epidemics.

There is no statutory or case law addressing this issue.

## V. PROCEDURE FOR OBTAINING RECORDS

### A. How to start.

#### 1. Who receives a request?

Any employee of a public agency may receive the request. FOI responsibilities are not assigned to specific offices.

#### 2. Does the law cover oral requests?

##### a. Arrangements to inspect & copy.

Yes. The request for records may be made orally or in writing. Ind. Code § 5-14-3-9(c); *but see* Ind. Code § 5-14-3-3(a) (agency has discretion to require request to be in writing or in a form provided by the agency).

##### b. If an oral request is denied:

The requester may renew the request in writing.

#### (1). How does the requester memorialize the refusal?

The burden is not on the requester to memorialize the refusal. If a written request is denied, the denial must be in writing and include a statement of the specific exemption authorizing the withholding of all

or part of the public record and the name and the title or position of the person responsible for the denial. Ind. Code § 5-14-3-9(c).

**(2). Do subsequent steps need to be in writing?**

The statute does not address later steps, short of an advisory opinion by the public access counselor or litigation.

**3. Contents of a written request.**

**a. Description of the records.**

Any requests, whether oral or written, must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

**b. Need to address fee issues.**

The statute does not require fee issues to be addressed in the request, but it is a good idea to do so, especially if the requester has a maximum that can be spent on the request. If the requester wants a fee waiver, it would be wise to request it then.

**c. Plea for quick response.**

The statute does not require a requester to say when the document is needed, but there is no downside to telling the agency if there are time pressures.

**d. Can the request be for future records?**

In theory, the request can seek future records, provided the request is made with sufficient specificity that will enable the agency to comply.

**e. Other.**

The statute does not make additional specifications regarding the contents of a request.

**B. How long to wait.**

**1. Statutory, regulatory or court-set time limits for agency response.**

Under Ind. Code § 5-14-3-9, a denial is deemed to occur: (a) in the case of a request for the record made in person or by telephone, immediately upon refusal by a person designated by an agency to make records disclosure decisions, or 24 hours after any other employee of the agency refuses to permit inspection and copying of the public record; or (b) in the case of a request by mail or facsimile, seven days after the request has been received. An agency that agrees to provide records does not violate the statute if it fails to provide the records within the statutory time frame, so long as the agency provides the records promptly and advises the requestor that the agency is not challenging the right to the documents. *Hrstich v. City of E. Chicago*, 862 N.E.2d 9 (Ind. Ct. App. 2007).

**2. Informal telephone inquiry as to status.**

Telephone inquiries are treated as the equivalent of an in-person request. Ind. Code § 5-14-3-9(a).

**3. Is delay recognized as a denial for appeal purposes?**

If a written request has been made and there is no response for more than seven days, the request is deemed to be denied. Ind. Code § 5-14-3-9(b). In the case of an in-person oral request, a delay of 24 hours or more in responding to the request is deemed to be a denial. Ind. Code § 5-14-3-9(a). However, an agency that agrees to provide records does not violate the statute if it fails to provide the records within the statutory time frame, so long as the agency provides the records promptly and advises the requestor that the agency is not challenging the right to the documents. *Hrstich v. City of E. Chicago*, 862 N.E.2d 9 (Ind. Ct. App. 2007).

**4. Any other recourse to encourage a response.**

To encourage a response, a savvy requester should seek the intervention of the agency's legal officer or public relations officer, the requester's legislator, or a political appointee in the agency who might be more responsive.

**C. Administrative appeal.**

There are no administrative appeals procedures under the Act. A person denied access is advised to seek the intervention of the state Public Access Counselor, not only to facilitate access to the record but also to lay the foundation for entitlement to attorney fees if litigation is required. Ind. Code § 5-14-3-9(i); *see also* 2(b) below.

**1. Time limit.**

A complaint to the Public Access Counselor must be filed within 30 days of the denial of access. Ind. Code § 5-14-5-7.

**2. To whom is an appeal directed?**

**a. Individual agencies.**

Because there is no administrative appeals process, there is no specific person to whom further requests should be made. A savvy requester will seek to have either the agency's public information officer or legal counsel intervene.

**b. A state commission or ombudsman.**

The Office of the Public Access Counselor responds to inquiries from the public and public agencies on public access issues. Ind. Code § 5-14-4-5. An individual or a public agency denied the right to inspect or copy records may file a formal complaint or make an informal inquiry with the Counselor. Ind. Code § 5-14-5-6. The complaint must be filed within 30 days of the denial of access. Ind. Code § 5-14-5-7. Once the Public Access Counselor receives the complaint, a copy must be forwarded immediately to the public agency that is the subject of the complaint. Ind. Code § 5-14-5-8. The Public Access Counselor may conduct an investigation, and the public agency is required to cooperate in any investigation. Ind. Code § 5-14-5-5. The Public Access Counselor is required to issue an advisory opinion not later than thirty days after the complaint is filed. Ind. Code § 5-14-5-9. If the Public Access Counselor determines that a complaint has priority, an advisory opinion must be issued within seven days. Ind. Code § 5-14-5-10. The statute of limitations for filing a lawsuit is not tolled by filing a formal complaint with the Public Access Counselor. Ind. Code § 5-14-5-12. The Public Access Counselor's advisory and informal opinions are available at <http://www.in.gov/pac>.

**c. State attorney general.**

The attorney general has no responsibility for public access issues under the Act. The attorney general is, however, responsible for investigating and enforcing violations of the new Social Security number confidentiality law, Ind. Code § 4-1-10, effective July 1, 2005.

**3. Fee issues.**

Fees for copies are limited to actual costs, and may not include labor or overhead. Ind. Code § 5-14-3-8.

**4. Contents of appeal letter.**

**a. Description of records or portions of records denied.**

Because there is no administrative appeals process, there is no appeal letter.

**b. Refuting the reasons for denial.**

Because there is no administrative appeals process, there is no appeal letter.

### 5. Waiting for a response.

Because there is no administrative appeals process, there is no appeal letter.

### 6. Subsequent remedies.

Because there is no administrative appeals process, there is no appeal letter.

#### D. Court action.

##### 1. Who may sue?

Any person or organization who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred. Ind. Code § 5-14-3-9(e).

##### 2. Priority.

The statute provides that any hearing in an action under the Access to Public Records Act shall be expedited. Ind. Code § 5-14-3-9(j). Also, an unsuccessful requester would be wise to seek a temporary restraining order or an injunction, as those proceedings are given docket priority.

##### 3. Pro se.

It is theoretically possible for an individual (but not a corporation) to appear *pro se*, but *pro se* litigants are held to the same standard as parties represented by counsel. *Diaz v. Carpenter*, 650 N.E.2d 688 (Ind. App. 1995). Therefore, it is not advisable to proceed *pro se* unless the individual has an intimate knowledge of legal procedures and analysis.

##### 4. Issues the court will address:

###### a. Denial.

The denial of access to a public record is the only matter that the court may address. It is a *de novo* review. See Ind. Code § 5-14-3-9(e) to (g).

###### b. Fees for records.

If an agency charges excessive fees for records and those fees amount to a denial of access, a court could address this issue as a constructive denial.

###### c. Delays.

To the extent that delays in responding to a written request for records are deemed to be a denial under the statute, the court could address this issue.

###### d. Patterns for future access (declaratory judgment).

The Access to Public Records Act does not contemplate declaratory judgment actions unless there has been a denial. However, the Indiana Convention and Visitors Association brought a declaratory judgment action to determine if it must respond to a request for disclosure from Indianapolis Newspapers Inc. *Indianapolis Convention and Visitors Ass'n Inc. v. Indianapolis Newspapers Inc.*, 577 N.E.2d 208 (Ind. 1991). The answer was yes. *Id.*

### 5. Pleading format.

Pleading forms are governed by Rule 10 of the Indiana Rules of Trial Procedure. Pleading captions must include the names of the parties, the title of the action, the court and case number. The pleadings must be signed, and copies served on all other parties or their counsel.

### 6. Time limit for filing suit.

Interestingly, the law does not specify a time limit for filing suit for denial of access; however, suit may not be filed until there is a denial of access. Ind. Code § 5-14-3-9(e).

### 7. What court.

The action must be filed in the circuit or superior court of the county in which the denial occurred. Ind. Code § 5-14-3-9(e).

### 8. Judicial remedies available.

The court may compel the agency to permit inspection and copying of the record for which access has been denied, or conclude that the record is exempt from disclosure. Ind. Code § 5-14-3-9(f).

### 9. Litigation expenses.

#### a. Attorney fees.

The court shall award attorney fees to the prevailing plaintiff, provided the plaintiff sought and received an informal inquiry response or advisory opinion from the Public Access Counselor before filing suit, unless plaintiff can show the action was necessary because the denial of access would prevent the plaintiff from presenting that public record to a public agency preparing to act on a matter of relevance to the public record. Ind. Code § 5-14-3-9(i). An award of attorney fees to a prevailing defendant is discretionary if the court finds the action was frivolous or vexatious. *Id.*

Attorney fees are awarded from the date of the Public Access Counselor's opinion until the date a prevailing party is determined. They are not to be limited by disclosure of the requested records if litigation is still pending. *Hydrotech Corp. v. Ind. Office of Env'tl Adjudication*, 862 N.E.2d 10 (Ind. Ct. App. 2007).

#### b. Court and litigation costs.

In addition to attorney fees, the statute provides that the court shall award "court costs and other reasonable litigation expenses." Ind. Code § 5-14-3-9(i). As a matter of course, costs are awarded to the prevailing party. Ind. Trial Rule 54(D). Costs are limited to filing fees and witness and fees. *VanWinkle v. Nash*, 761 N.E.2d 856 (Ind. Ct. App. 2002).

### 10. Fines.

The statute does not authorize fines for violations.

### 11. Other penalties.

A public employer, public official, or an employee or officer of a contractor or subcontractor of a public agency who knowingly discloses information classified as confidential by state statute commits a Class A misdemeanor. In addition, a public employee may be disciplined in accordance with personnel policies. Ind. Code § 5-14-3-10.

### 12. Settlement, pros and cons.

Litigation is expensive and often takes years to resolve. While the award of attorney fees is automatic if the plaintiff prevails and sought and received an informal inquiry response from the Public Access Counselor before filing suit, an award of attorney fees is discretionary for prevailing defendants. It is always advisable to explore settlement, because that will enable the requester to get the record sooner rather than later.

#### E. Appealing initial court decisions.

##### 1. Appeal routes.

An adverse decision is appealed to the Indiana Court of Appeals, although a party can seek to go directly to the Supreme Court under Rule 56 of the Rules of Appellate Procedure.

##### 2. Time limits for filing appeals.

A notice of appeal must be filed with the trial court clerk within 30 days after the entry of a final judgment or an appealable final order. Ind. R. App. P. 9(A)(1). The notice of appeal has replaced the praecipe for appeal. App. R. 2(I) and 9(A)(4). Failure to file the notice of appeal on time jurisdictional, and will forfeit the right to appeal. App. R.

9(A)(5). Within 30 days of filing a notice of appeal, an appealing party also must file an appellant's case summary (appearance form) with the clerk. App. R. 15(A) and (B). Failure to file a case summary does not forfeit an appeal. However, the clerk cannot accept any other filing from an appellant until the case summary is submitted. App. R. 15(E).

Within 30 days of a party filing a notice of appeal, the trial court clerk must assemble the Clerk's Record, which consists of the chronological case summary and all papers, pleadings, documents, orders, judgments and other materials filed in the trial court. App. R. 1(E) and 10(B). Within 90 days of the appellant filing the Notice of Appeal, the court reporter must file the Transcript with the trial court clerk. App. R. 11(B). Briefing deadlines are tied to the date the record is filed. App. R. 45.

### 3. Contact of interested amici.

*Amicus* briefs may be filed only by leave of court, granted on motion of the *amicus* or at the request of the court. App. R. 41. When moving for leave to file an *amicus curiae* brief, the movant must file an appearance form with the clerk that contains the information specified in App. R. 16(D) and 41(A). Unless the court permits the belated filing on motion for good cause, the *amicus* brief must be filed within the time set for the party the *amicus* is supporting. App. R. 41(B)-(D). So if a party wants to contact interested *amici*, it must be done as soon as possible, but in any event no later than when the record is being prepared.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

### F. Addressing government suits against disclosure.

The Act does not specify any procedures or guidelines for addressing government suits against disclosure. Seeking the opinion of the Public Access Counselor is an advisable starting point for addressing these issues.

## Open Meetings

### I. STATUTE -- BASIC APPLICATION.

#### A. Who may attend?

Members of the public. Ind. Code § 5-14-1.5-3(a). At the heart of the Open Door Law is the requirement that meetings of "the governing bodies of public agencies" must be open to allow members of the public to "observe and record them." *Id.* This does not mean that the law guarantees a citizen the right to speak; rather, it guarantees public access to the meetings.

#### B. What governments are subject to the law?

The law applies to "public agencies" of the state, counties, townships, school corporations, cities, towns, political subdivisions or other entities exercising the administrative, executive or legislative power of the state or a delegated local governmental power. Ind. Code § 5-14-1.5-2(a). The definition of "public agency" is broad enough to include almost any group that receives public funding support (as opposed to payment for measureable goods and services) or which gets its authority through the executive, administrative or legislative power of the state or local governments.

##### 1. State.

State agencies are included under the Act. Ind. Code § 5.14-1.5-2(a).

##### 2. County.

County agencies are included under the Act. Ind. Code § 5.14-1.5-2(a).

##### 3. Local or municipal.

Local and municipal agencies are included under the Act. Ind. Code § 5.14-1.5-2(a).

### C. What bodies are covered by the law?

#### 1. Executive branch agencies.

Any entity exercising executive or administrative power of the state or its political subdivisions is covered. In addition, any entity that is subject to budget review by the State Board of Tax Commissioners or the governing body of a county, city, town, township or school corporation or subject to audit by the State Board of Accounts required by statute, rule or regulation also is subject to the Act. Any advisory commission or other body created by statute, ordinance or executive order to advise the governing body of a public agency is subject to the Act, as well as any building corporation that issues bonds to construct public facilities. Ind. Code § 5-14-1.5-2(a). Individual office-holders are not "public agencies," so the statute does not require the governor, mayor or other chief executive to open their meetings to the public, unless they are meeting with the majority of the governing body of a public agency (which constitutes a meeting of that agency under the Open Door Law).

##### a. What officials are covered?

The statute applies to "public agencies" and "governing bodies," not officials.

##### b. Are certain executive functions covered?

Presumably all executive functions are covered, as the Open Door Law does not distinguish among them.

##### c. Are only certain agencies subject to the act?

No. All executive branch agencies are covered.

#### 2. Legislative bodies.

Unless covered by a specific exemption, all meetings of legislative bodies are subject to the Act. Ind. Code § 5-14-3-2. However, in a bizarre decision, the Indiana Supreme Court has held that separation of powers considerations prevent the courts from enforcing the access

statutes against the Indiana General Assembly. *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993). Also, although the Open Door Law's definition of a "public agency" applies to all entities that exercise "a portion of the . . . legislative power of the state," the statute explicitly exempts the General Assembly from its public notice of meetings requirements. Ind. Code § 5-14-1.5-5(g).

### 3. Courts.

Courts are not subject to the Open Door Law; however, the Public Access to Criminal Proceedings Law, Ind. Code §§ 5-14-2-1 *et seq.*, governs efforts to close criminal court proceedings, which are presumptively open to public attendance. Ind. Code § 5-14-2-2. Efforts to close civil proceedings are governed by constitutional and common law rights of access.

### 4. Nongovernmental bodies receiving public funds or benefits.

If the body is subject to budget review by the State Board of Tax Commissioners or the governing body of a local government agency, or an audit by the State Board of Accounts, it is subject to the Act. Ind. Code § 5-14-1.5-2(a).

In 2007, the statute was amended to clarify that providers of goods and services are not public agencies subject to the Open Door Law if they meet the following criteria: (1) the provider receives public funds through an agreement with the public entity, in exchange for services, goods, or other benefits; (2) the amount of fees received does not involve a consideration of tax revenues of the public entity; (3) the public entity negotiates the fee; (4) the public entity is billed for services or goods actually provided; and (5) the provider is not required to be audited by the state board of accounts. Ind. Code § 5-14-1.5-2.1.

### 5. Nongovernmental groups whose members include governmental officials.

The mere fact that a governmental official is a member of a nongovernmental group does not bring the group within the ambit of the Open Door Law. The group would have to exercise executive, administrative or legislative power of the state or its political subdivisions, be subject to audit by the State Board of Accounts or budget review by state or local governments, be a building corporation which issues bonds to construct public facilities, *or* be an advisory commission created to advise the governing body of a public agency in order to be covered by the Act. Ind. Code § 5-14-1.5-2(a).

### 6. Multi-state or regional bodies.

Though the law does not specifically address multistate or regional bodies, if these bodies fit the definition of a public agency outlined above, they would be covered by the Act.

### 7. Advisory boards and commissions, quasi-governmental entities.

Any advisory commission created by statute, ordinance or executive order to advise the governing body of a public agency is covered by the Act. Ind. Code § 5-14-1.5-2(a)(5).

### 8. Other bodies to which governmental or public functions are delegated.

No matter what these bodies call themselves, if they exercise executive, administrative or legislative power of the state or are subject to public budget review, they would be covered by the Act.

### 9. Appointed as well as elected bodies.

The law makes no distinction between appointed or elected bodies.

## D. What constitutes a meeting subject to the law.

### 1. Number that must be present.

The statute defines meeting as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action

upon public business." Ind. Code § 5-14-1.5-2(c). It does not include:

- Social or chance gatherings not intended to avoid the law;
- On-site inspections of any project, program, or facilities of applicants for incentives or assistance from the governing body;
- Traveling to (but not *from!*) and attending meetings of organizations devoted to betterment of government; or
- A "caucus." The statute defines "caucus" as a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action. Ind. Code § 5-14-1.5-2(h). *See also Evansville Courier v. Willner*, 563 N.E.2d 1269, 1271 (Ind. 1990) ("If the persons attending such [political] meetings happen to constitute a majority of a governing body, such a caucus is not thereby transformed into a meeting subject to full public scrutiny under the Open Door Law. It is the taking of official action which changes the character of a majority political strategy meeting from a private caucus to a public meeting.").
- a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;
- an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action; or
- a gathering for the sole purpose of administering an oath of office to an individual.

### a. Must a minimum number be present to constitute a "meeting"?

A majority of the governing body of a public agency must be present. Ind. Code § 5-14-1.5-2(c). A governing body must contain two or more individuals. Ind. Code § 5-14-1.5-2(b).

### b. What effect does absence of a quorum have?

The law does not speak in terms of quorums, but rather majorities. There must be a majority present for the statute to apply. Ind. Code § 5-14-1.5-2(c).

In 2006, the Indiana Court of Appeals found no violation of the Act when meetings were held in groups constituting less than a majority, "in direct contradiction to the public policy behind the Open Door Law". *Dillman v. Trustees of Ind. Univ.*, 848 N.E.2d 348 (Ind. Ct. App. 2006). Accordingly, in 2007, the General Assembly amended the Act to prohibit such "serial" meetings where members of the governing body participate in two or more gatherings to take official action on public business, concerning the same subject matter, within a period of not more than seven days, where the same number of different members attending any of the gatherings at least equals a quorum of the governing body. Ind. Code § 5-14-1.5-3.1.

## 2. Nature of business subject to the law.

### a. "Information gathering" and "fact-finding" sessions.

All official action must be taken in public. "Official action" is defined as receiving information, deliberating, making recommendations, establishing policy, making decisions and/or taking final action. Ind. Code § 5-14-1.5-2(d). Preliminary considerations may be conducted in private so long as the "final action" takes place at a public meeting. *See Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. App. 2001) (town council's compiling rehire list in executive session, which effectively removed town marshal from his office, was lawful, where council subsequently voted to approve the list in a regular meeting that was open to the public, because the council's "final action" consisted of its vote at the public meeting).

### b. Deliberations toward decisions.

Deliberations are considered official action. Ind. Code § 5-14-1.5-2(d). The statute defines deliberation as “a discussion which may reasonably be expected to result in official action.” Ind. Code § 5-14-1.5-2(i).

## 3. Electronic meetings.

### a. Conference calls and video/Internet conferencing.

The definition of “meeting” as “a gathering of a majority of the governing body of a public agency” is not limited to in-person gatherings. Thus it is broad enough to encompass conference calls. Furthermore, certain specific statutes provide that the members of an organization may participate in meetings without being physically present, so long as they use a means of communication that permits all other members participating in the meeting, and all members of the public physically present at the meeting, to simultaneously communicate with each other during the meeting. *See, e.g.*, Ind. Code §§ 5-1.5-2-2.5 and 20-12-63-7 (referenced in the Open Door Law and establishing meeting requirements for the Indiana Bond Bank and Indiana Educational Facilities Authority).

In 2007, the Act was amended to specifically address participation in meetings by electronic means. A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, videoconferencing, or any other electronic means may not participate in final action taken at the meeting unless the member’s participation is expressly authorized by statute; and may not be considered to be present unless the meeting is expressly authorized by statute. The minutes of the meeting must state whether members participated in person or by using a means of electronic communication.

### b. E-mail.

Except in its discussion of serial meetings, the Act does not address e-mail. But unless the e-mail exchange involves simultaneously a “gathering of a majority of the governing body of a public agency,” it would not constitute a meeting. In its discussion of serial meetings, the Act specifically exempts e-mail as a “gathering” or “meeting.” Ind. Code § 5-14-1.5-3.1(b).

### c. Text messages.

The Act does not address text messages. But unless the text message exchange involves simultaneously a “gathering of a majority of the governing body of a public agency,” it would not constitute a meeting.

### d. Instant messaging.

The Act does not address instant messaging. But unless the instant messaging involves simultaneously a “gathering of a majority of the governing body of a public agency,” it would not constitute a meeting.

### e. Social media and online discussion boards.

The Act does not address social media and online discussion boards. But unless the discussion board involves simultaneously a “gathering of a majority of the governing body of a public agency,” it would not constitute a meeting.

## E. Categories of meetings subject to the law.

### 1. Regular meetings.

#### a. Definition.

The statute addresses, but does not define, “regular” meetings.

#### b. Notice.

To give effect to the Open Door Law and its purposes, members of the public must have sufficient notice that a meeting is going to take place. With respect to regular meetings, the law provides that notice “need be given only once each year, except that an additional notice shall be given where the date, time, or place of a regular meeting or

meetings is changed. This subsection does not apply to executive sessions.” Ind. Code § 5-14-1.5-5(c). The legislature has mandated several specific requirements to ensure that the public is given sufficient notice. Ind. Code § 5-14-1.5-5. *But see Ripley County Bd. of Zoning Appeals v. Rumpke of Indiana Inc.*, 663 N.E.2d 198 (Ind. App. 1996) (five-minute discussion among board members, without notice, before hearing, did not violate Open Door Law, where discussions were unrelated to the hearing).

#### (1). Time limit for giving notice.

For non-emergency meetings, *at least 48 hours’ notice* (not including Saturdays, Sundays or legal holidays) prior to the meeting is required. Ind. Code § 5-14-1.5-5(a). The time limit does not apply to reconvened meetings, so long as an announcement of the date, time and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes from the meeting, and there is no change in the agenda. *Id.*

#### (2). To whom notice is given.

Notice must be given to the public and to all news media which annually request it. (The news media must expressly request to receive notice of all meetings for the calendar year by submitting a written request to the public agency by Jan. 1 of each year.) Ind. Code § 5-14-1.5-5(b). A state agency must provide electronic access to the notice through the computer gateway administered by the office of technology established by Ind. Code § 4-13.1-2-1. Ind. Code § 5-14-1.5-5(b).

#### (3). Where posted.

The notice must be posted at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held. Ind. Code § 5-14-1.5-5(b)(1). Notice also must be delivered to all news media which provide the governing body of the public agency with an annual written request for such notices. This requirement can be fulfilled by any one of the following methods: mailing notice by U.S. mail with postage prepaid, transmitting notice by e-mail, or sending notice by facsimile (fax). Ind. Code § 5-14-1.5-5(b)(2).

#### (4). Public agenda items required.

If the governing body uses an agenda, the agenda must be posted at the entrance to the meeting location before the meeting. Ind. Code § 5-14-1.5-4(a). The Open Door Law does not specify what agenda items are required, however. Yet, the statute specifically provides that “a rule, regulation, ordinance, or other final action adopted by reference to agenda item alone is void.” *Id.*

#### (5). Other information required in notice.

The notice must contain the date, time and place of any meeting. Ind. Code § 5-14-1.5-5(a). The subject matter of the meeting need not be included in notice of a regular meeting. *Id.*

#### (6). Penalties and remedies for failure to give adequate notice.

Any action taken at a meeting for which inadequate notice was given can be voided by filing an action in any court of competent jurisdiction. Ind. Code § 5-14-1.5-7(a). Voiding agency action is not automatic, however; courts consider a laundry list of factors, listed in Ind. Code § 5-14-1.5-5(d), when deciding whether invalidation is an appropriate remedy. The Indiana Court of Appeals has held that whether to void any final action taken by a public agency in violation of the Open Door Law is a matter left to the trial court’s discretion. *Town of Merrillville v. Blanco*, 687 N.E.2d 191, 199 (Ind. App. 1997); *see also Frye v. Vigo County*, 769 N.E.2d 188, 197 (Ind. App. 2002) (remanding case to the trial court for further consideration of the statutory factors to decide whether voiding the agency’s action would be a proper remedy); *Turner v. Town of Speedway*, 528 N.E.2d 858 (Ind. App. 1988) (interview sessions conducted by police commissioners at a local restaurant, without proper notice, violated the Open Door Act; however,

the subsequent final action by the commission could not be voided, as the violations predated non-retroactive amendment providing such a remedy). Injunctive or declaratory relief also are possible remedies for violations of the Open Door Law. Ind. Code § 5-14-1.5-7(a).

**c. Minutes.**

**(1). Information required.**

The following must be contained in memoranda of a public meeting: the date, time and place of the meeting; the members of the governing body either present or 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; and any additional information required under Ind. Code § 5-1.5-2-2.5 (relating to meetings of the board of directors of the Indiana Bond Bank) or Ind. Code § 20-12-63-7 (relating to meetings of the Indiana Educational Facilities Authority). Ind. Code § 5-14-1.5-4(b).

**(2). Are minutes public record?**

Yes. The Open Door Law specifically provides that the memoranda are to be available within a reasonable period of time and the minutes, if any, are to be open for public inspection and copying. “Reasonable period of time” is not defined by the Act. Ind. Code § 5-14-1.5-4(c).

**2. Special or emergency meetings.**

**a. Definition.**

Special or emergency meetings are not defined. However, if a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity of the jurisdiction of the public agency, the time limits for notice are altered. Ind. Code § 5-14-1.5-5(d).

**b. Notice requirements.**

**(1). Time limit for giving notice.**

The notice requirements for non-emergency meetings, which require at least 48-hour advance notice, are suspended for emergency meetings. Ind. Code § 5-14-1.5-5(d).

**(2). To whom notice is given.**

News media which have requested notice of meetings must be given the same notice as is given to members of the governing body *and* the public must be notified by posting a copy of the notice required by the statute. Ind. Code § 5-14-1.5-5(d)(1) and (2).

**(3). Where posted.**

The posting requirements for meetings dealing with emergency matters are the same as for regular meetings.

**(4). Public agenda items required.**

The general rules requiring agenda items apply to emergency or special meetings.

**(5). Other information required in notice.**

The notice requirements are the same, other than the time limits for giving notice.

**(6). Penalties and remedies for failure to give adequate notice.**

The penalties are the same for failure to provide adequate notice of regular meetings.

**c. Minutes.**

**(1). Information required.**

The same material required for minutes of regular meetings is required for minutes of special or emergency meetings: the date, time and place of the meeting; the members of the governing body present

or 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; and any additional information required under Ind. Code § 5-1.5-2-2.5 (relating to meetings of the board of directors of the Indiana Bond Bank) or Ind. Code § 20-12-63-7 (relating to meetings of the Indiana Educational Facilities Authority). Ind. Code § 5-14-1.5-4(b).

**(2). Are minutes a public record?**

Yes, as with regular meetings. The statute specifically provides that the memoranda are to be available within a reasonable period of time and the minutes, if any, are to be open for public inspection and copying. “Reasonable period of time” is not defined by the Act. Ind. Code § 5-14-1.5-4(c).

**3. Closed meetings or executive sessions.**

**a. Definition.**

An “executive session” is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. Ind. Code § 5-14-1.5-2(f); *see also* Ind. Code § 5-14-1.5-6.1 (providing statutory limitations on executive sessions).

**b. Notice requirements.**

The notice requirements for executive sessions are the same as for regular sessions, except the notice for an executive session must also state the subject matter of the meeting by specific reference to the statutory exemptions for which executive sessions may be held. Ind. Code § 5-14-1.5-6.1(d); *see also Gary/Chicago Airport Bd. of Auth. v. Maclin*, 772 N.E.2d 463, 468 (Ind. App. 2002) (board violated the Open Door Law because notice of executive session failed to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under Ind. Code § 5-14-1.5-6.1(b)).

**(1). Time limit for giving notice.**

At least 48-hour notice (not including Saturdays, Sundays, or legal holidays) before the meeting is required. Ind. Code § 5-14-1.5-5(a).

**(2). To whom notice is given.**

Notice must be given to the public and to all news media which annually request it. The news media must expressly request to receive notice of all meetings for the calendar year by submitting a written request to the public agency by Jan. 1 of each year. Ind. Code § 5-14-1.5-5(b). A state agency must provide electronic access to the notice through the computer gateway administered by the office of technology under Ind. Code § 4-13.1-2-1. Ind. Code § 5-14-1.5-5(b).

**(3). Where posted.**

The notice must be posted at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; *and* by mailing (with postage prepaid), e-mailing or faxing notice to all news media which provide the governing body of the public agency with an annual written request for such notices. Ind. Code § 5-14-1.5-5.

**(4). Public agenda items required.**

If the governing body uses an agenda, the agenda must be posted at the entrance to the location of the meeting prior to the meeting. Ind. Code § 5-14-1.5-4(a). The Open Door Law does not specify what agenda items are required, however. Yet, the statute specifically provides that “a rule, regulation, ordinance, or other final action adopted by reference to agenda item alone is void.” *Id.*

**(5). Other information required in notice.**

The notice must contain the date, time and place of any meeting. Ind. Code § 5-14-1.5-5(a). Additionally, the notice for an executive session must also state the subject matter of the meeting by specific

reference to the statutory exemptions for which executive sessions may be held. Ind. Code § 5-14-1.5-6.1(d); *see also Gary/Chicago Airport Bd. of Authority v. Maclin*, 772 N.E.2d 463, 468 (Ind. App. 2002) (board violated the Open Door Law because notice of its executive session failed to state the meeting's subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under Ind. Code § 5-14-1.5-6.1(b)).

**(6). Penalties and remedies for failure to give adequate notice.**

Failure to give proper notice of an executive session violates the Open Door Law. *See Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. App. 1997) (executive session violated the Open Door Law, where board of metropolitan police commissioners' notice of hearing failed to inform the public that an executive session would be held).

**c. Minutes.**

**(1). Information required.**

The minutes must identify the subject matter considered by specific reference to the enumerated instance for which public notice was given. The governing body must certify by a statement in its memorandum and minutes that it discussed nothing in the executive session other than the subject matter specified in the public notice. Ind. Code § 5-14-1.5-6.1(d).

**(2). Are minutes a public record?**

Yes, as with other meetings. The statute specifically provides that the memoranda are to be available within a reasonable period of time and the minutes, if any, are to be open for public inspection and copying. "Reasonable period of time" is not defined by the Act. Ind. Code § 5-14-1.5-4(c).

**d. Requirement to meet in public before closing meeting.**

The law contains no such requirement. In fact, the law specifically provides that a governing body may not conduct an executive session during a meeting, and a meeting may not be recessed and reconvened with the intent of circumventing this section of the statute. Ind. Code § 5-14-1.5-6.1(e).

**e. Requirement to state statutory authority for closing meetings before closure.**

The specific statutory exemption for an executive session, listed under Ind. Code § 5-14-1.5-6.1(b), must be stated in the meeting notice. Ind. Code § 5-14-1.5-6.1(d).

**f. Tape recording requirements.**

There is no requirement that executive sessions be tape recorded.

**F. Recording/broadcast of meetings.**

**1. Sound recordings allowed.**

The statute permits the public to "attend, observe, and record" public meetings. Ind. Code § 5-14-1.5-5(h). "Record" is not defined. However, the Indiana Supreme Court has held sound recordings may not be prohibited. *Berry v. Peoples Broad. Corp.*, 547 N.E.2d 231 (Ind. 1989). Another statute, Ind. Code § 4-22-3-2, authorizes live or recorded broadcasts of state administrative agency proceedings. "Record" is not defined or limited to audio. *See also Att'y Gen. Op. 84-9* (1984) ("A citizen has the right to be present at a public meeting, other than an executive session, and to record the meeting by videotaping, taping, shorthand, or any other recognized method of recording subject to reasonable restrictions as to equipment and use which may be imposed by the public agency."). It is customary to allow sound recording of meetings.

**2. Photographic recordings allowed.**

The same principles applicable to sound recordings apply to photographic recording of public meetings. In practice, still cameras and

video recording are commonplace.

**G. Are there sanctions for noncompliance?**

The statute does not authorize any penalties beyond the judicial remedies described above.

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

**1. Character of exemptions.**

**a. General or specific.**

The circumstances in which an executive session can be held are explicitly stated in the statute. Ind. Code § 5-14-1.5-6.1.

**b. Mandatory or discretionary closure.**

Closure is discretionary, although typically public agencies exercise their discretion in favor of closure. Ind. Code § 5-14-1.5-6.1(b) ("[e]xecutive sessions *may* be held . . .") (emphasis added).

**2. Description of each exemption.**

Under Ind. Code § 5-14-1.5-6.1(b)(1)-(12), executive sessions are permitted only in the following instances:

(1) Where authorized by federal or state statute.

(2) For discussion of strategy for collective bargaining, initiation of litigation or litigation which is either pending or has been threatened specifically in writing; the implementation of security systems; or the purchase or lease of real property up to the time a contract or option to purchase or lease is executed by the parties. However, all strategy discussions must be necessary for competitive or bargaining reasons *and must not include adversaries*.

(3) For discussion of the assessment, design and implementation of school security systems.

(4) Interviews with industrial or commercial prospects or agents of industrial or commercial prospects by the department of commerce, the Indiana development finance authority, the film commission, the Indiana business modernization and technology corporation, or economic development commissions.

(5) To receive information about, and interview, prospective employees.

(6) With respect to any individual over whom the governing body has jurisdiction, to receive information concerning the individual's alleged misconduct; and to discuss, before a determination, the individual's status as an employee, a student or an independent contractor who is a physician or a school bus driver. (Ind. Code § 5-14-1.5-6.1(b)(6)). However, an executive session may not be used to receive evidence. *Town of Merrillville v. Peters*, 639 N.E.2d 1036 (Ind. App. 1994).

(7) For discussion of records classified as confidential by state or federal statute.

(8) To discuss before a placement decision an individual student's abilities, past performance, behavior and needs.

(9) To discuss a job performance evaluation of individual employees. (This does not apply to discussions of the salary, compensation or benefits of employees during a budget process.)

(10) When considering the appointment of a public official, to develop a list of prospective appointees, consider applications, and make one initial exclusion of prospective appointees from further consideration. However, interviews of prospective appointees must be conducted at a public meeting.

(11) To train school board members with an outside consultant on how to perform as public officials.

(12) To prepare or score examinations used in issuing licenses, cer-

tificates, permits or registrations under Ind. Code § 15-5-1.1 (Indiana Veterinary Practice Law) and Ind. Code § 25 (Professions and Occupations — Licenses, Registration and Certification).

(13) To discuss information and intelligence intended to prevent, mitigate, or respond to the threat of terrorism.

**B. Any other statutory requirements for closed or open meetings.**

See, e.g., Ind. Code § 4-23-2-3(c) (public hearings — Indiana Arts Commission); Ind. Code § 4-22-3-1 (public hearings of administrative bodies); Ind. Code § 4-9.1.-1-3(c) (public meetings of State Board of Finance); Ind. Code § 4-15-2-5 (public meetings of State Personnel Board); Ind. Code § 5-12-1-11 (public meetings of local Boards of Finance); Ind. Code § 5-12-1-21(c) (public meetings of Board for Depositories); Ind. Code § 20-5-3-2 (school corporation meetings must be open and are limited to certain locations); Ind. Code § 36-2-2 (county commissioner meetings subject to certain notice requirements and location limitations).

**C. Court mandated opening, closing.**

There are no reported cases in which a court has added categories for executive sessions or invalidated the categories set by the legislature. In terms of interpreting the categories of exceptions, Indiana courts have recognized that effectuating the legislative intent behind the Open Door Law requires that “all doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed.” *Gary/Chicago Airport Bd. of Auth. v. Maclin*, 772 N.E.2d 463, 468 (Ind. App. 2002).

**III. MEETING CATEGORIES -- OPEN OR CLOSED.**

**A. Adjudications by administrative bodies.**

**1. Deliberations closed, but not fact-finding.**

*Marion County Sheriff's Merit Board v. People's Broad.*, 547 N.E.2d 235 (Ind. 1989) (Merit Board could discuss evidence in executive session after taking evidence in public hearing as long as final action on disciplinary case was taken in public).

**2. Only certain adjudications closed, i.e. under certain statutes.**

Unless there is a specific statutory authority for a closed meeting, the adjudications must be conducted in public. Ind. Code § 5-14-1.5-1.

**B. Budget sessions.**

These must be conducted in public.

**C. Business and industry relations.**

Unless the meeting involves interviews with industrial or commercial prospects or their agents by the department of commerce, the Indiana development finance authority, the film commission, the Indiana business modernization and technology corporation, or economic development commissions, these sessions must be open to the public. Ind. Code § 5-14-1.5-6.1(b)(4).

**D. Federal programs.**

There is no provision for closing meetings to discuss federal programs, unless authorized by a federal statute or other state statute, or unless it fits in the general categories for executive sessions in Ind. Code § 5-14-1.5-6.1(b).

**E. Financial data of public bodies.**

Unless this meeting fits into the general categories of executive sessions in Ind. Code § 5-14-1.5-6.1(b), it must be open to the public.

**F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

The statute permits executive sessions for discussion of records classified as confidential by state or federal statute. To the extent that these are classified as confidential records under the Access to Public Records Act, an executive session could be held to review this data. Ind. Code § 5-14-1.5-6.1(b)(7).

**G. Gifts, trusts and honorary degrees.**

Unless this meeting is to discuss a gift that is confidential as part of the donor's terms for giving the gift, the meeting must be open. Ind. Code § 5-14-1.5-6.1(b)(7).

**H. Grand jury testimony by public employees.**

The statute does not apply to courts. Ind. Code § 5-14-1.5-2(a) (defining a “public agency” subject to the act as an entity that “exercises a portion of the executive, administrative, or legislative power of the state” — but not judicial power). Grand jury proceedings are confidential under Ind. Code § 35-24-2-10. However, if a governing body met to discuss grand jury testimony that had already been given, the meeting would have to be open unless it could be classified under the general executive session categories in Ind. Code § 5-14-1.5-6.1(b).

**I. Licensing examinations.**

Executive sessions, which are closed, may be held “[t]o prepare or score examinations used in issuing licenses, certificates, permits, or registrations.” Ind. Code § 5-14-1.5-6.1(b)(12). Furthermore, if the meeting is to discuss particular questions to be included in tests or to discuss results identifiable to a particular person, this meeting could be closed under the exemption for discussion of records classified as confidential by state or federal statute. Such records would be confidential under the Indiana Access to Public Records Act. Ind. Code § 5-14-1.5-6.1(b)(7); see also Ind. Code §§ 5-14-3-4(a)(7) and (b)(3)-(4).

**J. Litigation; pending litigation or other attorney-client privileges.**

The public agency may hold an executive session to discuss strategy for initiation of litigation or litigation which is either pending or has been threatened specifically in writing. If an adversary is present, the meeting cannot be closed. Ind. Code § 5-14-1.5-6.1(b)(2). The Open Door Law precludes a public agency from going into executive session to receive legal advice from its attorneys about matters which are not litigation-related. *Simon v. City of Auburn*, 519 N.E.2d 205 (Ind. App. 1988); see also *Hinojosa v. Hammond Bd. of Pub. Works & Safety*, 789 N.E.2d 553 (Ind. App. 2003) (city board violated Indiana Open Door Law when it conferred with its attorney off the record in the course of administrative disciplinary hearings). Under the Indiana Access to Public Records Act, the work product of an attorney who represents a public agency, the state, or an individual pursuant to state employment or appointment by a public agency may be declared confidential at the agency's discretion. Ind. Code § 5-14-3-4(b)(2). If such records were classified as confidential, then meetings discussing them would qualify as executive sessions under Ind. Code § 5-14-1.5-6.1(b)(7).

**K. Negotiations and collective bargaining of public employees.**

**1. Any sessions regarding collective bargaining.**

Only sessions in which strategy is discussed may be closed. If the adversary is present, an executive session cannot be held. Accordingly, negotiations attended by a majority of the governing body of the public agency must be conducted in public. Ind. Code § 5-14-1.5-6.1(b)(2).

**2. Only those between the public employees and the public body.**

Only sessions in which strategy is discussed may be closed. If the adversary is present, an executive session cannot be held. Accordingly, negotiations attended by a majority of the governing body of the public agency must be conducted in public. Ind. Code § 5-14-1.5-6.1(b)(2).

### **L. Parole board meetings, or meetings involving parole board decisions.**

Parole board meetings are presumptively open because no exemption under Ind. Code § 5-14-1.5-6.1(b) applies.

### **M. Patients; discussions on individual patients.**

The public body could hold an executive session to discuss a patient's medical records, which are considered confidential under the Access to Public Records Act. Ind. Code §§ 5-14-1.5-6.1(b)(7) and 5-14-3-4(a)(9). Hospital peer review proceedings are confidential. Ind. Code § 34-30-15-1 and -2.

### **N. Personnel matters.**

#### **1. Interviews for public employment.**

Interviews of public employees may be conducted in executive session. Ind. Code § 6.1(b)(5). However, interviews of prospective appointees for positions as public officials must be conducted in public, though preliminary considerations can be closed. Ind. Code § 6.1(b)(10).

#### **2. Disciplinary matters, performance or ethics of public employees.**

An executive session is permitted for the governing body of a public agency to receive information about a public employee's alleged misconduct and to discuss, prior to any determination, that person's status as an employee. Ind. Code § 5-14-1.5-6.1(b)(6).

#### **3. Dismissal; considering dismissal of public employees.**

An executive session is permitted for discussion of the discipline of public employees. Ind. Code § 5-14-1.5-6.1(b)(6). The statute also authorizes executive sessions for discussing an individual employee's job performance evaluation. *See also Guzik v. Town of St. John*, 875 N.E.2d 258 (Ind. Ct. App. 2007). However, this exemption does not apply to discussions of the salary, compensation or benefits of employees during a budget process. Ind. Code § 5-14-1.5-6.1(b)(9).

### **O. Real estate negotiations.**

Executive sessions are permitted for strategy discussions about with respect to the purchase or lease of real property up to the time a contract or option to purchase or lease is executed by the parties. An executive session is not permitted if competitive or bargaining adversaries are included in the meeting. Ind. Code § 5-14-1.5-6.1(b)(2)(D).

### **P. Security, national and/or state, of buildings, personnel or other.**

Executive sessions are permitted for strategy discussions about the implementation of security systems. Ind. Code § 5-14-1.5-6.1(b)(2)(C). To the extent that the meeting would focus on records declared confidential by state statute or by federal statute, an executive session could be held. Ind. Code § 5-14-1.5-6.1(b)(1) and (b)(7).

### **Q. Students; discussions on individual students.**

Executive sessions are permitted to discuss, before a determination, an individual's status as a student, and to discuss before any placement decision a student's abilities, past performance, behavior and needs. Ind. Code §§ 5-14-1.5-6.1(b)(6)(B) and (b)(8).

## **IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS**

### **A. When to challenge.**

#### **1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?**

Yes. Ind. Code § 5-14-1.5-7(g) provides that a court shall expedite the hearing of an action filed for declaratory judgment or an injunc-

tion. The statute authorizes the filing of declaratory judgments or injunctive actions to ensure compliance with the statute, including injunctions against "threatened or future violations." Ind. Code § 5-14-1.5-7(a) (1) and (2).

#### **2. When barred from attending.**

Anyone who has been prevented from attending a meeting may file an action for injunctive relief to ensure compliance with the statute. Ind. Code § 5-14-1.5-7(a)(1) and (2).

#### **3. To set aside decision.**

The statute authorizes any aggrieved person to file an action to void any policy, decision or final action taken at a meeting which violates the Open Door Law. Ind. Code § 5-14-1.5-6.1(a)(3). Regardless whether a formal complaint or informal inquiry is pending before the Public Access Counselor, any lawsuit must be filed before the delivery of warrants, notes, bonds or obligations if the relief sought would have the effect of invalidating the notes, bonds or obligations; or within 30 days of the act or failure to act or the date that the plaintiff knew or should have known that the act or failure to act had occurred (whichever is later). Ind. Code § 5-14-1.5-7(b). If the challenged action is recorded in the memoranda or minutes of a governing body, a plaintiff is deemed to know of such act, at a minimum, as of that date. *Id.*

#### **4. For ruling on future meetings.**

The aggrieved party may seek injunctions against "threatened or future violations." Ind. Code § 5-14-1.5-7(a)(2).

#### **5. Other.**

The Open Door Law does not address other situations.

### **B. How to start.**

#### **1. Where to ask for ruling.**

##### **a. Administrative forum.**

No administrative agency handles Open Door Law complaints, and the statute provides only for judicial remedies. *See Miller v. Gibson County Solid Waste Mgmt. Distrib.*, 622 N.E.2d 248 (Ind. Tax 1993) ("[N]owhere within the Open Door Law is there provision for any administrative review . . . [The statute] plainly allows only courts to provide relief for Open Door Law violations."). However, the proponent of access will generally complain first to the president or chairman of the governing body or to the governing body's counsel. *But see, Petit v. Indiana Alcoholic Beverage Comm'n*, 511 N.E.2d 312 (Ind. App. 1987) (The word "action" as used in Ind. Code § 5-14-1.5-7 contemplates the filing of a lawsuit; objections to the failure to comply with the Open Door Law, standing alone, are not enough).

##### **(1). Agency procedure for challenge.**

Not applicable.

##### **(2). Commission or independent agency.**

The Office of the Public Access Counselor responds to inquiries from the public and public agencies on public access issues. Ind. Code § 5-14-4. An individual or a public agency may file a formal complaint or make an informal inquiry with the Counselor. Ind. Code § 5-14-5-6. Formal complaints must be filed within 30 days of the denial of access to a meeting. Ind. Code § 5-14-5-7(a). A complaint is considered filed on the date that it is either received by the Public Access Counselor or the date that it is postmarked, so long as it is received no more than 30 days after the date of the denial at issue. Ind. Code § 5-14-5-7(b).

Once the Public Access Counselor receives the complaint, a copy must be forwarded immediately to the public agency that is the subject of the complaint. Ind. Code § 5-14-5-8. The Public Access Counselor may conduct an investigation, and the public agency is required to

cooperate in any investigation. Ind. Code § 5-14-5-5. The Public Access Counselor is required to issue an advisory opinion not later than 30 days after the complaint is filed. Ind. Code § 5-14-5-9. If the Public Access Counselor determines that a complaint has priority, an advisory opinion must be issued within seven days. Ind. Code § 5-14-5-10. The statute of limitations for filing a lawsuit is not tolled by filing a formal complaint with the Public Access Counselor. Ind. Code § 5-14-5-12.

#### b. State attorney general.

There is no specific review by the state attorney general. However, at the state level, most state agencies have a specific deputy attorney general assigned to them, and this may facilitate a solution.

#### c. Court.

The statute permits lawsuits to be filed in any court of competent jurisdiction in the state. Ind. Code § 15-14-1.5-7(a). There are no administrative remedies to be exhausted. Indeed, the statute explicitly provides that a person or public agency is not required to file a complaint with the Public Access Counselor before seeking judicial remedy. Ind. Code § 5-14-5-4. However, it is advisable to make either a formal complaint or informal inquiry with the counselor, as failure to do so bars collection of attorney fees. Ind. Code § 5-14-1.5-7(f).

### 2. Applicable time limits.

Any lawsuit must be filed before delivery of warrants, notes, bonds or obligations if the relief sought would have the effect of invalidating the notes, bonds or obligations; or within 30 days the act or failure to act or the date that the plaintiff knew or should have known that the act or failure to act had occurred (whichever is later). Ind. Code § 5-14-1.5-7(b). If the challenged action is recorded in the memoranda or minutes of a governing body, a plaintiff is deemed to know of such act, at a minimum, as of that date. *Id.*

### 3. Contents of request for ruling.

Basic rules of notice pleading apply. At a minimum, the plaintiff should identify what constitutes the violation, when it occurred, and the relief sought. The plaintiff need not allege or prove special damage different from that suffered by the public at large. Ind. Code § 5-14-1.5-7(a).

#### 4. How long should you wait for a response?

The only way to get a decision is to file a lawsuit. The lawsuit must be tried, settled or adjudicated on summary judgment.

#### 5. Are subsequent or concurrent measures (formal or informal) available?

Settlement conferences or alternative dispute resolution are available options.

### C. Court review of administrative decision.

#### 1. Who may sue?

Any person. The plaintiff need not allege or prove special damage different from that suffered by the public at large. Ind. Code § 5-14-1.5-7(a). A county board lacks standing to sue. *Board of Comm'rs. v. Jones*, 457 N.E.2d 580 (Ind. App. 1983).

#### 2. Will the court give priority to the pleading?

Yes. Ind. Code § 5-14-1.5-7(g) provides that a court shall expedite the hearing of an action filed under this section. Additionally, actions for injunctive relief typically have priority on a court's docket.

#### 3. Pro se possibility, advisability.

It is theoretically possible for an individual (but not a corporation or other business entity) to appear *pro se*, but *pro se* litigants are held to the same standard as parties represented by counsel. *Diaz v. Carpenter*, 650 N.E.2d 688 (Ind. App. 1995). Therefore, it is not advisable to

proceed *pro se* unless the individual has an intimate knowledge of legal procedures and analysis.

### 4. What issues will the court address?

#### a. Open the meeting.

Yes, declaratory relief is available. Ind. Code § 5-14-1.5-7(a)(1).

#### b. Invalidate the decision.

Voiding a decision taken at a meeting that violates the statute is an available remedy. Ind. Code § 5-14-1.5-7(a)(3). In determining whether to declare any policy, decision, or final action void, the court must consider, among other relevant issues, the factors enumerated in Ind. Code § 5-14-1.5-7(d). The decision whether to void any final action taken in violation of the Open Door Law is a matter left to the trial court's discretion. *Thornberry v. City of Hobart*, 887 N.E.2d 110 (Ind. Ct. App. 2008).

#### c. Order future meetings open.

The court may enjoin threatened or future violations of the law. Ind. Code § 5-14-1.5-7(a)(2).

### 5. Pleading format.

There is no specific pleading format other than that required for lawsuits generally. Pleading forms are governed by Rule 10 of the Indiana Rules of Trial Procedure. Pleading captions must include the names of the parties, the title of the action, the court and cause number. The pleadings must be signed, and copies served on all other parties or their counsel.

### 6. Time limit for filing suit.

Any lawsuit must be filed before the delivery of warrants, notes, bonds or obligations if the relief sought would have the effect of invalidating the notes, bonds or obligations; or within 30 days of the act or failure to act or the date that the plaintiff knew or should have known that the act or failure to act had occurred (whichever is later). Ind. Code § 5-14-1.5-7(b). If the challenged action is recorded in the memoranda or minutes of a governing body, a plaintiff is deemed to know of such act, at a minimum, as of that date. *Id.*

### 7. What court.

The complaint may be filed in any court of competent jurisdiction. Ind. Code § 5-14-1.5-7(a).

### 8. Judicial remedies available.

The court may open the meeting, invalidate the decision, or order that future meetings be conducted in public. Ind. Code § 5-14-1.5-7. If a decision is voided, the court may enjoin the governing body from acting on the subject matter of the voided act until it has been substantially reconsidered at a meeting or meetings that comply with the Open Door Law. Ind. Code § 5-14-1.5-7(e). Indiana courts have held that substantial compliance with the Open Door Law may in some circumstances be sufficient remedy for previous violations. *Indiana Dep't of Envtl. Mgmt. v. West*, 812 N.E.2d 1099, 1112 (Ind. App. 2004); *but see Azbar v. Town of Fishers*, 744 N.E.2d 947 (Ind. App. 2001) (Open Door Law compliance at public agency's last meeting was not sufficient remedy for previous violations).

### 9. Availability of court costs and attorneys' fees.

The court shall award reasonable attorneys' fees, court costs and other reasonable expenses of litigation, to a prevailing plaintiff. However, a prevailing plaintiff may not recover fees if the plaintiff filed suit without seeking and obtaining an informal inquiry response from the Public Access Counselor, unless the lawsuit was necessary to prevent violation of the Open Door Law. Ind. Code § 5-14-1.5-7(f). *See, e.g., Hinojosa v. Hammond Bd. of Pub. Works & Safety*, 789 N.E.2d 533, 548-49 (Ind. App. 2003) (because appellant's suit against the government

was necessary to prevent current and further violations of the Indiana Open Door Law, award of attorney fees to appellant under IC 5-14-1.5-7(f) was proper, despite appellant's failure to obtain an advisory opinion from the public access counselor prior to filing for relief. An award of attorneys' fees and litigation expenses is discretionary to a prevailing defendant, if the court finds that the action is frivolous and vexatious. *Id. See, e.g., Simon v. City of Auburn*, 519 N.E.2d 205, 210 (Ind. App. 1988); *Board of Comm'rs v. Tinkham*, 491 N.E.2d 578 (Ind. App. 1986). As a matter of course, costs are awarded to the prevailing party. Ind. Trial Rule 54(D).

#### 10. Fines.

The statute does not authorize fines for violations.

#### 11. Other penalties.

The statute does not authorize penalties for violations.

### D. Appealing initial court decisions.

#### 1. Appeal routes.

An adverse decision is appealed to the Indiana Court of Appeals, although immediate review by the Supreme Court may be sought under Rule 56 of the Indiana Rules of Appellate Procedure.

#### 2. Time limits for filing appeals.

A notice of appeal must be filed with the trial court clerk within 30 days after the entry of a final judgment or an appealable final order. Ind. R. App. P. 9(A)(1). The notice of appeal has replaced the praecipe for appeal. App. R. 2(I) and 9(A)(4). Failure to file the notice of appeal on time is jurisdictional, and will forfeit the right to appeal. App. R. 9(A)(5). Within 30 days of filing a notice of appeal, an appealing party also must file an appellant's case summary (appearance form) with the clerk. App. R. 15(A) and (B). Failure to file a case summary does not forfeit an appeal. However, the clerk cannot accept any other filing from an appellant until the case summary is submitted. App. R. 15(E).

Within 30 days of a party filing of a notice of appeal, the trial court clerk must assemble the Clerk's Record, which consists of the chronological case summary and all papers, pleadings, documents, orders, judgments and other materials filed in the trial court. App. R. 1(E) and

10(B). Within 90 days of the appellant filing the notice of appeal, the court reporter must file the transcript with the trial court clerk. App. R. 11(B). These documents and procedures have replaced the Record of Proceedings, which was abolished as of Jan. 1, 2001. App. R. 27. Briefing deadlines are tied to the date the record is filed. App. R. 45.

#### 3. Contact of interested amici.

*Amicus* briefs may be filed only by leave of court, granted on motion of the *amicus* or at the request of the court. App. R. 41. When moving for leave to file an *amicus curiae* brief, the movant must file an appearance form with the clerk that contains the information specified in App. R. 16(D) and 41(A). Unless the court permits the belated filing for good cause, the *amicus* brief must be filed within the time set for the party the *amicus* is supporting. App. R. 41(B)-(D). So if a party wants to contact interested *amici*, it must be done as soon as possible, but in any event no later than when the record is being prepared.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

### V. ASSERTING A RIGHT TO COMMENT.

#### A. Is there a right to participate in public meetings?

No. The Open Door Law authorizes the public only to "observe and record" meetings. Ind. Code § 5-14-1.5-3(a).

#### B. Must a commenter give notice of intentions to comment?

There is no right to comment, so no notice is required.

#### C. Can a public body limit comment?

Yes, because the law does not provide a right to comment.

#### D. How can a participant assert rights to comment?

There is no right to comment.

#### E. Are there sanctions for unapproved comment?

Because there is no right to comment, presumably a public agency could order a person removed from the meeting.

## Statute

### *Open Records*

#### *Title 5. State and Local Administration*

#### *Article 14. Public Records and Public Meetings*

#### *Chapter 3. Access to Public Records*

#### *5-14-3-1*

#### *Public policy; construction; burden of proof for nondisclosure*

Sec. 1. 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.

#### *5-14-3-2*

#### *Definitions*

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) “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) “Electronic map” means copyrighted data provided by a public agency from an electronic geographic information system.

(e) “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 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) “Facsimile machine” means a machine that electronically transmits exact images through connection with a telephone network.

(g) “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) “Investigatory record” means information compiled in the course of the investigation of a crime.

(i) “Offender” means a person confined in a penal institution as the result of the conviction for a crime.

(j) “Patient” has the meaning set out in IC 16-18-2-272(d).

(k) “Person” means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

(l) “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) “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, 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) “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.

(o) “Standard-sized documents” includes all documents that can be me-

chanically 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.

(p) “Trade secret” has the meaning set forth in IC 24-2-3-2.

(q) “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.

#### 5-14-3-2.1

*“Public agency”; certain providers exempted*

Sec. 2.1. “Public agency”, for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

(1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:

(A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.

(B) The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.

(C) The amount of the fees are negotiated by the entity and the state, county, or municipality.

(D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.

(2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.

#### 5-14-3-3

*Right to inspect and copy public agency records; electronic data storage; use of information for commercial purposes; contracts*

Sec. 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 of this chapter. A request for inspection or copying must:

(1) identify with reasonable particularity the record being requested; and

(2) be, at the discretion of the agency, in writing on or in a form provided by the agency.

No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.

(b) A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either:

(1) provide the requested copies to the person making the request; or

(2) allow the person to make copies:

(A) on the agency’s equipment; or

(B) on the person’s own equipment.

(c) Notwithstanding subsections (a) and (b), a public agency may or may not do the following:

(1) In accordance with a contract described in section 3.5 of this chapter, permit a person to inspect and copy through the use of enhanced access public records containing information owned by or entrusted to the public agency.

(2) Permit a governmental entity to use an electronic device to inspect and copy public records containing information owned by or entrusted to the

public agency.

(d) Except as provided in subsection (e), a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency’s data storage system. This subsection does not apply to an electronic map.

(e) A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d).

(f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. The lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to any individual or entity for political purposes and may not be used by any individual or entity for political purposes. In addition, the lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes. The prohibition in this subsection against the disclosure of lists for political or commercial purposes applies to the following lists of names and addresses (including electronic mail account addresses):

(1) A list of employees of a public agency.

(2) A list of persons attending conferences or meetings at a state educational institution or of persons involved in programs or activities conducted or supervised by the state educational institution.

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes; or

(C) with respect to disclosure related to a political purpose, prohibiting the disclosure of the list to individuals and entities for political purposes.

A policy adopted under subdivision (3)(A) or (3)(B) must be uniform and may not discriminate among similarly situated commercial entities. For purposes of this subsection, “political purposes” means influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.

(g) A public agency may not enter into or renew a contract or an obligation:

(1) for the storage or copying of public records; or

(2) that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute;

if the contract, obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency’s public records.

(h) If this section conflicts with IC 3-7, the provisions of IC 3-7 apply.

*5-14-3-3.5**State agencies; enhanced access to public records; office of technology*

Sec. 3.5. (a) As used in this section, “state agency” has the meaning set forth in IC 4-13-1-1. The term does not include the office of the following elected state officials:

- (1) Secretary of state.
- (2) Auditor.
- (3) Treasurer.
- (4) Attorney general.
- (5) Superintendent of public instruction.

However, each state office described in subdivisions (1) through (5) and the judicial department of state government may use the computer gateway administered by the office of technology established by IC 4-13.1-2-1, subject to the requirements of this section.

(b) As an additional means of inspecting and copying public records, a state agency may provide enhanced access to public records maintained by the state agency.

(c) If the state agency has entered into a contract with a third party under which the state agency provides enhanced access to the person through the third party’s computer gateway or otherwise, all of the following apply to the contract:

(1) The contract between the state agency and the third party must provide for the protection of public records in accordance with subsection (d).

(2) The contract between the state agency and the third party may provide for the payment of a reasonable fee to the state agency by either:

- (A) the third party; or
- (B) the person.

(d) A contract required by this section must provide that the person and the third party will not engage in the following:

- (1) Unauthorized enhanced access to public records.
- (2) Unauthorized alteration of public records.
- (3) Disclosure of confidential public records.

(e) A state agency shall provide enhanced access to public records only through the computer gateway administered by the office of technology.

*5-14-3-3.6**Public agencies; enhanced access to public records; office of technology*

Sec. 3.6. (a) As used in this section “public agency” does not include a state agency (as defined in section 3.5(a) of this chapter).

(b) As an additional means of inspecting and copying public records, a public agency may provide enhanced access to public records maintained by the public agency.

(c) A public agency may provide a person with enhanced access to public records if any of the following apply:

(1) The public agency provides enhanced access to the person through its own computer gateway and provides for the protection of public records under subsection (d).

(2) The public agency has entered into a contract with a third party under which the public agency provides enhanced access to the person through the third party’s computer gateway or otherwise, and the contract between the public agency and the third party provides for the protection of public records in accordance with subsection (d).

(d) A contract entered into under this section and any other provision of enhanced access must provide that the third party and the person will not engage in the following:

- (1) Unauthorized enhanced access to public records.
- (2) Unauthorized alteration of public records.

(3) Disclosure of confidential public records.

(e) A contract entered into under this section or any provision of enhanced access may require the payment of a reasonable fee to either the third party to a contract or to the public agency, or both, from the person.

(f) A public agency may provide enhanced access to public records through the computer gateway administered by the office of technology established by IC 4-13.1-2-1.

*5-14-3-4**Records excepted from disclosure requirements; names and addresses; time limitations; destruction of records*

Sec. 4. (a) The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

(1) Those declared confidential by state statute.

(2) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.

(3) Those required to be kept confidential by federal law.

(4) Records containing trade secrets.

(5) Confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute.

(6) Information concerning research, including actual research documents, conducted under the auspices of a state educational institution, including information:

- (A) concerning any negotiations made with respect to the research; and
- (B) received from another party involved in the research.

(7) Grade transcripts and license examination scores obtained as part of a licensure process.

(8) Those declared confidential by or under rules adopted by the supreme court of Indiana. (9) Patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39 or as provided under IC 16-41-8.

(10) Application information declared confidential by the board of the Indiana economic development corporation under IC 5-28-16.

(11) A photograph, a video recording, or an audio recording of an autopsy, except as provided in IC 36-2-14-10.

(12) A Social Security number contained in the records of a public agency.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(1) Investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter.

(2) The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

- (A) a public agency;
- (B) the state; or
- (C) an individual.

(3) Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests if the person is identified by name and has not consented to the release of the person’s scores.

(5) The following:

- (A) Records relating to negotiations between the Indiana economic devel-

opment corporation, the ports of Indiana, the Indiana state department of agriculture, the Indiana finance authority, an economic development commission, a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.

(B) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, the ports of Indiana, the Indiana finance authority, an economic development commission, or a governing body of a political subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(C) When disclosing a final offer under clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

(6) 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.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, 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) 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.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

(9) Minutes or records of hospital medical staff meetings.

(10) Administrative or technical information that would jeopardize a record keeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility.

(12) Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1. However, this subdivision does not apply to that information required to be available for inspection and copying under subdivision (8).

(13) The work product of the legislative services agency under personnel rules approved by the legislative council.

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if:

(A) the donor requires nondisclosure of the donor's identity as a condition of making the gift; or

(B) after the gift is made, the donor or a member of the donor's family requests nondisclosure.

(16) Library or archival records:

(A) which can be used to identify any library patron; or

(B) deposited with or acquired by a library upon a condition that the records be disclosed only:

(i) to qualified researchers;

(ii) after the passing of a period of years that is specified in the documents under which the deposit or acquisition is made; or

(iii) after the death of persons specified at the time of the 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 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) the victim of a crime; or
  - (iii) a family member of a correctional officer or the victim of a crime; or
- (B) concern or could affect the security of a jail or correctional facility.

(c) Nothing contained in subsection (b) shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.

(d) Notwithstanding any other law, a public record that is classified as confidential, other than a record concerning an adoption or patient medical records, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.

(e) Only the content of a public record may form the basis for the adoption by any public agency of a rule or procedure creating an exception from disclosure under this section.

(f) Except as provided by law, a public agency may not adopt a rule or procedure that creates an exception from disclosure under this section based upon whether a public record is stored or accessed using paper, electronic media, magnetic media, optical media, or other information storage technology.

(g) Except as provided by law, a public agency may not adopt a rule or procedure nor impose any costs or liabilities that impede or restrict the reproduction or dissemination of any public record.

(h) Notwithstanding subsection (d) and section 7 of this chapter:

(1) public records subject to IC 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15; or

(2) public records not subject to IC 5-15 may be destroyed in the ordinary course of business.

#### 5-14-3-4.3

##### *Job title or job descriptions of law enforcement officers*

Sec. 4.3. Nothing contained in section 4(b)(8) of this chapter requires a law enforcement agency to release to the public the job title or job description of law enforcement officers.

#### 5-14-3-4.5

##### *Indiana economic development corporation negotiation records excepted from disclosure; disclosure of final offers*

Sec. 4.5. (a) Records relating to negotiations between the Indiana economic development corporation and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the corporation if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the corporation to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

#### 5-14-3-4.7

##### *Negotiation records; final offers; certification of final offer disclosure*

Sec. 4.7. (a) Records relating to negotiations between the Indiana finance authority and industrial, research, or commercial prospects are excepted from

section 3 of this chapter at the discretion of the authority if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the authority to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the authority shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

#### 5-14-3-4.8

##### *Records exempt from disclosure requirements; office of tourism development negotiations; final offers public*

Sec. 4.8. (a) Records relating to negotiations between the office of tourism development and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the office of tourism development if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the office of tourism development to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the office of tourism development shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

#### 5-14-3-4.9

##### *Ports of Indiana negotiation records excepted from disclosure; disclosure of final offers*

Sec. 4.9. (a) Records relating to negotiations between the ports of Indiana and industrial, research, or commercial prospects are excepted from section 3 of this chapter at the discretion of the ports of Indiana if the records are created while negotiations are in progress.

(b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the ports of Indiana to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(c) When disclosing a final offer under subsection (b), the ports of Indiana shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

#### 5-14-3-5

##### *Information relating to arrest or summons; jailed persons; agency records*

Sec. 5. (a) If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

(1) Information that identifies the person including the person's name, age, and address.

(2) Information concerning any charges on which the arrest or summons is based.

(3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:

(A) time and location of the arrest or the issuance of the summons;

(B) investigating or arresting officer (other than an undercover officer or agent); and

(C) investigating or arresting law enforcement agency.

(b) If a person is received in a jail or lock-up, the following information shall be made available for inspection and copying:

(1) Information that identifies the person including the person's name, age, and address.

(2) Information concerning the reason for the person being placed in the jail or lock-up, including the name of the person on whose order the person is being held.

(3) The time and date that the person was received and the time and date of the person's discharge or transfer.

(4) The amount of the person's bail or bond, if it has been fixed.

(c) An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

(1) The time, substance, and location of all complaints or requests for assistance received by the agency.

(2) The time and nature of the agency's response to all complaints or requests for assistance.

(3) If the incident involves an alleged crime or infraction:

(A) the time, date, and location of occurrence;

(B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;

(C) the factual circumstances surrounding the incident; and

(D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.

(d) This chapter does not affect IC 5-2-4, IC 10-13-3, or IC 5-11-1-9.

#### 5-14-3-5.5

##### *Sealing certain records by court; hearing; notice*

Sec. 5.5. (a) This section applies to a judicial public record.

(b) As used in this section, "judicial public record" does not include a record submitted to a court for the sole purpose of determining whether the record should be sealed.

(c) Before a court may seal a public record not declared confidential under section 4(a) of this chapter, it must hold a hearing at a date and time established by the court. Notice of the hearing shall be posted at a place designated for posting notices in the courthouse.

(d) At the hearing, parties or members of the general public must be permitted to testify and submit written briefs. A decision to seal all or part of a public record must be based on findings of fact and conclusions of law, showing that the remedial benefits to be gained by effectuating the public policy of the state declared in section 1 of this chapter are outweighed by proof by a preponderance of the evidence by the person seeking the sealing of the record that:

(1) a public interest will be secured by sealing the record;

(2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;

(3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record;

(4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; and

(5) it is reasonably necessary for the record to remain sealed for a period of time.

Sealed records shall be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records no longer exist.

#### 5-14-3-6

##### *Partially disclosable records; computer or microfilm record systems; fees*

Sec. 6. (a) If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

(b) If a public record stored on computer tape, computer disks, microfilm, or a similar or analogous record system is made available to:

(1) a person by enhanced access under section 3.5 of this chapter; or

(2) a governmental entity by an electronic device;

the public agency may not make the record available for inspection without first separating the material in the manner required by subsection (a).

(c) A public agency may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if:

(1) the disclosable information is stored on a computer tape, computer disc, or a similar or analogous record system; and

(2) the public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information.

(d) A public agency is not required to reprogram a computer system to provide:

(1) enhanced access; or

(2) access to a governmental entity by an electronic device.

#### 5-14-3-6.5

##### *Confidentiality of public record*

Sec. 6.5. A public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record..

#### 5-14-3-7

##### *Protection against loss, alteration, destruction, and unauthorized enhanced access*

Sec. 7. (a) A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.

(b) A public agency shall take precautions that protect the contents of public records from unauthorized enhanced access, unauthorized access by an electronic device, or alteration.

(c) This section does not operate to deny to any person the rights secured by section 3 of this chapter.

#### 5-14-3-8

##### *Fees; copies*

Sec. 8. (a) For the purposes of this section, "state agency" has the meaning set forth in IC 4-13-1-1.

(b) Except as provided in this section, a public agency may not charge any fee under this chapter:

(1) to inspect a public record; or

(2) to search for, examine, or review a record to determine whether the record may be disclosed.

(c) The Indiana department of administration shall establish a uniform copying fee for the copying of one (1) page of a standard-sized document by state agencies. The fee may not exceed the average cost of copying records by state agencies or ten cents (\$0.10) per page, whichever is greater. A state agency may not collect more than the uniform copying fee for providing a copy of a public record. However, a state agency shall establish and collect a reasonable fee for copying nonstandard-sized documents.

(d) This subsection applies to a public agency that is not a state agency. The fiscal body (as defined in IC 36-1-2-6) of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification or copying of documents. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents may not exceed the greater of:

(1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or

(2) the actual cost to the agency of copying the document.

As used in this subsection, "actual cost" means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. A fee established under this subsection must be

uniform throughout the public agency and uniform to all purchasers.

(e) If:

- (1) a person is entitled to a copy of a public record under this chapter; and
- (2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record;

the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

(f) Notwithstanding subsection (b), (c), (d), (g), (h), or (i), a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court.

(g) Except as provided by subsection (h), for providing a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the public agency or entrusted to it, a public agency may charge a fee, uniform to all purchasers, that does not exceed the sum of the following:

- (1) The agency's direct cost of supplying the information in that form.
- (2) The standard cost for selling the same information to the public in the form of a publication if the agency has published the information and made the publication available for sale.
- (3) In the case of the legislative services agency, a reasonable percentage of the agency's direct cost of maintaining the system in which the information is stored. However, the amount charged by the legislative services agency under this subdivision may not exceed the sum of the amounts it may charge under subdivisions (1) and (2).

(h) This subsection applies to the fee charged by a public agency for providing enhanced access to a public record. A public agency may charge any reasonable fee agreed on in the contract under section 3.5 of this chapter for providing enhanced access to public records.

(i) This subsection applies to the fee charged by a public agency for permitting a governmental entity to inspect public records by means of an electronic device. A public agency may charge any reasonable fee for the inspection of public records under this subsection, or the public agency may waive any fee for the inspection.

(j) Except as provided in subsection (k), a public agency may charge a fee, uniform to all purchasers, for providing an electronic map that is based upon a reasonable percentage of the agency's direct cost of maintaining, upgrading, and enhancing the electronic map and for the direct cost of supplying the electronic map in the form requested by the purchaser. If the public agency is within a political subdivision having a fiscal body, the fee is subject to the approval of the fiscal body of the political subdivision.

(k) The fee charged by a public agency under subsection (j) to cover costs for maintaining, upgrading, and enhancing an electronic map may be waived by the public agency if the electronic map for which the fee is charged will be used for a noncommercial purpose, including the following:

- (1) Public agency program support.
- (2) Nonprofit activities.
- (3) Journalism.
- (4) Academic research.

#### 5-14-3-8.3

*Enhanced access fund; establishment by ordinance; purpose*

Sec. 8.3. (a) The fiscal body of a political subdivision having a public agency that charges a fee under section 8(h) or 8(i) of this chapter shall adopt an ordinance establishing an enhanced access fund. The ordinance must specify that the fund consists of fees collected under section 8(h) or 8(i) of this chapter. The fund shall be administered by the public agency or officer designated in the ordinance or resolution. Money in the fund must be appropriated and expended in the manner authorized in the ordinance.

(b) The fund is a dedicated fund with the following purposes:

- (1) The replacement, improvement, and expansion of capital expenditures.
- (2) The reimbursement of operating expenses incurred in providing enhanced access to public information.

#### 5-14-3-8.5

*Electronic map generation fund; establishment by ordinance; purpose*

Sec. 8.5. (a) The fiscal body of a political subdivision having a public agency that charges a fee under section 8(j) of this chapter shall adopt an ordinance establishing an electronic map generation fund. The ordinance must specify that the fund consists of fees collected under section 8(j) of this chapter. The fund shall be administered by the public agency that collects the fees.

(b) The electronic map generation fund is a dedicated fund with the following purposes:

- (1) The maintenance, upgrading, and enhancement of the electronic map.
- (2) The reimbursement of expenses incurred by a public agency in supplying an electronic map in the form requested by a purchaser.

#### 5-14-3-9

*Denial of disclosure; action to compel disclosure; intervenors; burden of proof; attorney's fees and costs*

Sec. 9. (a) A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:

- (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
- (2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made;

whichever occurs first.

(b) If a person requests by mail or by facsimile a copy or copies of a public record, a denial of disclosure does not occur until seven

(7) days have elapsed from the date the public agency receives the request.

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

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:

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

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

(d) This subsection applies to a board, a commission, a department, a division, a bureau, a committee, an agency, an office, an instrumentality, or an authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state. If an agency receives a request to inspect or copy a record that the agency considers to be excepted from disclosure under section 4(b)(19) of this chapter, the agency may consult with the counterterrorism and security council established by IC 10-19-8-1. If an agency denies the disclosure of a record or a part of a record under section 4(b)(19) of this chapter, 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 the public safety.

(e) A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit

the person to inspect and copy the public record. Whenever an action is filed under this subsection, the public agency must notify each person who supplied any part of the public record at issue:

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

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

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

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

- (1) the public agency meets its burden of proof under this subsection by:
  - (A) proving that the record falls within any one (1) of the categories of exempted records under section 4(b) of this chapter; and
  - (B) establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit; and

(2) a person requesting access to a public record meets the person's burden of proof under this subsection by proving that the denial of access is arbitrary or capricious.

(h) The court may review the public record in camera to determine whether any part of it may be withheld under this chapter.

(i) In any action filed under this section, a 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.

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

(j) A court shall expedite the hearing of an action filed under this section.

#### 5-14-3-10

*Classified confidential information; unauthorized disclosure or failure to protect; offense; discipline*

Sec. 10. (a) A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency, except as provided by IC 4-15-10, who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor.

(b) A public employee may be disciplined in accordance with the personnel policies of the agency by which the employee is employed if the employee intentionally, knowingly, or recklessly discloses or fails to protect information classified as confidential by state statute.

(c) A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency who unintentionally and unknowingly discloses confidential or erroneous information in response to a request under IC 5-14-3-3(d) or who discloses confidential information in reliance on an advisory opinion by the public access counselor is immune from liability for such a disclosure.

(d) This section does not apply to any provision incorporated into state law from a federal statute.

#### *Open Meetings*

#### *Title 5. State and Local Administration*

#### *Article 14. Public Records and Public Meetings*

#### *Chapter 1.5. Public Meetings (Open Door Law)*

#### *5-14-1.5-1*

#### *Purpose*

Sec. 1. In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. 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. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.

#### *5-14-1.5-2*

#### *Definitions*

Sec. 2. For the purposes of this chapter:

(a) "Public agency", except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.

(2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

(3) Any entity which is subject to either:

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

(4) Any building corporation of a political subdivision of the state of Indiana 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) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.

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

(b) "Governing body" means two (2) or more individuals who are:

(1) a public agency that:

(A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and

(B) takes official action on public business;

(2) the board, commission, council, or other body of a public agency which takes official action upon public business; or

(3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

(c) “Meeting” means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. It does not include:

- (1) any social or chance gathering not intended to avoid this chapter;
  - (2) any on-site inspection of any:
    - (A) project;
    - (B) program; or
  - (C) facilities of applicants for incentives or assistance from the governing body;
  - (3) traveling to and attending meetings of organizations devoted to betterment of government;
  - (4) a caucus;
  - (5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;
  - (6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action; or
  - (7) a gathering for the sole purpose of administering an oath of office to an individual.
- (d) “Official action” means to:
- (1) receive information;
  - (2) deliberate;
  - (3) make recommendations;
  - (4) establish policy;
  - (5) make decisions; or
  - (6) take final action.
- (e) “Public business” means any function upon which the public agency is empowered or authorized to take official action.
- (f) “Executive session” means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.
- (g) “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.
- (h) “Caucus” means a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action.
- (i) “Deliberate” means a discussion which may reasonably be expected to result in official action (defined under subsection (d)(3), (d)(4), (d)(5), or (d)(6)).
- (j) “News media” means all newspapers qualified to receive legal advertisements under IC 5-3-1, all news services (as defined in IC 34-6-2-87), and all licensed commercial or public radio or television stations.
- (k) “Person” means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

#### 5-14-1.5-2.1

*“Public agency”; certain providers exempted*

Sec. 2.1. “Public agency”, for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

- (1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:
  - (A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.
  - (B) The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.

(C) The amount of the fees are negotiated by the entity and the state, county, or municipality.

(D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.

(2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.

#### 5-14-1.5-3

*Open meetings; secret ballot votes; member participating by electronic means of communication*

Sec. 3. (a) Except as provided in section 6.1 of this chapter, 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.

(b) A secret ballot vote may not be taken at a meeting.

(c) A meeting conducted in compliance with IC 5-1.5-2-2.5 does not violate this section.

(d) A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, videoconferencing, or any other electronic means of communication:

(1) may not participate in final action taken at the meeting unless the member’s participation is expressly authorized by statute; and

(2) may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

(e) The memoranda of a meeting prepared under section 4 of this chapter that a member participates in by using a means of communication described in subsection (d) must state the name of:

(1) each member who was physically present at the place where the meeting was conducted;

(2) each member who participated in the meeting by using a means of communication described in this section; and

(3) each member who was absent.

#### 5-14-1.5-3.1

*Serial meetings*

Sec. 3.1. (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(b) This subsection applies only to the city-county council of a consolidated city or county having a consolidated city. The city-county council violates this chapter if its members participate in a series of at least two (2) gatherings of members of the city-county council and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least five (5) members of the city-county council and the other gatherings include at least three (3) members of the city-county council.

(2) The sum of the number of different members of the city-county council attending any of the gatherings at least equals a quorum of the city-county council.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of the city-county council attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to the betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;

(7) a gathering for the sole purpose of administering an oath of office to an individual; or

(8) a gathering between less than a quorum of the members of the governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.

(d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter.

#### 5-14-1.5-4

##### *Posting agenda; memoranda of meetings; public inspection of minutes*

Sec. 4. (a) A governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. A rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.

(b) As the meeting progresses, the following memoranda shall be kept:

(1) The date, time, and place of the meeting.

(2) The members of the governing body recorded as either present or absent.

(3) The general substance of all matters proposed, discussed, or decided.

(4) A record of all votes taken, by individual members if there is a roll call.

(5) Any additional information required under IC 5-1.5-2-2.5.

(c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, if any, are to be open for public inspection and copying.

#### 5-14-1.5-5

##### *Public notice of meetings*

Sec. 5. (a) Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. This requirement does not apply to reconvened meetings

(not including executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda.

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

(1) posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and

(2) delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. The governing body shall give notice by one (1) of the following methods:

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

(B) Transmitting the notice by electronic mail.

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

If a governing body comes into existence after January 1, it shall comply with this subdivision upon receipt of a written request for notice.

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

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

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

(1) news media which have requested notice of meetings must be given the same notice as is given to the members of the governing body; and

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

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

(f) This section shall not apply to:

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

(2) the executive of a county or the legislative body of a town if the meetings are held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. "Administrative functions" do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town.

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

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

#### 5-14-1.5-6.1

##### *Executive sessions*

Sec. 6.1. (a) As used in this section, "public official" means a person:

(1) who is a member of a governing body of a public agency; or

(2) whose tenure and compensation are fixed by law and who executes an oath.

(b) Executive sessions may be held only in the following instances:

(1) Where authorized by federal or state statute.

(2) For discussion of strategy with respect to any of the following:

(A) Collective bargaining.

(B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.

(C) The implementation of security systems.

(D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

(3) For discussion of the assessment, design, and implementation of school safety and security measures, plans, and systems.

(4) Interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by the Indiana economic development corporation, the office of tourism development, the Indiana finance authority, the ports of Indiana, an economic development commission, the Indiana state department of agriculture, a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision.

(5) To receive information about and interview prospective employees.

(6) With respect to any individual over whom the governing body has jurisdiction:

(A) to receive information concerning the individual's alleged misconduct; and

(B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:

(i) a physician; or

(ii) a school bus driver.

(7) For discussion of records classified as confidential by state or federal statute.

(8) To discuss before a placement decision an individual student's abilities, past performance, behavior, and needs.

(9) To discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

(10) When considering the appointment of a public official, to do the following:

(A) Develop a list of prospective appointees.

(B) Consider applications.

(C) Make one (1) initial exclusion of prospective appointees from further consideration.

Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. Interviews of prospective appointees must be conducted at a meeting that is open to the public.

(11) To train school board members with an outside consultant about the performance of the role of the members as public officials.

(12) To prepare or score examinations used in issuing licenses, certificates, permits, or registrations under IC 25.

(13) To discuss information and intelligence intended to prevent, mitigate, or respond to the threat of terrorism.

(c) A final action must be taken at a meeting open to the public.

(d) Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). The requirements stated in section 4 of this chapter for memoranda and minutes being made available to the public is modified as to executive sessions in that the memoranda and minutes must

identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

(e) A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. A meeting may not be recessed and reconvened with the intent of circumventing this subsection.

#### 5-14-1.5-6.5

##### *Collective bargaining meetings; applicable requirements*

Sec. 6.5. (a) Whenever a governing body, or any person authorized to act for a governing body, meets with an employee

organization, or any person authorized to act for an employee organization, for the purpose of collective bargaining or discussion, the following apply:

(1) Any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information.

(2) If a mediator is appointed, any report the mediator may file at the conclusion of mediation is a public record open to public inspection.

(3) If a factfinder is appointed, any hearings the factfinder holds must be open at all times for the purpose of permitting members of the public to observe and record them. Any findings and recommendations the factfinder makes are public records open to public inspection as provided by IC 20-29-8-13 or any other applicable statute relating to factfinding in connection with public collective bargaining.

(b) This section supplements and does not limit any other provision of this chapter.

#### 5-14-1.5-7

##### *Violations; remedies; limitations; costs and fees*

Sec. 7. (a) An action may be filed by any person in any court of competent jurisdiction to:

(1) obtain a declaratory judgment;

(2) enjoin continuing, threatened, or future violations of this chapter; or

(3) declare void any policy, decision, or final action:

(A) taken at an executive session in violation of section 3(a) of this chapter;

(B) taken at any meeting of which notice is not given in accordance with section 5 of this chapter;

(C) that is based in whole or in part upon official action taken at any:

(i) executive session in violation of section 3(a) of this chapter;

(ii) meeting of which notice is not given in accordance with section 5 of this chapter; or

(iii) series of gatherings in violation of section 3.1 of this chapter; or

(D) taken at a meeting held in a location in violation of section 8 of this chapter.

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

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

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

(2) with respect to any other subject matter, within thirty (30) days of either:

(A) the date of the act or failure to act complained of; or

(B) the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred;

whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of a governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection.

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

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

(1) The extent to which the violation:

(A) affected the substance of the policy, decision, or final action;

(B) denied or impaired access to any meetings that the public had a right to observe and record; and

(C) prevented or impaired public knowledge or understanding of the public's business.

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

(3) Whether the public interest will be served by voiding the policy, decision, or final action by determining which of the following factors outweighs the other:

(A) The remedial benefits gained by effectuating the public policy of the state declared in section 1 of this chapter.

(B) The prejudice likely to accrue to the public if the policy, decision, or final action is voided, including the extent to which persons have relied upon the validity of the challenged action and the effect declaring the challenged action void would have on them.

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

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

sequently acting upon the subject matter of the voided act until it has been given substantial reconsideration at a meeting or meetings that comply with this chapter.

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

(1) the plaintiff prevails; or

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

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

(g) A court shall expedite the hearing of an action filed under this section.

#### 5-14-1.5-8

#### *Accessibility to individuals with disabilities*

Sec. 8. (a) This section applies only to the following public agencies:

(1) A public agency described in section 2(a)(1) of this chapter.

(2) A public agency:

(A) described in section 2(a)(5) of this chapter; and

(B) created to advise the governing body of a public agency described in section 2(a)(1) of this chapter.

(b) As used in this section, "accessible" means the design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (41 C.F.R. 101-19.6, App. A (1991)) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (56 Fed. Reg. 35605 (1991)).

(c) As used in this section, "individual with a disability" means an individual who has a temporary or permanent physical disability.

(d) A public agency may not hold a meeting at a location that is not accessible to an individual with a disability.



