

Office of the State Treasurer's

Guide to the Access to Public Records Act

2016

Prepared by Jillean Battle
General Counsel



Office of the Treasurer of State's Guide to the Access to Public Records Act

Under Indiana Code § 5-14-3, records held by government agencies are presumed to be accessible for inspection or copying by any member of the public unless exempted by law.

We are fully committed to upholding the public policy of the Access to Public Records Act (APRA) because providing members of the public with access to records is an essential function in our form of representative government.

It is for this purpose that we are pleased to provide this quick reference guide to our Access to Public Records Policy.

This guide will provide a basic understanding of our most common public record requests and how these requests are typically answered by our office.

Due to the varied nature of public requests, this guide is not exhaustive.

If you have questions about our internal policy please contact our office:

Indiana State Treasurer's Office
242 State House
Indianapolis, Indiana 46204
Phone: 317-232-6386
Fax: 317-233-1780

Sincerely,

Kelly M. Mitchell
Treasurer of State

Contents

SECTION ONE: OVERVIEW OF THE INDIANA ACCESS TO PUBLIC RECORDS ACT	4
I. DEFINING PUBLIC RECORD	4
II. SUBMITTING AN APRA REQUEST	4
III. COMMUNICATION PROCEDURES	4
A. Initial Response from the Treasurer's Office	4
B. Estimate Timeframe Letter	4
C. Letter of Clarification	5
D. Update letters/Notice of Fee and Complete Review	5
IV. DENIAL OR REDACTION OF RECORDS	5
V. OBTAINING LEGAL ASSISTANCE	6
SECTION TWO: MOST COMMON RECORDS REQUEST	7
EMAIL	7
A. REASONABLE PARTICULARITY	7
B. INTER/INTRA-AGENCY DELIBERATIVE MATERIAL	7
C. ATTORNEY-CLIENT PRIVILEGE	8
D. WORK PRODUCT DOCTRINE	8
CALENDARS	9
PERSONNEL FILES	9
RESOURCES	11

SECTION ONE: OVERVIEW OF THE INDIANA ACCESS TO PUBLIC RECORDS ACT

REQUEST FOR PUBLIC RECORDS

This internal guide may be used as quick reference when applying the Access to Public Records Act (APRA) to records requests made to the Office of the Indiana Treasurer ("TOS").

I. DEFINING PUBLIC RECORD

A public record means any writing, paper, report, study, map photography, book, card tape, recording, or other material that is created, received, retained, maintained, or filed by or with a public agency.¹ Public records also include any material created for or on behalf of a public agency. To the extent that a record is neither created, received, retained, maintained, or filed by or with the TOS nor is required to be created, received, retained, maintained, or filed by or with the office, members of the staff are not required to create records or perform new analysis of existing information to satisfy a public access request.²

II. SUBMITTING AN APRA REQUEST

The TOS requires all record requests be submitted in writing. Placing a request in writing ensures that the requestor and the office will have documentation regarding what specific records are sought. Written requests can be submitted via email, fax, the Treasurer's website, or by mail.

III. COMMUNICATION PROCEDURES

A. Initial Response from the Treasurer's Office

The TOS will send a response acknowledging receipt of a public record request within seven (7) days. For requests made in-person or over the phone, the TOS response is given within twenty-four (24) hours. Please note that if an APRA request is made by phone, the requestor will be required to submit the request in writing.

B. Estimate Timeframe Letter

The TOS will send an Estimate Timeframe Letter after initial review of the request. The letter will outline any applicable exceptions to the APRA and the estimated time it will take for the TOS to gather, review, or redact disclosable materials. The APRA does not prescribe timeframes for the actual production of

¹ I.C. § 5-14-3-2(a)(n)

² Opinion of the Public Access Counselor 07-FC-236

records. For guidance, the Indiana Public Access Counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances.

“Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete non-disclosable material are necessary to determine whether [the office] has produced records within a reasonable timeframe”.³

A common misconception is that the office is required to stop regular business operations to respond to a public records request. The TOS will regulate any material interference with the regular discharge of the functions of the office while effectively communicating the status of the request.

C. Letter of Clarification

A clarification letter may be sent if the office cannot identify with certainty the specific records being sought. To provide further aid in identifying records, the office will advise the requestor to provide as much description and background information as possible. The more information provided in the request, the greater the probability that the TOS will locate the records in a timely manner.

D. Update letters/Notice of Fee and Complete Review

Once the review of the requested records is complete, a notice for the copying fee is sent via U.S. mail to the requestor. Indiana law permits the office to recoup a copying expense of ten cents (\$.10) per page.⁴ If the requestor chooses to receive copies of the records, he or she must send a cashier's check, money order, or company check for the full amount due made payable to the Office of the Treasurer of State. Documents will not be released until payment is received. The TOS may choose to send documents via email and without receiving a copying fee if the number of documents does not exceed five pages.

If circumstances arise that will prevent the TOS from meeting the estimated timeframe projected in earlier correspondence, or an exception to the APRA will apply to the request, an update letter will be sent to the requestor via U.S. mail.

IV. DENIAL OR REDACTION OF RECORDS

A denial of access to public records occurs when a public agency either affirmatively denies a request or fails to respond to a public records request within a reasonable time.⁵ Any denial of public records requested must include an explanation, including legal authority, and the name and title of the person responsible for the denial. All explanations will be made in writing. An agency is required to separate and/or redact confidential information in public records before making the disclosable information

³ See Opinion of the Public Access Counselor 07-FC-268

⁴ I.C. § 5-14-3-8(d)(1)

⁵ Opinion of the Public Access Counselor 12-INF-18.

available for inspection and/or copy.⁶ If there are any redactions made to a record, the requestor will be notified of the redactions and the specific exemption(s) authorizing the withholding of the redacted information.

V. OBTAINING LEGAL ASSISTANCE

This internal guide is not intended to be a substitute for seeking legal advice. A person seeking records may consider consulting the Office of the Indiana Public Access Counselor. The Indiana Public Access Counselor maintains a website with detailed information on the APRA. The website is updated periodically to reflect changes in the law and is a great resource for understanding access to public information.

⁶ See I.C. § 5-14-3-6(a).

SECTION TWO: MOST COMMON RECORDS REQUEST

EMAIL

A. REASONABLE PARTICULARITY

Example Request: I seek copies of any and all email from Samantha Smith's state e-mail account in 2002.

Public records include agency related e-mail conducted on government computers.⁷ A request for an employee's e-mail must be specifically described with reasonable particularity.⁸ Indiana Public Access Counselors have opined that "e-mail is a method of communication and not a type of record and requests for records that only identify the records by method of communication are not defined with reasonable particularity." *Id.*

With respect to the above example request, the language "any and all email" is not particular. As a result, the TOS would advise the requestor to resubmit the request with additional information. Generally, a request for e-mail is more successful when it is narrowed to reflect the sender, recipient, and a particular range of dates. The TOS should comply with requests reflecting this information unless an exception to the APRA permits or requires withholding all or part of the records.⁹

B. INTER/INTRA-AGENCY DELIBERATIVE MATERIAL

Example Request: I would like to obtain copies of all email between office staff regarding investing the Heritage Fund.

Requests for correspondence between staff or communications between office staff and other state offices or agencies may fall into the deliberative material exception.¹⁰ The APRA provides that records between staff or interagency, including material developed by a private contractor under a contract, that are expressions of opinion or speculative in nature, and that are communicated for the purpose of decision making may be withheld from disclosure.

Deliberative material is described as information that reflects one's ideas and recommendations on a subject or issue for use in the decision making process.¹¹ Use of this exemption is "to prevent injury

⁷ See Opinions of the Public Access Counselor: 08-INF-23, 09-FC-24, 09-FC-104, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, and 11-FC-80.

⁸ See I.C. § 5-14-3-3(a).

⁹ See Opinion of the Public Access Counselor 12-FC-44.

¹⁰ See I.C. § 5-14-3-4(b)(6).

¹¹ See Opinion of the Public Access Counselor 05-FC-206.

to the quality of agency decisions.”¹² The TOS encourages an environment that welcomes diverse thought and the distribution of opinions. Without this atmosphere, “frank discussion of legal or policy matters in writing might be inhibited if the discussions were disclosed, and the decisions and policies formulated might be poorer as a result.”¹³

The TOS will deny requests for correspondence between staff regarding decisions to invest. It is important to note that should any of the correspondence contain factual matters that are not inextricably linked to non-disclosable material, the TOS will redact records to provide disclosable information.

C. ATTORNEY-CLIENT PRIVILEGE

Example Request: Please provide me with copies of communication between general counsel and the investment manager regarding the decision to hire a third-party investment manager for the tobacco fund.

Communication between an attorney and staff should be meticulously reviewed before being made available to the public for inspection or copy. Any person has the right to inspect and copy public records, however, Indiana law also provides that one category of public records are confidential.¹⁴ Communication between attorney and client is privileged. The Indiana Supreme Court explained the privilege as follows:

...when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential ...The privilege applies to all communications made to an attorney for the purpose of professional advice or aid, upon the subject of the client's rights or liabilities.¹⁵

The aforementioned request seeks to obtain a copy of communication involving general counsel when the attorney is consulted on business within the scope of the legal profession. When the attorney-client privilege is applicable, the TOS will choose to exercise the privilege to prevent waiving the right to withhold privileged information.¹⁶

D. WORK PRODUCT DOCTRINE

Example Request: I seek to obtain any and all records of Rebecca Allen, General Counsel, related to City Group Homestead v. Indiana State Treasurer.

¹² *Id.*

¹³ *Id.*

¹⁴ See I.C. § 34-46-3-1.

¹⁵ Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992)

¹⁶ See The Indianapolis Star v. Trustees of Indiana University, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003).

The work product of an attorney, namely any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories, prepared in anticipation of a realistic possibility of litigation is protected from disclosure. Moreover, Indiana Rules of Professional Conduct *prohibit* a lawyer from revealing any information related to representation.¹⁷ This prohibition also applies to disclosure that does not reveal protected information but could reasonably lead to the discovery of such information by a third person. *Id.*

The records sought in the aforementioned request relate to a litigated matter and, as a result, may call for documents reflecting Rebecca Allen's exercise of professional judgment. Consequently, the request for Rebecca Allen's records related to work product prepared for City Group Homestead v. Indiana State Treasurer would be reviewed and denied.

CALENDARS

Example Request: I seek to obtain copies of Treasurer John Monroe's May 2008 calendar.

Generally, schedules or records of activities are reflected in an employee or a state official's calendar and shall be excepted from the right of the public to inspect or copy.¹⁸ At the discretion of the agency, the following (among others) may be withheld from disclosure: Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.¹⁹ Several Indiana Public Access Counselors have provided that appointment calendars serve the functional equivalent of a diary or journal.²⁰ The TOS chooses to exercise its right to withhold calendars pursuant to I.C. § 5-14-3-4(b)(7). Therefore, a request for an employee or the Treasurer's calendar will be denied.

PERSONNEL FILES

Example Request: Please provide copies of all requests for time off, including sick leave, vacation and leave without pay, and discipline documentation located in Mary Johnson's personnel file.

Certain information in staff personnel files and files of applicants for public employment shall be excepted from disclosure. However, the Indiana General Assembly has mandated the disclosure of the following information upon a request:

- (A) The names, 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;

¹⁷ Indiana Rules of Professional Conduct Rule 1.6. Comment 9

¹⁸ See I.C. § 5-14-3-4(b)(7).

¹⁹ *Id.*

²⁰ See Opinions of the Public Access Counselor 01-FC-42; IC 5-14-3-6(a); 05-FC-152; 01-FC-41 or Informal inquiry 09-INF-7.

- (B) Information relating to the status of any formal charges against the employee; and
- (C) Information concerning any disciplinary actions in which action has been taken and that resulted in the employee being disciplined or discharged.²¹

The example APRA request for Mary Johnson's "requests for time off" does not fall within disclosable information outlined by Indiana's legislature. As a result, this request may be disclosed at the discretion of the office. For legal purposes, a request for leave without pay and requests for sick leave are always denied by our office pursuant to the privacy provisions of the Health Insurance and Accountability Act ("HIPPA").

As to the request for records reflecting the discipline of a state employee, the TOS will disclose information about an employee's discipline record. Please note that under the requirements of APRA, this office is mandated to only release "information" and *not* the public record. As a result, the office would supply the requestor with a digest of information to fulfill the request and not actual copies of documents located in Mary Johnson's file.²²

²¹ I.C. § 5-14-3-4(b)(8).

²²Opinion of the Public Access Counselor 02-FC-22.

RESOURCES

Office of the Public Access Counselor

W470, Indiana Government Center South
402 West Washington Street
Indianapolis, IN 46204
Phone: (317) 234-0906
Toll Free: (800) 228-6013
Fax: (317) 233-3091
www.in.gov/pac

State Information Center

402 W. Washington Street
Indianapolis, IN 46204
Chat with a Live State Information Center Counselor
Phone: (317) 233-0800
Toll Free: (800) 457-8283
stinfo@sic.IN.gov
www.in.gov/help.htm

The State Information Center (SIC) is your single point of contact for questions about the state. This agency maintains a website to help the public search state documents. If you cannot find what you are looking for on the SIC's website, you can contact a SIC representative.

Indiana Transparency Portal

Office of the Auditor of State
www.in.gov/itp/

This is a website aimed to provide the public with complete access to information about how Indiana is utilizing taxpayer resources. Recently, the Federation of State Public Interest Research Groups and the Sunshine Review, two non-profit organizations dedicated to state and local government transparency, rated the Indiana Transparency Portal grade "A."

Indiana Department of Administration

402 W. Washington St., Room W-478
Indianapolis, IN 46204
Phone: (317) 232-3150
Fax: (317) 232-3153
www.in.gov/idoa

The Indiana Department of Administration (IDOA) is an umbrella agency that provides support services to other state agencies to help assure the smooth functioning of state government. The IDOA has a website link that provides the public access to search the database for state contracts.