



# Indiana's Public Access Laws

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## **Indiana Association of Cities and Towns Complying with Public Access and Public Record Laws**

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**April 19, 2012**



# The Public Access Counselor

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## Background 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.
- Powers and Duties:
  - Educating public officials and members of the public
  - Responding to informal inquiries concerning the public access laws.
  - Issuing formal advisory opinions in response to formal complaints alleging violations of the laws.

# The Public Access Counselor

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## 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  - 32 Withdrawn Prior to Opinion Issued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

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## The Open Door Law

- The full text of the Open Door Law can be found at I.C. § 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).

# Open Door Law

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## Executive Sessions

- I.C. § 5-14-1.5-6.1
- A meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose
- The governing body may not take final action (i.e., vote) in an executive session.
  - “Final Action” is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.

# Open Door Law

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## 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

# Open Door Law

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## 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.
- Possible legislative amendment.

# Open Door Law

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## Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

The Council will meet to discuss a job performance of an individual employee as authorized under

I.C. 5-14-1.5-6.1(b)(9)





# Open Door Law

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## Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

Personnel and Litigation to be discussed

# Open Door Law

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## Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

The Council will meet pursuant to I.C. 5-14-1.5-  
6.1(b)(9)

# Open Door Law

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Executive Sessions may be held only in the following instances (I.C. 5-14-1.5-6.1(b)):

- Where authorized by federal or state statute
- For discussion of strategy with respect to any of the following:
  - Collective bargaining
  - Initiation of litigation or litigation that is either pending or has been threatened specifically in writing
  - Implementation of security systems
  - Purchase or lease of real property by the governing body up to the time of a contract or option to purchase or lease is extended by the parties (Sale prohibition)
  - School consolidation
    - All such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries

# Open Door Law

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Executive Sessions may be held only in the following instances (I.C. 5-14-1.5-6.1(b):

- Discussion of the assessment, design, and implementation of school safety measures, plans, and systems.
- Interviews and negotiation with industrial or commercial prospects or agents of industrial or commercial prospects by the IEDC, ...or a governing body of a political subdivision
- To receive information about and interview prospective employees

# Open Door Law

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Executive Sessions may be held only in the following instances (I.C. 5-14-1.5-6.1(b)):

- With respect to any individuals over whom the governing body has jurisdiction
  - To receive information concerning the individual's misconduct
  - 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.
- For discussion of records classified as confidential by state or federal statute
- To discuss before a placement decision on an individual student's abilities, past performance, behavior, and needs.

# Open Door Law

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Executive Sessions may be held only in the following instances (I.C. 5-14-1.5-6.1(b)):

- To discuss a job performance evaluation of an individual employee. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process
- When considering appointment of a public official
- To train school board members
- To prepare or score examinations used in issuing licenses, certificates, permits, or registrations under Indiana Code 25.

# Open Door Law

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- Executive Session
  - Memoranda Requirements
    - Requirements of I.C. 5-14-1.5-4
    - Must identify by specific reference to the enumerated instance(s) for which public notice was given.
    - Include certification that no subject matter was discussed in the E.S. other than the subject matter specified in the public notice.

# Open Door Law

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- Executive Session

- Misc.

- A governing body may not conduct an E.S. 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



# Access to Public Records Act

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## 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."

# Access to Public Records Act

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## 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

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- 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

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- 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

# Access to Public Records Act

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- 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

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## 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

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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

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## 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
- Attorney-client privileged communications and attorney-work product
- Records developed or prepared during discussion in an executive session
- Deliberative materials - Record that are intra-agency or interagency advisory or deliberative material, that are expressions of opinion or speculative in nature, communicated for purposes of decision making.



# Access to Public Records Act

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- 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.
- If an agency does not have a record that is responsive to the request, not required to create or produce a record (APRA = Records, not information).

# Access to Public Records Act

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## 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

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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.

# APRA and ODL

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## New Legislation

- Fines
- Creation of Education Fund
- Addition of School Consolidation to E.S. exceptions
- Attendance and Voting via Remote Access (Governing bodies of public agency of political subdivision exception)
- Personalized notification (Requires adoption of policy)

# Office of the Public Access Counselor

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