Indiana’s Public Access Laws

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The Public Access Counselor

Background & History of the PAC:

- The Public Access Counselor provides advice and assistance concerning Indiana's public access laws (the Access to Public Records Act and the Open Door Law) to members of the public and government officials and employees.
- Governor Frank O'Bannon created the office by executive order in 1998 after a statewide collaboration of seven newspapers found great obstacles in obtaining government information in Indiana.
- In 1999, the General Assembly created the office statutorily.
The Public Access Counselor

Some of the powers and duties of the public access counselor:

- Educating public officials and members of the public on the public access laws.
- Responding to informal inquiries concerning the public access laws.
- Issuing formal advisory opinions in response to formal complaints alleging violations of the laws.
  - However, the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed.
The Public Access Counselor

The PAC Office:

- The counselor is appointed by the Governor for four year terms. The terms expire in non-election years, so the PAC terms typically overlap with different administrations.
- The PAC office employs the counselor, a legal assistant, and legal interns who assist with investigations and research.
- The PAC office also maintains a website, available at http://www.in.gov/pac, where you can find the Handbook on Indiana’s Public Access Laws, prior opinions and answers to frequently asked questions, among other resources.
The Public Access Counselor

2010-2011 Fiscal Year

- Received 1600 inquiries
- 349 Formal Complaints Filed
  - 32 Alleged ODL Violations
  - 317 Alleged APRA Violations
    - 111 Inmate Complaints filed
    - 32 Withdrawn Prior to Opinion Issued
  - 87 Violations Found
    - 7 ODL/80 APRA
Open Door Law

The Open Door Law

- The full text of the Open Door Law ("ODL") can be found at Ind. Code § 5-14-1.5-1 et seq.

- What does the ODL require?
  - "[A]ll meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them." I.C. § 5-14-1.5-3(a).
  - The ODL also requires 48-hour advanced notice of meetings. I.C. § 5-14-1.5-5.
Open Door Law

What is a Meeting?

- A gathering of a majority of the governing body for the purpose of taking official action upon public business. I.C. § 5-14-1.5-2(c).
  - The ODL only applies to governing bodies of public agencies; it does not apply to all public officials or public entities.
Open Door Law

What is **NOT** a Meeting?

- Any social or chance gathering not intended to avoid this chapter;
- any on-site inspection of any project, program or facilities of applicants for assistance;
- traveling to and attending meetings of organizations devoted to the betterment of government
- a caucus;
Open Door Law

What is “Official Action?”

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

  NOTE: Any one of these items constitutes official action.
Open Door Law

Executive Sessions

- I.C. § 5-14-1.5-6.1
- A meeting from which the public is excluded, except for persons necessary to carry out business
- The provisions allowing for executive sessions are narrowly construed against the agency
- The governing body may **not** take final action (i.e., vote) in an executive session but may make decisions in the executive session. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001).
Open Door Law

Reasons for Executive Sessions

- Discussion of strategy with respect to initiation of litigation or litigation that is pending or has been threatened in writing (I.C. § 5-14-1.5-6.1(b)(2)(B))
- To receive information about and interview prospective employees (I.C. § 5-14-1.5-6.1(b)(5))
- To discuss a job performance evaluation (I.C. § 5-14-1.5-6.1(b)(9))
Open Door Law

Notice Requirements

- I.C. § 5-14-1.5-5
- The notice requirements apply to open meetings, reconvened meetings, rescheduled meetings, and executive sessions
- Must post notice of date, time and location of meeting 48 hours in advance of meeting
  - The 48 hours does **not** include Saturdays, Sundays, or legal holidays
  - “an executive session after the regular meeting” is not sufficient notice of meeting time
Open Door Law

Posting or Delivery of Notice

- Notice must be posted at agency’s principal office or at meeting place.
- The agency must also deliver notice to all news media that deliver by January 1 an annual written request for such notices.
  - The delivery of notice to news media does not meet the “posting” requirement, even if the media publish the notice or advertise the meeting.
Open Door Law

Notice Requirements for Executive Sessions:

- The notice must contain the same information as for an open meeting, but must also state the subject matter by specific reference to the enumerated instance(s) for which executive sessions may be held. (e.g., “to interview prospective employees pursuant to I.C. § 5-14-1.5-6.1(b)(5)”)
  - **Note:** There is no executive session instance to “discuss personnel matters” or to “meet with the Board’s attorney” – specific instances must be cited
Open Door Law

Agenda and Memoranda

- Covered in Section 4 of the ODL. I.C. § 5-14-1.5-4)
- The ODL does not require an agency to utilize an agenda.
- If the governing body utilizes an agenda, the agenda must be posted outside the meeting before the meeting begins – the ODL does not provide a time by when the agenda must be posted.
Open Door Law

Agenda and Memoranda (cont.)

- ODL does not require minutes
- Memoranda must be kept as the meeting progresses and must contain:
  - Date, time and location of meeting
  - Members present and absent
  - The general substance of all matters, proposed, discussed, or decided
  - A record of all votes taken, by individual members if there is a roll call
Open Door Law

Agenda and Memoranda (cont.)

- The memoranda are to be available within a reasonable period of time after the meeting.
- The minutes, if any, are to be open for inspection and copying.
  - **Note**: Draft minutes of a public meeting are disclosable public records despite not being in final form or adopted by the governing body.
Memoranda Requirements for Executive Sessions

- Same requirements as for meetings, except 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 memoranda and minutes must certify no other matter was discussed.
Open Door Law

○ A right of the public to record meetings, found at I.C. § 5-14-1.5-3(a) includes the right to record the meeting (audio or video). *Berry v. Peoples Broadcasting Corp.*, 547 N.E.2d 231 (Ind. 1989).

○ A governing body may place reasonable restrictions on the use of such equipment, but may not ban the use of audio or video recorders.
Open Door Law

- Teleconferencing or videoconferencing of meetings
  - Generally, a member of a governing body who is not physically present but communicates by electronic or telephonic means may not vote and may not be counted present
    - IFA members may vote by proxy: “Members may vote by written proxy delivered in advance to any other member who is present at the meeting.” I.C. § 4-4-11-7
    - Three (3) members of the authority constitute a quorum for the transaction of business. Id.
  - Some specific statutes allow for teleconferencing or videoconferencing
Access to Public Records Act

The Access to Public Records Act (“APRA”)

- Purpose: “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.”

- The full text of APRA can be found at Ind. Code 5-14-3-1 et seq.
Access to Public Records Act

- “Public records” are broadly defined: “any material that is created, received, retained, maintained or filed by or with a public agency.” I.C. § 5-14-3-2(n).
- The Indiana Court of Appeals added to this definition any material created for or on behalf of a public agency. Knightstown Banner v. Town of Knightstown, 838 N.E.2d 1137 (Ind. Ct. App. 2005).
  - In Knightstown, the record in question was a settlement agreement held in a private attorney’s office. The settlement agreement was created for the public agency but not physically maintained by the agency.
Access to Public Records Act

The APRA provides two forms of access to public records:

- "Copy" includes the right to photocopy and/or make a digital copy using a digital camera or a hand-held scanner.
- "Inspect" includes the right to make notes, abstracts and memoranda, or to listen to an audiotape.

If a public agency denies one of these rights, the burden is on the agency to demonstrate why such denial was justified (e.g., Formal Complaint 08-FC-28: agency did not sustain burden to show why it denied citizen’s request to use his own digital camera to make copies).
Access to Public Records Act

- The agency may require a person to submit a request for a public record in writing, or in a form supplied by the agency. I.C. § 5-14-3-3(a).
  - The form should not “deny or interfere” with the right to access public records.
  - Some agencies are required to see photo identification or other material before granting a records request.
- The agency shall either make the requested copy or allow the person to make a copy on the agency’s equipment or on the person’s own equipment.
Access to Public Records Act

Electronic Mail

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

What about emails that are not on the public employee’s official email account?

- Email messages maintained in a personal email account (e.g. Yahoo! account) are generally not public records subject to disclosure.

- If the personal email is submitted to the agency, it becomes a public record.
  
  **Example:** A council member prints a personal email message from a neighbor and gives it to a city employee for follow-up.
Access to Public Records Act

Public Agency’s Responsibilities

- Respond to requests made in person or via telephone within 24 hours of receipt.
- Respond to mailed, faxed, or e-mailed requests within seven days of receipt.
- Respond in writing to written requests for records
  - Best practice for requesters is to submit all requests in writing, and for agencies to respond to all requests in writing.
Access to Public Records Act

- Responding is not necessarily producing the record; the PAC’s opinions have consistently been that the records should be produced within a reasonable time.
- PACs have considered factors such as:
  - the nature of the requests (whether they are broad or narrow)
  - how old the records are
  - whether the records must be reviewed and redacted
Access to Public Records Act

- The burden lies with the public agency to show the time period for producing documents is reasonable.

- **TIPS** re: voluminous records requests:
  - Communicate frequently.
  - Document communications.
  - Try to negotiate a production deadline from the outset.
  - Release portions of records periodically
The APRA does not require an agency to stop doing business to respond to public records requests.

- Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a).

- However, section 7 does not operate to otherwise deny a requester’s rights under the APRA. I.C. §5-14-3-7(c).
Access to Public Records Act

Denials

- If denying records, agencies should state reason for denial with citation to specific authority, and give name and title or position of person responsible for denial. I.C. § 5-14-3-9.

  **TIP**: Citing unspecified “privacy laws” or referring generally to “HIPAA” is not sufficient. (*Formal Opinion 05-FC-104*: agency did not demonstrate that it was a HIPAA-covered entity)
Access to Public Records Act

- If a record contains disclosable and nondisclosable information, the agency shall separate the disclosable material and make it available. I.C. § 5-14-3-6.
- However, if the factual material is “inextricably linked” with the deliberative material, the APRA permits the public agency to withhold the factual material.
Access to Public Records Act

Exceptions to Disclosure - I.C. § 5-14-3-4.

- Section 4(a) categories are confidential
  - Confidential under federal/state statute
  - Trade secrets
  - Confidential financial information obtained, upon request, from a person.
    - Does not include information filed “pursuant to state statute.”
  - Court records declared confidential under rules adopted by Indiana supreme court (Admin. R. 9)
  - Social security numbers
  - Patient medical records created by a “provider.”
Access to Public Records Act

Section 4(b): Discretionary Exemptions

- Investigatory records of law enforcement
  - No open/closed distinction; applies to records compiled by law enforcement
- Public employees’ personnel file information, except for information in 4(b)(8) (basic information about public employees, information relating to the status of formal charges against the employee, and the factual basis for disciplinary actions that resulted in suspension, demotion, or discharge).
  - Personnel file information under 4(b)(8) may be withheld if another exception applies
Access to Public Records Act

Section 4(b): Discretionary Exemptions (cont.)

- Attorney-client privileged communications and attorney work product
- Test scores and test questions/scoring keys, etc.
- Dairies, journals, or other personal notes
- Technical information that would jeopardize a record keeping or security system
- Records developed or prepared during discussion in an executive session
Access to Public Records Act

Section 4(b): Discretionary Exemptions (cont.)

- Personal information concerning a customer of a municipally owned utility (telephone number, address, social security number)
- Personal information about complainants contained in law enforcement records (telephone number, address)
- Information relating to undercover police officers
- Records requested by incarcerated persons that contain information concerning correctional officers and their family members or crime victims, or which, if released, could affect the security of a correctional facility
Access to Public Records Act

Declassification After 75 Years

- The Access to Public Records Act provides that “[n]otwithstanding any other law, a public record that is classified as confidential . . . Shall be made available for inspection and copying seventy-five years after the creation of that record.”
  - I.C. § 5-14-3-4(d).
  - If this conflicts with another statutory exemption, please contact the PAC.
Copy Fees

- Local agencies may charge only the fee schedule adopted by the fiscal body and authorized by I.C. § 5-14-3-8.
- May not exceed the *actual cost* for providing a copy of the public record.
- Actual cost is the cost of the paper and per page cost for use of the equipment.
  - Actual cost *cannot* include labor or overhead. I.C. § 5-14-3-8(d)(2).
Copy Fees, cont.

- APRA’s general provisions regarding fees are sometimes superseded by a specific statute allowing higher fee.
  - County recorders – I.C. § 36-2-7-10.
  - County clerks and court records - I.C. § 33-37-5-1.
- Agencies may require advance payment.
APRA and ODL

Enforcement Provisions

○ A person may file a complaint with the public access counselor alleging a denial of a right under APRA or ODL.

○ The PAC sends formal complaint to the agency for response and issues a formal advisory opinion within 30 days.

○ Any person may file a lawsuit in superior court to compel the agency to produce a record or declare an action void.
APRA and ODL

Enforcement Provisions, cont.

- If a person prevails in court and has received an advisory opinion from the PAC prior to going to court, the laws provide that the person shall be awarded reasonable attorney’s fees, court costs, and other reasonable costs of litigation.

- Please remember that all records submitted to the Public Access Counselor’s office are public records unless a statutory exemption exists.
Office of the Public Access Counselor

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