

GUIDE TO FILING A FORMAL COMPLAINT
Office of the Indiana Public Access Counselor
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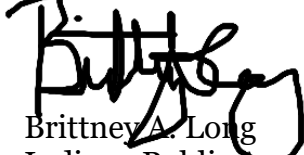
Introduction

The Office of Public Access Counselor is pleased to provide you with a copy of this “Guide to Filing a Formal Complaint.” The Indiana General Assembly created this office by statute in July 1999, after Governor Frank O’Bannon had created it by executive order in 1998. The role of the office, among other things, is to prepare and distribute interpretive and educational materials such as this guide. This guide is available in PDF format on our website, www.IN.gov/pac.

In this guide, you will find information about filing a formal complaint with this office. It will provide guidelines on completing the complaint form, what the process is once the complaint is received, what to expect after the opinion is issued and helpful tips for requesting documents. It is the hope of the Office of the Public Access Counselor that this guide will answer questions which may arise as complaints are being filed.

This guide addresses many issues but is not intended to be a substitute for seeking advice from legal counsel. While this office cannot serve as legal counsel for any person, we are available to answer questions related to Indiana’s public access laws. Please feel free to contact this office using the contact information provided on the front of this guide if you have any questions or problems related to the public access statutes.

Sincerely,

A handwritten signature in black ink, appearing to read "Brittney A. Long". The signature is stylized with a large, looped "B" and a long, sweeping underline.

Brittney A. Long
Indiana Public Access Counselor

Purpose of filing a formal complaint

The formal complaint process exists to allow any person to seek and receive interpretation by the Public Access Counselor of issues relating to the Open Door Law and the Access to Public Records Act. The process provides an alternative to litigation for retrieving requested records or settling an issue from a public meeting. Since the creation of this office in 1998, we have received several thousand complaints and have issued approximately 3500 opinions. As the public becomes more aware of the right to know what government is doing, the need for the services of the Office of the Public Access Counselor will continue to grow.

Common types of denial

The formal complaint process first begins with an alleged violation of either the Access to Public Records Act or the Open Door Law. Common types of denials are the following:

- Wrongly denied records
- Information incorrectly redacted
- No response from the agency
- Unreasonable amount of time for record production
- Excessive copy fees
- No proper notice for meeting
- Unauthorized executive session
- Inaccessible meeting room
- Final action taken outside of public meeting

Wrongly Denied Records

If an agency denies a record request submitted in writing, it must provide the state or federal law allowing it to deny the record. I.C. § 5-14-3-9(d)(2). If the agency fails to provide this or you believe the wrong statute was used to deny your request, you may file a formal complaint.

Information incorrectly redacted

Another form of denial is when information is incorrectly redacted from the records requested. The agency must also provide the state or federal law allowing it to redact certain information. If it does not provide this information, a formal complaint may be filed.

No response from agency

There are specific time restrictions for agencies to follow when responding to requests. An agency has seven (7) days after receipt to respond to a written request which is mailed, faxed or emailed. An agency must respond within twenty-four (24) business hours to a verbal or hand-delivered request. A response does not have to be a production of records. It can simply be an acknowledgement of receipt of the request. If

an agency does not respond to a request within the allotted time frames, a formal complaint may be filed.

Unreasonable amount of time for record production

There are no prescribed timeframes when the records must be produced by a public agency. The Public Access Counselor has determined records must be produced within a “reasonable amount of time” based on the facts and circumstances. If an agency takes an unreasonable amount of time to produce records, a complaint may be filed.

Excessive copy fees

The Access to Public Records Act allows a public agency to set a fee schedule for copies of records. These fees cannot exceed the actual cost to the agency of copying the document and must be uniform for all requestors. There are some statutes, like those regarding the records maintained by county clerks and recorders, which allow a specific amount to be charge for certain documents. If you believe a copy fee being charged exceeds what the statute allows, you may file a formal complaint with this office.

No or improper notice for meeting

A complaint may be filed if a governing body held a meeting and did not provide the proper notice for the meeting. There are specific guidelines in the Open Door Law for the posting notice. I.C. § 5-14-1.5-5. In addition, a complaint may be filed if a notice does not contain the required information or is not posted at the correct time.

Unauthorized executive session

If an agency holds an executive session, it must follow certain rules. There are very specific instances in which an executive session can be held. I.C. § 5-14-1.5-6.1. An executive session also must be properly noticed. If the executive session is not noticed and/or the subject matter is not allowed under I.C. § 5-14-1.5-6.1, a complaint may be submitted to this office.

Inaccessible meeting room

The Open Door Law requires a governing body’s meeting room to be accessible to people with disabilities. I.C. § 5-14-1.5-8. If a governing body holds a meeting which does not satisfy these requirements, a violation of the Open Door Law has occurred and a complaint may be filed. The Open Door Law does not provide for any specific audio or visual equipment to be utilized by the agency. Therefore, a complaint regarding the lack of audio or visual technology will be rejected.

Final action taken outside of public meeting

A governing body must take any final action during a properly noticed public meeting and may not be taken during executive session. Final action is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. I.C. § 5-14-1.5-2(g). Any final action taken outside of a public meeting is a violation of the Open Door Law.

Prior to filing a complaint

Once the determination of denial occurs, several details must be considered prior to filing the complaint:

- ✓ Do I have the correct complaint form?
- ✓ Do I have all the necessary information?
- ✓ Is my complaint an Access to Public Records Act or Open Door Law issue?
- ✓ Is the complaint within the statutory timeframe?

Do I have the correct complaint form?

The Public Access Counselor prescribes a form on which formal complaints must be submitted. You must file a formal complaint using the formal complaint form available via our website, www.in.gov/pac. This form provides space for all the information necessary for the processing of the complaint.

Do I have all the necessary information?

All spaces must be completed. You must describe the denial of access in the space on the form. You can use additional sheets if necessary, and you can send copies of documentation such as meeting notices or the agency's written denial of the record. It is usually not helpful to explain why the record is needed or to complain about the agency's conduct, because the opinion seldom concerns those matters. You need only submit one (1) copy of the complaint to the counselor. Any information provided to the Office of the Public Access Counselor is considered public record unless a specific statutory exemption applies.

Is my complaint an Access to Public Record Act or Open-Door Law issue?

The complaint must concern an issue which is related to the Access to Public Records Act or the Open Door Law or other state law pertaining to public access. The Public Access Counselor will not accept complaints dealing with issues outside the public access laws. Also, the agency the complaint is against must be a public agency as defined by statute. The Public Access Counselor cannot accept complaints against private agencies or corporations.

Is the complaint within the statutory time limits?

A formal complaint ***must be filed within thirty (30) days of the denial of records or receiving information regarding a meeting held in secret or without notice***. I.C. § 5-14-5- 7(a). Complaints filed beyond thirty (30) days are untimely and will be returned.

Why Complaints are Rejected or Returned

When a complainant fails to provide all the necessary information or follow the previously addressed guidelines, the complaint may be returned for more information or returned because the complaint does not state a matter subject to the opinion of the Public Access Counselor.

Rejected Complaints

Reasons for complaints are rejected include but are not limited to the following:

- Untimely or not ripe
- Not a public agency
- Outside OPAC jurisdiction
- Legal litigation where a court would have authority
- Not a valid complaint or not related to APRA or ODL law
- Duplicate or similar complaints
- Incomplete Complaint
- Unable to articulate or provide enough information
- Complaint lacks merit

Untimely

A complaint is considered untimely if it is filed more than thirty (30) days after the denial occurred. I.C. § 5-14-5-7. The Public Access Counselor cannot accept untimely complaints. It is not ripe when a complaint is filed prematurely and an agency has not yet violated the Access to Public Records Act or Open Door Law.

Not a public agency

Because only public agencies are subject to the Access to Public Records Act and the Open Door Law, the Public Access Counselor cannot accept complaints against private corporations, private individuals or non-profit organizations. An agency must fit the definition of a public agency in the Access to Public Records Act or the Open Door Law. I.C. §§ 5-14-3-2(n), 5-14-1.5-2(a). A complaint should be filed against the entire public agency and not against only part of the agency.

Legal litigation

I.C. § 5-14-4-10(6) precludes the Public Access Counselor from accepting complaints and issuing opinions in cases where a lawsuit has been filed, there pending litigation, or ongoing criminal or civil case. If a lawsuit has been filed against the public agency and pertains to the issue for which the formal complaint has been filed, the counselor will not issue an opinion.

Not a valid complaint

The Public Access Counselor cannot accept complaints irrelevant to the state public access laws. The scope of the Public Access Counselor's office does not reach beyond the Access to Public Records Act and the Open Door Law.

Duplicate or similar complaints

The Public Access Counselor will not accept similar or duplicate complaints. Once the Public Access Counselor has issued an opinion, the issue is closed. Duplicate complaints regarding the same issue from different complainants will be consolidated into one (1) complaint and addressed collectively. Duplicate complaints about the same issue and from the same complainant will not be accepted.

Incomplete complaint

The Public Access Counselor will not accept complaint when State Form 49407 is not filled out completely, including the agency or government entity's information (*i.e.* contact name, email, signature, dates, narrative, *etc.*) The complaint is deficient, not legible, or not clear.

Unable to Articulate or provide enough information

The information related to an alleged Access to Public Records Act or Open-Door Law violation must be articulated so that it can be understood what the issue is and that that issue could potentially be a violation of the Access to Public Records Act or the Open Door Law. Information that might be needed to show a possible violation would include supporting documents. These supporting documents could be, but are not limited to, a public records request, denial letter, e-mail chain, or any documents that would support the complaint.

Complaint lacks merit

The Public Access Counselor determines the information provided in the complaint is not violation of IC 5-14-3 or IC 5-14-1.5, lacks factual substance, or the issue is clear exclusion of the law where the Office of Public Access Counselor has already issued opinions or where there is clear case law showing there is not a violation.

Returned Complaints

Occasionally complaints are filed which are neither rejected or accepted. In limited situations these complaints are returned at the discretion of the Office of Public Access Counselor for either more information or to provide clarity to the complaint.

Other Issues that Cause Delay's or Complaints to be Rejected

Improper Form

As indicated previously in this guide, the Public Access Counselor prescribes a form for submitting complaints. The Office will not accept complaints submitted without the form. Complaints must be filed on this prescribed form in order to provide the Counselor with all the necessary information he/she needs to draft an opinion.

Insufficient information

It is important for the complainant to provide all the information requested on the form. The complaint will be returned if the form is not completed in its entirety. The Office of the Public Access Counselor does not have the resources to research the contact information for every complaint it receives; therefore, it is imperative this information is provided at the initial time of filing. It also is important the information is provided in the allotted spaces and not only in the narrative portion.

Narrative is unclear

On the complaint form, there is space to provide the Public Access Counselor with details of what occurred. Additional sheets may be used if necessary, and copies of documentation such as meeting notices or the agency's written denial of the record may be included with the complaint. Please keep the narrative as brief as possible. It is

usually not helpful to explain why the record is needed or to complain about the agency's conduct.

Request originally sent to wrong agency or address

Once a complaint is received, if the Public Access Counselor believes the original request was sent to the wrong address or agency, the complaint will be returned. The complainant will be asked to resubmit the request to the proper agency and/or address. If there is still no response to the request or a denial still occurs, the complainant may resubmit the complaint to the Office of the Public Access Counselor.

No actual denial has occurred

A complaint will be returned if the complainant has not allowed a sufficient amount of time to pass for a denial to occur. A public agency has seven (7) days to respond to a request delivered by mail, facsimile or email or twenty-four (24) hours to respond to a hand-delivered or oral request. I.C. § 5-14-3-9. A complaint may not be filed based on lack of response before this time has passed.

How to File the Complaint

Fill out State Form 49407 completely. When filling out the Complaint Form (State Form 49407) remember it is best if typed and not handwritten, all the information for the complainant and responding party is provided, including contacts and emails, and the form must be signed and dated. If there are supporting documents or materials to provide send them electronically with your complaint form, organized, with the Complaint Form being the first document, and include all documents in one (1) PDF as attachments (not in the body of the email). Do not change the format or encrypt the Complaint Form or any materials being sent and review the Complaint Form to ensure it is readable.

The complaint narrative should be short but provide details on who, when, where, how, etc. Keep your complaint simple with only relative APRA or ODL issues, minimal supporting documents, and keeping the documents organized in one (1) PDF. DO NOT send an overabundance of information, material, or provide details in the narrative that are not germane to the APRA or ODL issue.

*Please Note: OPAC **does not** accept videos or links for several reasons including, but not limited to storage, security, record keeping, and it's not necessary as documents and your narrative is what is needed.*

Once the Complaint is filed

Once a complaint is filed and accepted, the Office of the Public Access Counselor notifies the public agency. A notice of formal complaint and a copy of the complaint are sent to the agency. The agency is given approximately fifteen (15) business days to respond to the complaint. An agency may request more time to complete the response if necessary. The Public Access Counselor requires the response to be submitted in writing.

Occasionally, complainants request a copy of the public agency's response prior to the opinion being issued in order to provide a rebuttal. It is not the practice of the Public Access Counselor to send a copy of the agency response prior to the issuance of the opinion. The agency response and opinion are issued simultaneously. Further, nothing in the law requires the Counselor to await a response or rebuttal from the complainant before issuing the opinion. Any further information the complainant or the public agency wishes to provide should be done in writing, as will be included in the complaint file.

I.C. § 5-14-5-9 requires the Public Access Counselor to issue an opinion in response to the complaint within thirty (30) days of receiving it. Due to the volume of complaints the office receives, the opinions are not typically issued earlier.

There are instances that delay the ability to issue a response in thirty (30) days. Some delays include but are not limited to inaccurate information provided by the complainant to the Office of Public Access Counselor, additional follow-up, additional legal research, and more complicated opinions. Sometime the Office of Public Access Counselor is working with both parties in an attempt to resolve a complaint where there is misunderstanding where a resolution might be better solution.

After the Opinion is issued

The "response" the Public Access Counselor provides to a formal complaint is called a formal opinion. Once the opinion is issued, a copy is forwarded to the public agency. The opinion is also sent to the complainant, along with a copy of the response from the public agency. Further, the opinion is posted on the Counselor's website, www.IN.gov/pac. It should be noted that any information provided to the Public Access Counselor is public record unless a statutory exception applies.

All formal opinions are based on the facts presented to the Public Access Counselor. The Office does not have the resources to conduct an extensive investigation beyond the information provided by the public agency and the complainant.

The opinions issued by the Public Access Counselor are advisory only. The Public Access Counselor has no statutory authority to compel a public agency to either produce records or reverse an action made in a public meeting. Only a court may compel action.

If there is evidence which may change the Public Access Counselor's opinion after it has been issued, he/she will review the information and may make necessary amendments to the opinion. This is a rare occurrence. The complainant may send a letter to refute the opinion of the Public Access Counselor. However, the Public Access Counselor deems a matter closed upon the issuance of formal opinion. Because the counselor issues only an opinion, there is no appeal process. Any information filed after the opinion is issued will be added to the complaint file for future reference or public inspection.

Under certain circumstances, a court could reverse a decision made in violation of the Open Door Law or the Access to Public Records Act. The only method for compelling action by a governmental agency is to file a lawsuit. If a complainant first asks for and receives an advisory opinion or an informal inquiry response before the lawsuit is filed and the complainant wins the lawsuit, the court shall award attorney fees, court costs, and reasonable expenses of litigation.

Frivolous or Vexatious Records Requests and Complaints

The Public Access Counselor acts as an advisory and mediation body. While the Public Access Counselor does not issue financial penalties for frivolous administrative complaints, they will rule in favor of the agency if the requestor fails to meet Access to Public Records Act requirements. Requests for records should not be made with the intent to harass, annoy, disrupt government operations, or cause an undue burden on a public agency or government body. The purpose of the Access to Public Records Act and the Open Door Law is to ensure government openness and transparency. The complaint process is not to be punitive but designed to educate agencies and assist citizens with legitimate transparency matters.

The weaponization of the Access to Public Records Act or the Open Door Law through frivolous or vexatious requests or complaints can be a hardship on the governments, communities, and the people they serve. Complaints that lack merit could be considered frivolous and vexatious leading to a rejection of the complaint or an opinion in favor of the agency or government body.

If a court rules in favor of the public agency, the court can order the requestor to pay the agency's attorney's fees, court costs, and litigation expenses if it determines the lawsuit was frivolous and vexatious (under Ind. Code § 5-14-3-9 and Ind. Code § 34-52-1-1)

Tips for requesting documents

In many cases, the formal complaint process may be avoided. The following are tips for requesting records from a public agency. While the Access to Public Records Act does not specifically outline these actions, they will help in obtaining the records requested.

Have the correct contact information.

Make sure the mailing address, fax number or email address is correct. In some cases, public agencies do not respond to a request because they simply do not receive it. An agency may require a request be submitted in writing I.C. § 5-14-3-3(a)(2), so having the correct contact information is necessary.

Send it to the right person.

It may be helpful to determine to whom the request should be directed.

Several public agencies have public information officers or attorneys who handle public records requests. Directing the request to the correct person will help ensure the timely response to a request and/or prompt production of the requested records.

Make sure you are contacting the proper agency.

An agency is not required to provide a record it does not maintain.

Further, nothing requires an agency to send a request to the agency to which it should have been submitted. Therefore, it is crucial to ensure the request is sent to the appropriate agency.

Follow up on the request.

Following up on a request is an excellent way to ensure the agency received and is aware of the request. The request can then be resubmitted if it was not previously received.

Do not send record requests to the Public Access Counselor.

The Public Access Counselor cannot find records or determine what agency may have a record. The Public Access Counselor cannot obtain the record for you from another agency.

Be particular about the records.

A record request must identify the record(s) you are seeking with reasonable particularity. I.C. § 5-14-3-3(a)(1). This means the requestor must provide as much information about the record as possible so the agency can clearly identify what records are being requested. An agency may deny a request if it does not know what the request is asking.

Following these simple tips will help ensure record requests are received and documents are provided. Additionally, utilizing the tips may assist in avoiding the formal complaint procedure.

Formal Complaint Checklist

Use this checklist to make sure the formal complaint form is filled out completely and correctly.

- ✓ The correct form is being used.
- ✓ All requested contact information is provided, including an email contact for the agency.
- ✓ There is not a legal matter or litigation pending where a court order or discovery through the court is appropriate.
- ✓ The date of denial is provided in the correct box.
- ✓ The narrative is clear and precise.
- ✓ The complaint is timely.
- ✓ The issue is Access to Public Records Act/Open Door Law related.
- ✓ Sign and date the form.
- ✓ Only one copy is being sent to the Public Access Counselor.
- ✓ The original request was sent to the correct agency/address.
- ✓ Enough time has passed for an actual denial.
- ✓ Send copies of any related documentation with the formal complaint form.

- ✓ The Public Access Counselor has not previously addressed this issue.

Frequently Asked Questions

Do I have to file a formal complaint to get assistance from the Public Access Counselor?

No. The Public Access Counselor can advise you about your rights via the telephone or by email however we are unable to provide legal advice.

Are previously issued opinions available for review?

Yes. You can search for the PAC Opinions on the website. In addition, many of the informal inquiry responses are posted on the website. A search function on the advisory opinion and informal opinion page(s) allows you to search opinions by certain terms.

Can the Public Access Counselor compel production of records, fine a public official for withholding a record, or declare a board's action "void"?

No. The Public Access Counselor's office is advisory only. There is no authority for fining a public official who violates the access laws. Under certain circumstances, a court could reverse a decision made in violation of the Open Door Law. The only method for forcing compliance by a governmental agency is to file a lawsuit. The complaint process is not punitive but designed to educate agencies and help citizens in matters related to APRA and ODL.

Can the Public Access Counselor provide legal representation?

No. The Public Access Counselor cannot provide legal representation to private citizens or public officials.

Is there a process to appeal an opinion of the Public Access Counselor?

No. Because the Public Access Counselor cannot compel action or impose any sanctions, the Public Access Counselor deems a matter closed after the issuance of a formal opinion. Because the counselor issues only an opinion, there is no appeal process. If there is evidence which may change the Public Access Counselor's opinion, he/she will review the information and may make necessary amendments to the opinion; though this is a rare occurrence.

How long do I have to file a formal complaint?

Generally you must file a formal complaint within thirty (30) days of the denial of your right to attend a meeting or from the day you were denied access to a record.

A complaint filed after this time limit will be deemed untimely and rejected. Complaints filed before any denial has occurred (i.e. filed before the seven (7) day time limit to respond has passed) will be returned. The complaint may be resubmitted once the seven (7) day time limit has passed.