
SENATE BILL No. 328

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-14.

Synopsis: Penalty for open door or public records violation. Provides that a person may bring an action for the imposition of a civil penalty against an individual who, as a member of a governing body, participates in a meeting that the individual knows violates the open door law. Provides that a person may bring an action for the imposition of a civil penalty against an individual who knowingly violates the public records law. Provides that a court may impose a civil penalty of not more than \$1,000 against an individual for a violation of the open door law or public records law. Provides that any civil penalties must be deposited in the state general fund. Provides that a court may award attorney's fees to: (1) a prevailing plaintiff; or (2) a defendant who proves the action was frivolous and vexatious.

Effective: July 1, 2005.

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January 6, 2005, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.

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First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

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SENATE BILL No. 328



A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 5-14-1.5-7 IS AMENDED TO READ AS
 2 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7. (a) **Subject to**
 3 **subsection (g)**, an action may be filed by any person in any court of
 4 competent jurisdiction to:

- 5 (1) obtain a declaratory judgment;
- 6 (2) enjoin continuing, threatened, or future violations of this
 7 chapter; or
- 8 (3) declare void any policy, decision, or final action:
 - 9 (A) taken at an executive session in violation of section 3(a) of
 10 this chapter;
 - 11 (B) taken at any meeting of which notice is not given in
 12 accordance with section 5 of this chapter;
 - 13 (C) that is based in whole or in part upon official action taken
 14 at any executive session in violation of section 3(a) of this
 15 chapter or at any meeting of which notice is not given in
 16 accordance with section 5 of this chapter; or
 - 17 (D) taken at a meeting held in a location in violation of section



1 8 of this chapter.

2 The plaintiff need not allege or prove special damage different from

3 that suffered by the public at large.

4 (b) Regardless of whether a formal complaint or an informal inquiry

5 is pending before the public access counselor, any action to declare any

6 policy, decision, or final action of a governing body void, or to enter an

7 injunction which would invalidate any policy, decision, or final action

8 of a governing body, based on violation of this chapter occurring before

9 the action is commenced, shall be commenced:

10 (1) prior to the delivery of any warrants, notes, bonds, or

11 obligations if the relief sought would have the effect, if granted,

12 of invalidating the notes, bonds, or obligations; or

13 (2) with respect to any other subject matter, within thirty (30)

14 days of either:

15 (A) the date of the act or failure to act complained of; or

16 (B) the date that the plaintiff knew or should have known that

17 the act or failure to act complained of had occurred;

18 whichever is later. If the challenged policy, decision, or final action is

19 recorded in the memoranda or minutes of a governing body, a plaintiff

20 is considered to have known that the act or failure to act complained of

21 had occurred not later than the date that the memoranda or minutes are

22 first available for public inspection.

23 (c) If a court finds that a governing body of a public agency has

24 violated this chapter, it may not find that the violation was cured by the

25 governing body by only having taken final action at a meeting that

26 complies with this chapter.

27 (d) In determining whether to declare any policy, decision, or final

28 action void, a court shall consider the following factors among other

29 relevant factors:

30 (1) The extent to which the violation:

31 (A) affected the substance of the policy, decision, or final

32 action;

33 (B) denied or impaired access to any meetings that the public

34 had a right to observe and record; and

35 (C) prevented or impaired public knowledge or understanding

36 of the public's business.

37 (2) Whether voiding of the policy, decision, or final action is a

38 necessary prerequisite to a substantial reconsideration of the

39 subject matter.

40 (3) Whether the public interest will be served by voiding the

41 policy, decision, or final action by determining which of the

42 following factors outweighs the other:

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- 1 (A) The remedial benefits gained by effectuating the public
2 policy of the state declared in section 1 of this chapter.
- 3 (B) The prejudice likely to accrue to the public if the policy,
4 decision, or final action is voided, including the extent to
5 which persons have relied upon the validity of the challenged
6 action and the effect declaring the challenged action void
7 would have on them.
- 8 (4) Whether the defendant acted in compliance with an informal
9 inquiry response or advisory opinion issued by the public access
10 counselor concerning the violation.
- 11 (e) If a court declares a policy, decision, or final action of a
12 governing body of a public agency void, the court may enjoin the
13 governing body from subsequently acting upon the subject matter of
14 the voided act until it has been given substantial reconsideration at a
15 meeting or meetings that comply with this chapter.
- 16 (f) **Except as provided in subsection (g)**, in any action filed under
17 this section, a court shall award reasonable attorney's fees, court costs,
18 and other reasonable expenses of litigation to the prevailing party if:
19 (1) the plaintiff prevails; or
20 (2) the defendant prevails and the court finds that the action is
21 frivolous and vexatious.
- 22 The plaintiff is not eligible for the awarding of attorney's fees, court
23 costs, and other reasonable expenses if the plaintiff filed the action
24 without first seeking and receiving an informal inquiry response or
25 advisory opinion from the public access counselor, unless the plaintiff
26 can show the filing of the action was necessary to prevent a violation
27 of this chapter.
- 28 **(g) A person may bring a civil action against any individual who**
29 **is a member of the governing body to assess a penalty under this**
30 **subsection. The civil action may be joined with any other action**
31 **against the governing body of which the individual is a member for**
32 **a violation of this chapter. In order for a court to assess a civil**
33 **penalty against a member of the governing body, the court must**
34 **determine that the:**
- 35 **(1) governing body of which the individual is a member**
36 **conducted a meeting in violation of this chapter; and**
37 **(2) individual against whom the action is brought**
38 **participated in the meeting set forth in subdivision (1)**
39 **knowing that the meeting was in violation of this chapter.**
- 40 **The public access counselor may not make a determination in a**
41 **formal or informal opinion whether an individual member of the**
42 **governing body has violated this chapter. If the court makes a**

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determination described in subdivisions (1) and (2) with respect to a member of a governing body, the court may impose a civil penalty on the member of not more than one thousand dollars (\$1,000) for each violation of this chapter. Within thirty (30) days after collection, the clerk of the court shall distribute the civil penalty to the auditor of the state for deposit in the state general fund. In an action filed under this subsection, a court may 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.

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

SECTION 2. IC 5-14-3-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: 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.

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1 (d) This subsection applies to a board, a commission, a department,
 2 a division, a bureau, a committee, an agency, an office, an
 3 instrumentality, or an authority, by whatever name designated,
 4 exercising any part of the executive, administrative, judicial, or
 5 legislative power of the state. If an agency receives a request to inspect
 6 or copy a record that the agency considers to be excepted from
 7 disclosure under section 4(b)(19) of this chapter, the agency may
 8 consult with the counterterrorism and security council established
 9 under IC 4-3-20. If an agency denies the disclosure of a record or a part
 10 of a record under section 4(b)(19) of this chapter, the agency or the
 11 counterterrorism and security council shall provide a general
 12 description of the record being withheld and of how disclosure of the
 13 record would have a reasonable likelihood of threatening the public
 14 safety.

15 (e) A person who has been denied the right to inspect or copy a
 16 public record by a public agency may file an action in the circuit or
 17 superior court of the county in which the denial occurred to compel the
 18 public agency to permit the person to inspect and copy the public
 19 record. Whenever an action is filed under this subsection, the public
 20 agency must notify each person who supplied any part of the public
 21 record at issue:

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

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

30 (f) The court shall determine the matter de novo, with the burden of
 31 proof on the public agency to sustain its denial. If the issue in de novo
 32 review under this section is whether a public agency properly denied
 33 access to a public record because the record is exempted under section
 34 4(a) of this chapter, the public agency meets its burden of proof under
 35 this subsection by establishing the content of the record with adequate
 36 specificity and not by relying on a conclusory statement or affidavit.

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

- 40 (1) the public agency meets its burden of proof under this
- 41 subsection by:
- 42 (A) proving that the record falls within any one (1) of the

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1 categories of exempted records under section 4(b) of this
 2 chapter; and
 3 (B) establishing the content of the record with adequate
 4 specificity and not by relying on a conclusory statement or
 5 affidavit; and
 6 (2) a person requesting access to a public record meets the
 7 person's burden of proof under this subsection by proving that the
 8 denial of access is arbitrary or capricious.
 9 (h) The court may review the public record in camera to determine
 10 whether any part of it may be withheld under this chapter.
 11 (i) **Except as provided in subsection (j)**, in any action filed under
 12 this section, a court shall award reasonable attorney's fees, court costs,
 13 and other reasonable expenses of litigation to the prevailing party if:
 14 (1) the plaintiff substantially prevails; or
 15 (2) the defendant substantially prevails and the court finds the
 16 action was frivolous or vexatious.
 17 The plaintiff is not eligible for the awarding of attorney's fees, court
 18 costs, and other reasonable expenses if the plaintiff filed the action
 19 without first seeking and receiving an informal inquiry response or
 20 advisory opinion from the public access counselor, unless the plaintiff
 21 can show the filing of the action was necessary because the denial of
 22 access to a public record under this chapter would prevent the plaintiff
 23 from presenting that public record to a public agency preparing to act
 24 on a matter of relevance to the public record whose disclosure was
 25 denied.
 26 (j) **A person may bring a civil action against an individual who**
 27 **is an employee or an appointed or elected officer of a public agency**
 28 **to assess a penalty under this subsection. The civil action may be**
 29 **joined with any other action against the public agency for which**
 30 **the individual is an employee or an elected or appointed officer for**
 31 **a violation of this chapter. In order for a court to assess a civil**
 32 **penalty against an individual under this subsection, the court must**
 33 **determine that the:**
 34 (1) **public agency denied a person access to a public record in**
 35 **violation of this chapter; and**
 36 (2) **individual against whom the action is brought knowingly**
 37 **denied the person making the request set forth in subdivision**
 38 **(1) access to the public record knowing that the denial violates**
 39 **this chapter.**
 40 **The public access counselor may not make a determination in a**
 41 **formal or informal opinion whether an individual member of the**
 42 **governing body has violated this chapter. If the court makes a**

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1 **determination described in subdivisions (1) and (2) with respect to**
2 **an employee or elected or appointed officer of the public agency,**
3 **the court may impose a civil penalty on the employee or elected or**
4 **appointed officer of not more than one thousand dollars (\$1,000)**
5 **for each violation of this chapter. Within thirty (30) days after**
6 **collection, the clerk of the court shall distribute the civil penalty to**
7 **the auditor of the state for deposit in the state general fund. In an**
8 **action filed under this subsection, a court may award reasonable**
9 **attorney's fees, court costs, and other reasonable expenses of**
10 **litigation to the prevailing party if the plaintiff prevails or if the**
11 **defendant prevails and the court finds that the action is frivolous**
12 **and vexatious.**

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

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