

2012 Public Access Seminar

*Presented by:
The Office of the Attorney General,
Office of the Public Access Counselor, and
The Hoosier State Press Association*

The Indiana Open Door Law (ODL)

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



Meetings under the ODL

General Rule: Meetings covered by the ODL are to be open to the public.

Exception to the Rule: Executive Sessions

- Not all meetings are covered by the ODL
- Governing body of public agency
- Majority must be present
- Some gatherings are excluded from ODL
- Taking official action on public business
- Includes committees/panels appointed by governing body or its presiding officer

Meetings under the ODL

- No right to speak under ODL unless some other statute requires it (i.e. public hearings)
- Do have right to attend and observe meetings
- Meetings may be taped or recorded but governing body may regulate placement of cameras, microphones etc.

Minutes and Memoranda

ODL requires Governing Bodies to keep certain memoranda:

- Date, time and place
- Members present or absent
- General substance of matters discussed/decided
- Record of all votes, by individual if a roll call vote
- *Agendas, if used, must be posted prior to meeting
- *Minutes, if any, must be made available for public inspection

What Kind of Notice is Required

- 48 business hours in advance
- Date, time and place where Governing Body will meet
- Not required to be published in newspaper unless that is required under some other statute
- Annual notices are permitted
- Emergency meetings are exception to 48 hour notice requirement
- Must post at principal place of business or meeting location
- 2012 legislation concerning local public agencies allows the adoption of policies to provide additional notice (website, e-mail, annual notices for non-media requestors)

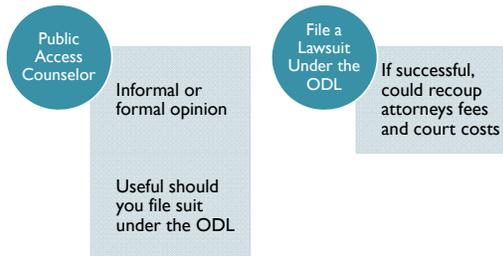
Executive Sessions

- The “exception” to meetings that are open to the public
- Notice must include statutory purpose(s) for the meeting excluding the public.
- Meeting minutes or memoranda must include certification that only the topics permitted under the ODL for executive session were discussed.

Executive Session Exceptions under the ODL

- To discuss records classified as confidential by state or federal statute
- To discuss the alleged misconduct of an employee
- To receive information and interview prospective employees
- To discuss strategy with respect to pending litigation or litigation threatened in writing
- To discuss information and intelligence intended to prevent, mitigate or respond to threat of terrorism

Remedies



New Legislation

January, 2013—State public agencies may adopt a policy that governs participation by telephone or other electronic means of communication



Fines for violations of the ODL

Questions on the Open Door Law



Access to Public Records Act (APRA)



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

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

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

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

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

What is a public record

See Indiana Code § 5-14-3-2(m) for the definition of “public agency” in APRA.

“Public record” means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code § 5-14-3-2(n)

Three Categories of Public Records

-  Disclosable
-  Confidential
-  Disclosable at the discretion of the public agency

Right to Inspect and Copy Public Records

IC §5-14-3-3, in relevant part, sets forth general rule of APRA:

- 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.
- 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.



Other Items of Note under APRA

 Copying Fees

Enhanced access/IN.gov 



If a public record contains nondisclosable and disclosable information, APRA requires the public agency to redact/separate the nondisclosable information.

Responding to APRA Requests

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



IC 5-14-3-9 concerns denial and remedies, but also sets forth times for response:

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

Exceptions to disclosure

- Confidential Public Records-IC 5-14-3-4(a)
- Categories of public records that are confidential and cannot be disclosed *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*

Confidential Public Records

-  Those confidential by state statute or federal law (i.e. IC 4-6-9-4)
-  Social Security Numbers contained in public records
-  Patient medical records unless the patient gives written consent
-  Trade secret information
-  Certain foreclosure information
-  Grade transcripts/license exam scores in licensure process

Exceptions to disclosure



Discretionarily disclosable public records
IC 5-14-3-4(b)

Public agencies must exercise this discretion uniformly, subject to review under an arbitrary and capricious standard.

Public agencies may exercise their discretion as to certain categories of public records to withhold them from disclosure.

Arrest Records

APRA Sec. 5.:

- If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:
 - Arrestee's name, age, address, charges, and information relating to the circumstances of the arrest, including time/location of arrest, investigating or arresting officer and agency.
- If a person is received in jail or lockup, the following information must be provided:
 - Name, age, and address; the reason for the detainment, time/date person received in and of discharge, bail information.
- An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints:
 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.

Arrest Records

APRA Sec. 5. Continued:

- If the incident involves an alleged crime or infraction:
 1. the time, date, and location of occurrence;
 2. the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4 (sexual crimes, child molestation, and similar crimes);
 3. the factual circumstances surrounding the incident; and
 4. a general description of any injuries, property, or weapons involved

The record containing the information must be created not later than twenty-four (24) hours after being reported to the agency.

Discretionary Categories

- Investigatory records of law enforcement agencies (except as provided in IC 5-14-3-5)
- The work product of an attorney representing, pursuant to state employment or an appointment by a public agency, a public agency, the state or an individual.
- Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
- Personnel files of public employees and files of applicants for public employment, however certain information must be provided upon request including compensation, business telephone number, dates of first and last employment, etc
- 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



Common Misconceptions of Requestors

- A public agency has to answer my questions under APRA.
- A public agency has to keep public records forever so it is not appropriate to respond that the record no longer exists.
- A public agency must handle public records requests before handling other matters of the public agency.
- A public agency must keep public records in a format that is most convenient for me.

Other common misconceptions

- ▣ • Offering to allow inspection is always sufficient. **See 11-FC-238**
- All disclosable records requested must be produced within 7 days of receiving the request. **See 11-FC-74**
- Denials do not have to be explained with specificity.
- All documents containing medical information, children’s names or personal information are confidential.
- Any document containing confidential information may be omitted from public records response. **See 10-FC-7**

Remedies and penalties for noncompliance



- Complaint to Public Access Counselor
- Bad press and damage to public perception
- Court action seeking order to produce records and potentially order to pay attorney’s fees
- Fines for knowing and intentional withholding of public records

New legislation – HB 1003

- Effective July 1st
- Allows courts to fine public officers and management level employees in public agencies for knowing and intentional denials of records that should be disclosed under APRA
 - Up to \$100 for first offense
 - Up to \$500 for additional violations
- Prerequisites and defenses to imposition of civil penalty
 - Advisory opinion from the Public Access Counselor
 - Not an intentional denial
 - Relying on opinion of legal counsel
 - Relying on opinion of the OAG
 - Officer ordered management level employee to deny a request

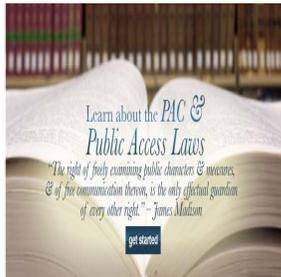
HB 1003 – other changes

- Express addition of “within a reasonable time after the request is received” in IC 5-14-3-3
- In camera inspections by courts of redacted public records in unredacted form
- One expanded and one new discretionary basis for denial
 - Offender requests for personal information of law enforcement officers, judges, or their families
 - Provision corresponding to FERPA confidentiality of individuals under 18 participating in university programs

Questions on the APRA



Public Access Counselor



- History
- Powers
- Duties
- Informal Opinions
- Advisory Opinions

Answer #1

Record is clearly disclosable. It could cast agency in bad light. You want to be able to explain the record. What's the best way to handle this situation?

- See 11-FC-81
 - Agencies may request that records be accessed during regular business hours but may not interfere with individuals exercising right to examine or copy records.
 - County Commissioner insisted that requester could only pick up the copies directly from the Commissioner during a meeting with the Commissioner.
 - PAC said that violated APRA

Answer #2

Records request asks for agency documents that include quite a bit of medical and health information of a sensitive nature? Which of the following is the best approach?

- See 05-FC-104
 - Agency did not demonstrate that it was a HIPAA covered entity
 - Citing unspecified "privacy laws" or referring generally to "HIPAA" was not sufficient attempt to state reason for denial with citation to specific authority
 - PAC noted that HIPAA is often cited by public agencies that are not covered entities under HIPAA, in the mistaken belief that HIPAA covers everyone that has health information.

Answer #3

Records request for massive amount of records. Responding could take a lot of staff time and effort. You're overworked and underpaid. Why not just give blanket denial based on work product exception, or attorney-client privilege, or investigatory record, or the too burdensome exception, or the you-can-get-this-somewhere-else exception, or the I-don't-like-you exception?

- See 11-FC-76
 - PAC found that City Controller response saying that records would be produced "in approximately 90-150 days" was unreasonable.
 - Burden is on public agency to show that record is exempt. Exceptions are narrowly construed
 - Records must be produced within reasonable period of time, based on the facts and circumstances.
 - Subject agency to court action and attorney fee award.

Answer #4

You receive a hand-written records request from an individual who can't spell very well and can't explain very clearly what records she is seeking. Why not just ignore the request based on the "reasonable particularity" provision in APRA?

- See 11-FC-238
 - County Security Center determined by PAC to have violated Act.
 - Proper response to an overly broad request is not general rejection but rather asking for clarification regarding the particular records being sought.
 - Burden of proof is on public agency
 - Can't just say that records are available for inspection either

Transparency in Government

Thank you for your participation

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Access to Public Records Act:
<http://www.in.gov/legislative/ic/code/title5/ar14/ch3.html>

Public Access Handbook:
http://www.in.gov/pac/files/pac_handbook.pdf

Public Access Counselor Website:
<http://www.in.gov/pac/>
