

HOW PUBLIC SHOULD
PUBLIC INFORMATION BE?

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DISCLAIMER

The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individuals. Compliance with Indiana's Access to Public Records laws and regulations, and its application to particular cases, should only be taken upon the advice of knowledgeable counsel.

I. Access to Public Records under Indiana Law

A. Public Policy behind the law-I.C. § 5-14-3-1

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.

B. Examples of records that must be disclosed

1. Any person has the right to inspect and copy public records of any public agency, and the agency may not deny or interfere with that right. I.C. §§ 5-14-3-3(a) and (b).
2. The agency “may or may not” permit inspection and copying through “enhanced access,” which includes use of “an electronic device other than an electronic device provided by a public agency in the office of the public agency.” I.C. §§ 5-14-3-3(c) & 5-14-3-2.
 - (a) State Agencies may provide enhanced access via computer gateway administered by the Office of Technology (as of 7/1/05). The state agency may enter into a contract with a third party to set up a computer gateway I.C. § 5-14-3-3.5(c), but it must use the Access Indiana web site I.C. § 5-14-3-3.5(e).
 - (b) Public Agencies other than state agencies may also provide enhanced access to public records and may use a third party’s computer gateway, but it must provide ample protection of public records against unauthorized access, alteration, or disclosure of confidential information. I.C. § 5-14-3-3.6(b), (c), and (d). The agency may charge the person using the web site, but the fee must be reasonable. I.C. § 5-14-3-3.6(e).

3. When the public agency uses an electronic data storage system, it must make reasonable efforts to give the requestor copies on paper, disk, etc. I.C. § 5-14-3-3(d).
4. Political subdivisions may enact ordinances that prescribe whether and how a person may use the information for commercial purposes. I.C. § 5-14-3-3(e).
5. Public agencies do not have to create or provide copies of lists of names and addresses unless ordered by statute. If it did create a list, it must make that available. There are three exceptions provided. I.C. § 5-14-3-3(f).
6. Arrest records must be disclosed, including personal information, charges, and circumstances of the arrest. I.C. § 5-14-3-5(a). Information about a person's jailing must also be disclosed. I.C. § 5-14-3-5(b). Finally, the agency must keep a daily log for inspection of suspected crimes, accidents, or complaints. I.C. § 5-14-3-5(c).

C. Exceptions to disclosure requirements

1. The following records must not be disclosed, unless access is specifically required by state or federal statute or by court order:
 - (a) Those declared confidential by state statute;
 - (b) Those declared confidential by rule adopted by a public agency under specific authority;
 - (c) Those required to be kept confidential by federal law;
 - (d) Records containing trade secrets;
 - (e) Confidential financial information obtained, upon request, from a person unless the information is filed or received by a public agency pursuant to state statute;
 - (f) Information concerning research conducted under the auspices of an institution of higher education;
 - (g) Grade transcripts and license examination scores obtained as part of a licensure process;
 - (h) Those declared confidential by or under rules adopted by the Indiana Supreme Court;

- (i) Patient medical records and charts created by a provider, unless the patient gives written consent for disclosure;
 - (j) Application information declared confidential by the twenty-first century research and technology fund board; and,
 - (k) A photograph, a video recording, or an audio recording of an autopsy, except as provided in I.C. § 36-2-14-10.
2. The following records may be withheld from disclosure at the public agency's discretion:
- (a) Investigatory records of law enforcement agencies, subject to the exception found at I.C. § 5-14-3-5.
 - (b) The work product of an attorney representing a public agency, the state, or an individual pursuant to state employment or an appointment by a public agency;
 - (c) 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;
 - (d) Scores of tests if the person is identified by name and has not consented to the release of the scores;
 - (e) Certain records from public agencies relating to negotiations created while the negotiations are in progress;
 - (f) Intra-agency or interagency advisory or deliberative material, including material that express opinions and are used for decision making;
 - (g) Diaries, journals, or other personal notes;
 - (h) Certain information contained in the files of public employees and applicants for public employment, except for:
 - (i) 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;

- (ii) information relating to the status of any formal charges against the employee; and
- (iii) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative.

- (i) Minutes or records of hospital medical staff meetings;
- (j) Administrative or technical information that would jeopardize a recordkeeping or security system;
- (k) Computer software owned by the public agency;
- (l) Records specifically prepared for discussion or developed during discussion in an executive session, except for records discussed in I(C)(2)(h) above;
- (m) The work product of the legislative services agency under personnel rules approved by the legislative council;
- (n) The work product of the general assembly and its staff;
- (o) The identity of a donor of a gift made to a public agency if the donor or the donor's family requests nondisclosure;
- (p) Information identifying library patrons or material deposited with the library or archives;
- (q) The identity of any person who contacts the BMV concerning the ability of a driver to operate a motor vehicle safely;
- (r) School safety and security measures, plans, and systems, including emergency preparedness plans;
- (s) 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;

- (t) The personal information concerning a customer of a municipally owned utility, including telephone number, address, and social security number.
- 3. Job titles or job descriptions of law enforcement officers need not be released. I.C. § 5-14-3-4.3.
- 4. Judicial records may be sealed following the notice & hearing process in I.C. § 5-14-3-5.5.

II. Public Records and Web sites

A. What you should place on your web site

- 1. Statutory/Regulation requirements.
 - (a) I.C. § 13-14-1-11.5(b) mandates certain information to be posted on IDEM's web site.
 - (b) Sheriff must provide Registry of sex offenders online. I.C. § 36-2-13-5.5.
 - (c) HIPAA's Privacy Rule-A Covered Entity (health plan, health care clearinghouse, and health care provider) that maintains a web site the provides information about the Covered Entity's customer services or benefits must prominently post its Notice of Privacy Practices on the web site, and make the Notice available electronically through the web site. 45 CFR §164.520(c)(3)(i).
- 2. Recommended items.
 - (a) Calendar of Events;
 - (b) Public meeting schedules, notices and agendas;
 - (c) Public meeting minutes (approved only);
 - (d) Department listings and contact information;
 - (e) Board/Commission members and contact information;
 - (f) Job postings, applications and forms;
 - (g) Notices to bidders;

- (h) Permit applications and schedule of fees;
 - (i) Maps;
 - (j) Municipal Code (if codified); and,
 - (k) State of the City address.
3. Evidentiary effect regarding web site content placement.
- (a) A statement on the Marion County Sheriffs' web site that special deputies are political appointees was admitted into evidence. Wright v. State, 772 N.E.2d 449 (Ind. App. 2002).
 - (b) There is no state law against disclaiming evidentiary effect of statements on a web site. The City of Indianapolis web site states that "...the Site is provided "as is," and that Indygov.org and its authorized agents and contractors assume no responsibility for the timeliness, deletion, mis-delivery, or failure to store any user communications or personalization settings."

B. What you should not place on your web site

- 1. Public records deemed confidential under federal, state or local law.
- 2. Contracts, Memoranda of Understanding, Letter Agreements, etc.
 - (a) Without a proper context, public may not have the "whole picture".
 - (b) These are available via public records request.
- 3. Uncodified Ordinances
 - (a) Likelihood that web site will not have updated information for the public to review.
 - (b) These can be provided to the public via public records request.
- 4. General personnel lists and information (the "rank and file" employees).
- 5. Personnel handbook and policies.
- 6. Financial data (i.e., budgets, salaries, interim reports).

7. Inter-office memoranda.

C. Cost/Benefit Analysis

1. Public agencies cannot charge fees for search/inspection, except actual cost for copies, actual cost for computer discs, reasonable fees for maintaining a legislative services agency, reasonable fees for an enhanced access system, and fees for providing an electronic map that cover maintenance, upgrades, and enhancements. I.C. § 5-14-3-8.
2. If a political subdivision charges a fee under I.C. § 5-14-3-8 for enhanced access or an electronic map, it must adopt an ordinance enabling an enhanced access or electronic map fund. I.C. §§ 5-14-3-8.3 and 8.5.
3. Cost of providing public records on web site
 - (a) Who will ensure that the web site is up-to-date and accurate?
 - (b) Will you need to hire more technology personnel and, if so, at what cost?
 - (c) Will you need to upgrade your system/memory to provide additional public records on the web site?
 - (d) Public begins to expect these records in this format.
 - (e) More is sometimes not better, not user-friendly.
4. Benefit of providing public records on web site
 - (a) Because the public is more technology savvy, public will be better informed.
 - (b) For job postings, you could receive increased interest and a better pool of candidates.
 - (c) Office personnel could spend less time responding to public records requests and focus on other tasks related to their job.
 - (d) Public can spend less time traveling to City Hall to obtain records; rather, they can simply download and copy the information they desire from work or home.

- (e) Visitors to web site may see that you are on the cutting edge of technology which, in turn, may lead to future economic growth and opportunities.
- (f) Public will be served in a more efficient manner.

III. Conclusion

Being proactive with your web site and the public records placed on the web site may better serve the public in general; however, there may be economic and administrative costs to bear. Having an appropriate consultant assist you in your endeavor may help cut down on unnecessary costs and increase efficiency.

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