Indiana Opens Public Records: But (b)(6) May Be the Exemption That Swallows the Rule

I. Introduction

Indiana's new Public Records Act presents, for the first time in Indiana, a comprehensive approach to the public's access to records.[1] Although the new statute changes several areas of public records law, the single most significant change is the redefining of "public records."[2] Prior to the new Act, Indiana's definition of "public records" was found in the 1953 Hughes Anti-Secrecy Act.[3] The definition under the Hughes Act was similar to, but perhaps more restrictive than, the common law definition.[4] With the passage of the new Public Records Act, the definition of "public records" has become much less restrictive, similar in language to the most liberal definitions nationwide.[5] This new definition

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[1]Act of Apr. 12, 1983, Pub. L. No. 19-1983, 1983 Ind. Acts 241 (codified at IND. CODE §§ 5-14-3-1 to -9 (Supp. 1984)) (all references in this Note will be to the Indiana Code rather than the statute). Indiana's first public records statute, the 1953 Hughes Anti-Secrecy Act, IND. CODE §§ 5-14-1-1 to -6 (1982) (repealed effective Jan. 1, 1984), did not provide a comprehensive approach to public records access. The narrow definition of "public records" and the relative brevity of the Hughes Act precluded full application to public records access. *Compare id.* at §§ 5-14-1-1 to -6 *with* IND. CODE §§ 5-14-3-1 to -9 (Supp. 1984).

[2]IND. CODE § 5-14-3-2 (Supp. 1984). The new law also includes an expansive definition of "public agency." *Id.* This definition is important because the disclosure rule focuses on public documents held by a public agency. While there may be some dispute as to the proper construction of the public agency definition, this Note will not discuss alternative interpretations of "public agency"; instead, this Note will focus on the interpretation of "public records."

[3]IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984). The Hughes Anti-Secrecy Act provided for both open records and open meetings by state and local administrative agencies.

[4]*See* Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1366 (Ind. Ct. App. 1980). "The more conservative and prevailing [common law] definition included records 'required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done.' " *Id.* at 1365 (quoting Linder v. Eckard, 261 Iowa 216, 218, 152 N.W.2d 833, 835 (1967)). The Hughes Act defined "public records" as "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation." IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984). The *Gallagher* court viewed the Hughes Act definition as stricter than the common law because it omitted the language allowing disclosure of a document created in "the discharge of a duty imposed by law." 401 N.E.2d at 1366 (emphasis deleted).

[5]*See* CAL. GOV'T CODE § 6252 (West 1980 & Supp. 1981); KY. REV. STAT. ANN. § 61.870 (Bobbs-Merrill 1980); MASS. GEN. LAWS ANN. ch. 4, § 7 (West 1976 & Supp. 1983-84); N.Y. PUB. OFF. LAW § 86 (McKinney Supp. 1983-84); OR. REV. STAT. § 192.410(4) (Supp. 1983). The Kentucky statute is typical of most liberal "public records" definitions. Kentucky defines "public records" to include "all books, papers, maps,

is exhaustive and apparently encompasses any type of information in any form,[6] making disclosure the rule, rather than the exception.

This broad definition, however, and consequently the public's access to information, has been tempered by twenty-two exemptions.[7] The most far-reaching and troublesome is Indiana Code section 5-14-3-4(b)(6)

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photographs, cards, tapes, discs, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used in the possession of or retained by a public agency." KY. REV. STAT. ANN. § 61.870 (Bobbs-Merrill 1980). Compare Kentucky's definition with Indiana's new definition of "public record":

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, or any other material, regardless of form or characteristics.

IND. CODE § 5-14-3-2 (Supp. 1984).

[6]ACADEMY IN THE PUBLIC SERVICE, MANAGING CITIZEN ACCESS TO LOCAL GOVERNMENT RECORDS 4 (Nov. 1983) (available through the Indiana University School of Public and Enivironmental Affairs, Indianapolis) [hereinafter cited as PUBLIC SERVICE]. "The proposal [was] designed to cover nearly every document that is generated by every public agency." INDIANA LEGISLATIVE SERVICES AGENCY, FINAL REPORT OF THE INTERIM STUDY COMMITTEE ON ACCESS TO PUBLIC RECORDS, REPORT TO THE GEN. ASSEMBLY OF 1983, at 3 (Nov. 1, 1982) [hereinafter cited as FINAL REPORT].

[7]Although the Indiana statute refers to records *excepted* from disclosure, the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), refers to records *exempted* from disclosure. This Note will use the terms interchangeably as the terms are synonomous. Indiana Code section 5-14-3-4 differentiates between two types of exempted records. The first type includes public records that *can not* be disclosed by the public agency, "unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery." IND. CODE § 5-14-3-4(a) (Supp. 1984). Six categories of public records fall within this absolute exemption rule:

> (1) Those declared confidential by state statute.
>
> (2) Those declared confidential by . . . a public agency under specific authority to classify public records as confidential . . . .
>
> (3) Those required to be kept confidential by federal law.
>
> (4) Records containing trade secrets.
>
> (5) Confidential financial information obtained, upon request, from a person. . . .
>
> (6) Information concerning research . . . conducted under the auspices of an institution of higher education . . . .

Id.

In addition to these absolute exemptions, there are sixteen categories of public records that fall under a discretionary exemption. *Id.* § 5-14-3-4(b). Under this section, the public agency holding the requested record is given the discretion to grant or deny the release of the requested record. Records falling under the discretionary exemptions include:

> (1) Investigatory records of law enforcement agencies. . . .
>
> (2) The work product of an attorney representing . . .
>
> (A) a public agency;
>
> (B) the state; or
>
> (C) an individual.
>
> (3) Test questions, scoring keys, and other examination data used in

(exemption (b)(6)),[8] which permits disclosure, at the discretion of the agency, of public records containing "intraagency or interagency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decisionmaking."[9] In reference to a similar federal provision, it has been stated that "[o]n its face, an exemption for intra-agency memoranda can encompass nearly anything an agency puts in writing."[10] Likewise, in Indiana, (b)(6) may be the exemption that will swallow the rule.

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administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests or license examinations if the person is identified by name and has not consented to the release of his scores.

(5) Records relating to negotiations [of specified entities].

(6) Records that contain intraagency or interagency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decisionmaking.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees, except for [certain specified information such as names, the type of employment, and formal charges against the employee].

(9) Patient medical records and charts . . . and minutes or records of hospital medical staff meetings.

(10) Administrative or technical information that would jeopardize a record-keeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it.

(12) Records specifically prepared for discussion, or developed during discussion in an executive session under IC 5-14-1.5-6.

(13) The work product of the legislative services agency . . . .

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if the donor requires nondisclosure of his identity as a condition of making the gift.

(16) Library records which can be used to identify any library patron.

Id.

[8]Interview with Richard W. Cardwell, General Counsel for The Hoosier State Press Association, in Indianapolis (Dec. 20, 1983) [hereinafter cited as Cardwell Interview]. Cardwell, principal author of the new Indiana statute, believes exemptions (b)(6) and (b)(12) will account for 90% of all public records disputes at the local governmental level.

[9]IND. CODE § 5-14-3-4 (b)(6). *Compare* 5 U.S.C. § 552(b)(5) (1982) (exempting from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

[10]Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1048-49 (1973) (footnotes omitted). The similarities between the federal Freedom of Information Act (FOIA) and the Indiana Public Records Act are striking. Both the FOIA and the Indiana Act were passed to broaden the public's access from that permitted under predecessor acts. *See* Comment, *The Freedom of Information Act: A Time for Change?*, 1983 DET. C.L. REV. 171, 172 (discussing the FOIA and its predecessor); FINAL REPORT, *supra* note 6, at 3. The approach taken by the acts is similar

Initially the agency has discretion to disclose or retain a requested memorandum.[11] The Indiana Public Records Act, however, gives circuit and superior courts the power to review agency decisions upon the filing of an action by the individual who was denied the right of inspection.[12] Thus, the new statute places Indiana courts squarely between the non-disclosing agency and the disclosure-seeking public. In light of the expansive nature of the agency memoranda exemption, the role of Indiana courts as arbiters becomes even more essential.

Recognizing the potential difficulty exemption (b)(6) presents, this Note reviews the sources of the new Indiana Act, the fundamental policies of the agency memoranda exemption,[13] and the two major limitations on the exemption. Finally, a mode of analysis for Indiana courts reviewing (b)(6) disputes is suggested. The Note does not discuss the applicability of the exemption to outside agency consultants,[14] nor does it consider the attorney-client and attorney work product privileges within the context of the agency exemption.[15]

II. The Indiana Public Records Law

A. Policy Behind the Act

The policy behind Indiana's Public Records Act parallels the policies underlying the federal Freedom of Information Act (FOIA).[16] When the

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in that both acts permit a rather broad range of access to public documents and then limit that access by enumerating a number of specific exemptions. *See* 5 U.S.C. § 552 and Ind. Code §§ 5-14-3-1 to -9. Although the exemptions are not identical, both acts contain exemptions covering interagency and intraagency memoranda, medical files, investigatory records of law enforcement agencies, and trade secrets. This list of overlapping exemptions is not exhaustive; nevertheless, it serves to illustrate the similarities in the two acts. Because of the similarities, it is probable that Indiana courts will turn to federal case law for guidance when interpreting the Indiana Act. *See, e.g.*, Gumz v. Starke County Farm Bureau Co-op. Ass'n, Inc., 271 Ind. 694, 697, 395 N.E.2d 257, 261 (1979); Yaksich v. Gastevich, 440 N.E.2d 1138, 1139 n.3 (Ind. Ct. App. 1982); Celina Mut. Ins. Co. v. Forister, 438 N.E.2d 1007, 1011 n.3 (Ind. Ct. App. 1982). This Note, therefore, relies heavily on federal case law when examining the provisions of the Indiana Act.

[11]Ind. Code § 5-14-3-4(b).

[12]*Id.* § 5-14-3-9(b).

[13]For purposes of this Note, the term agency memoranda may be deemed to include both intraagency and interagency written communications.

[14]For a discussion of the intraagency memoranda exemption as it applies to outside agency consultants, see Note, *supra* note 10, at 1063-66.

[15]Indiana Code section 5-14-3-4(b)(2) establishes a separate exemption from (b)(6) for attorneys representing the public agency. On the federal level, the attorney-client and attorney work product privileges are most often claimed within the intraagency memorandum exemption. For a discussion of these issues, see Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862-66 (D.C. Cir. 1980); Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977).

[16]The FOIA is codified at 5 U.S.C. § 552 (1982).

FOIA was passed in 1966 it was believed that the Act would "promote an informed electorate, which in turn [would] further the growth of democratic principals [sic]."[17] In addition, the FOIA was intended "to increase agency responsibility by allowing increased access to governmental records."[18] These policies are largely reiterated in the Indiana Act:

> 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.[19]

In Indiana, as on the federal level, the ultimate goals of agency responsibility and popular control of government are best-served by maximum public access to governmental records. Indiana's new Public Records Act attempts to facilitate this access through its broad definition of "public records."

B. Access to Indiana Public Records: A Matter of Definition

As noted above, the most significant change resulting from the new Indiana Public Records Act is the broadening of the "public records" definition.[20] The definition of "public records" in Indiana law has taken an unusual course, from a relatively liberal one at common law,[21] to a restrictive one under the Hughes Anti-Secrecy Act,[22] and finally to a very liberal definition under the new Act.[23] The Indiana public's access to government records has varied in the same manner. According to Indiana courts, the public's access has depended upon "whether [the] particular document [for which disclosure is sought] may be categorized as 'public.' "[24] Thus, a restrictive definition of "public records" resulted in more limited access while a liberal definition produced broader access.

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[17]Comment, *supra* note 10, at 173.

[18]*Id.* at 174 (footnote omitted).

[19]IND. CODE § 5-14-3-1. It should be noted that this policy statement is substantially similar to the policy statement in the Hughes Anti-Secrecy Act. IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984). Yet, the Hughes Act was applied in a very restrictive manner because of its public records definition. *See supra* note 4.

[20]IND. CODE § 5-14-3-2 (Supp. 1984). *See supra* note 5.

[21]Robison v. Fishback, 175 Ind. 132, 137-38, 93 N.E. 666, 668-69 (1911). *See infra* text accompanying note 29.

[22]IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984); Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1368 (Ind. Ct. App. 1980). *See supra* note 4.

[23]IND. CODE § 5-14-3-2. *See supra* note 5.

[24]*See* Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1365 (Ind. Ct. App. 1980). In *Gallagher*, the court found that certain police incident reports

Although Indiana courts never officially adopted a common law definition of public records,[25] the Indiana Supreme Court in *Robison v. Fishback*,[26] decided in 1911, noted both the restrictive and liberal common law definitions of public records.[27] The restrictive definition identified a public record as "one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done."[28] The *Robison* court, however, relied on the liberal common law definition:

> "Whenever a written record of the transaction of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record . . . ."[29]

While this broad definition would have aided access to public records, the definition was never utilized for public records disclosure.[30]

Forty-two years after the *Robison* decision, Indiana passed the Hughes Anti-Secrecy Act.[31] The Hughes Act, with the stated policy of opening access to public records,[32] defined "public records" as "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation . . . ."[33] This definition was basically the same as the restrictive common law definition set forth in *Robison*.[34] Thus, in spite of the Act's broad disclosure policy, the overall effect was to actually decrease access to public records.

Beginning in 1953, the Indiana Attorney General issued opinions interpreting the Hughes Act which consistently recommended against public

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were not subject to disclosure as they were not required or directed to be made by any rule or regulation as required by the Hughes Act "public records" definition.

[25] *Id.* at 1371 (Chipman, J., dissenting).

[26] 175 Ind. 132, 93 N.E. 666 (1911).

[27] *Id.* at 137, 93 N.E. at 668-69. It should be noted that this case did not deal with public records disclosure; instead, it determined the property rights in certain public records.

[28] *Id.* at 137-38, 93 N.E. at 669 (citation omitted).

[29] *Id.* at 137, 93 N.E. at 668-69 (quoting Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865 (1874)).

[30] *See* Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1371 (Ind. Ct. App. 1980); *supra* note 27.

[31] Act of Mar. 9, 1983, ch. 115, 1953 Ind. Acts 420.

[32] IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984).

[33] *Id.* § 5-14-1-2.

[34] HOOSIER STATE PRESS ASSOCIATION, ACCESS TO PUBLIC RECORDS 7 (Nov. 1983) (available from the Hoosier State Press Association, Indianapolis) [hereinafter cited as ACCESS TO PUBLIC RECORDS].

disclosure.[35] Under the Attorney General's interpretation, a writing was not a public record unless a "statute or regulation requir[ed] or direct[ed] the [writing] to be kept."[36]

In 1980, the Indiana Court of Appeals, in *Gallagher v. Marion County Victim Advocate Program*,[37] adopted a similar approach to the Hughes Act.[38] Judge Young, writing for the majority, reviewed both the restrictive and liberal common law definitions of "public records."[39] Noting that Indiana's "statutory definition clearly limits 'public records' to writings which are required to be made, expressly or by necessary inference, by statute or rule or regulation,"[40] Judge Young concluded that the definition appeared to be even stricter than the narrowest common law definition.[41] Judge Chipman, in dissent, however, noted that the Hughes Act was viewed as "an *expansion* of the common law definitions."[42] Relying in part on the Act's liberal declaration of policy[43] and its mandate of liberal construction,[44] the dissent deduced a "legislative intent to make government records freely available to the public."[45] Based on this disclosure policy and a broad reading of what constituted a rule or regulation, the dissent concluded that the documents sought were subject to

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[35] *E.g.*, 1953 Op. Att'y Gen. 524, 525 (denying access to Insurance Department files of complaints against insurance companies); 1953 Op. Att'y Gen. 94, 95-96 (restricting access to State Personnel Board records). It should be noted that Attorney General opinions are not binding on Indiana courts. Medical Licensing Bd. v. Ward, 449 N.E.2d 1129, 1138 (Ind. Ct. App. 1983).

[36] 1953 Op. Att'y Gen. 524, 525.

[37] 401 N.E.2d 1362 (Ind. Ct. App. 1980).

[38] *Id.* at 1368 (denying access to Indianapolis Police Department accident and incident reports).

[39] *Id.* at 1365.

[40] *Id.* at 1366.

[41] *Id.*

[42] *Id.* at 1371 (Chipman, J., dissenting) (citation omitted).

[43] IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984).

[44] *Id.*

[45] 401 N.E.2d at 1370 (Chipman, J., dissenting). The Indiana Supreme Court has long recognized that when courts construe statutes, they are to look at the act as a whole and must construe the statute to place it in "harmony with the intent the Legislature had in mind, in order that the spirit and purpose of the statute be carried out." Indiana State Highway Comm'n v. White, 259 Ind. 690, 695, 291 N.E.2d 550, 553 (1973) (citing Zoercher v. Indiana Associated Tel. Corp., 211 Ind. 447, 7 N.E.2d 282 (1936)). This view was recently reaffirmed as a basic principle when the supreme court stated

> all statutes should be read where possible to give effect to the intent of the legislature. It is well settled that the foremost objective of the rules of statutory construction is to determine and effect the true intent of legislature. It is also well settled that the legislative intent as ascertained from an Act as a whole will prevail over the strict literal meaning of any word or term used therein. When the court is called upon to construe words in a single section of a statute, it must construe them with due regard for all other sections of the act and with

disclosure.[46] Because of its emphasis on the Hughes Act's policy of disclosure, the dissenting opinion "is far more compelling than that of the majority."[47]

Nevertheless, the *Gallagher* decision served to aptly underscore the shortcomings of the Hughes Act.[48] The fundamental shortcoming of the Hughes Act, its severely restrictive definition of "public record," has been remedied by the new law.

The definition of "public records" under the new Act is one of the most liberal in the nation.[49] "Public records" in Indiana now include

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, or any other material, regardless of form or characteristics.[50]

> due regard for the intent of the legislature in order that the spirit and purpose of the statute be carried out.

Park 100 Dev. Co. v. Indiana Dep't of State Revenue, 429 N.E.2d 220, 222-23 (Ind. 1981) (citations omitted).

In spite of Indiana Supreme Court statements requiring courts to give effect to legislative intent, the *Gallagher* majority merely acknowledged the policy statement contained in the Hughes Act and stated:

> However, the specific grant of the right of inspection extends only to "public records" as specifically defined. The limitations on this court are clear. In the construction of statutes, we have nothing to do with questions of policy and political morals; such matters are for the consideration of the Legislature. Consideration of hardships cannot properly lead a court to broaden a statute beyond its legitimate limits. We must examine the language used by the Legislature and give effect to every word and clause if possible, since it is presumed that all language in a statute was used intentionally.

401 N.E.2d at 1364 (citations omitted). The majority then focused on the specific wording in the public records definition without giving due consideration to the Act's policy statements. The dissenting opinion, however, examined the legislative purpose of the Act and reasonably concluded that the records in question were disclosable. *Id.* at 1370-72 (Chipman, J., dissenting). In light of the supreme court's recent affirmation of the rule requiring consideration of legislative intent, Indiana courts should follow the lead of the *Gallagher* dissent and consider the policies set forth by Indiana's new Public Records Act when construing the scope of the Act.

[46]401 N.E.2d at 1369 (Chipman, J., dissenting). Judge Chipman developed a broad interpretation of what constituted a rule or regulation. By expanding this concept, he expanded the definition of public records because under the statute a public record was one required to be kept by a rule or regulation.

[47]Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 88 (1981).

[48]ACCESS TO PUBLIC RECORDS, *supra* note 32, at 8.

[49]*See supra* note 5 and accompanying text.

[50]IND. CODE § 5-14-3-2.

Disclosure no longer depends upon the existence of a statute or regulation requiring that the record be made. Any agency record, based on its actual existence,[51] is deemed disclosable under the broad, new definition.

C. Other Modifications Affecting Disclosure

Significant modifications are also present in two other areas of the new Act. First, the burden of proof for the nondisclosure of a public record has been specifically placed on the nondisclosing agency.[52] Although the Hughes Act did not expressly place the burden on either party,[53] as a practical matter, it fell on the individual seeking disclosure.[54] Because of the narrow definition of "public records" under the Hughes Act, the party seeking disclosure had to prove a right of inspection by pointing to a statute or regulation requiring the creation of the record.[55] Under the new Act, the agency denying disclosure has the burden to prove that the requested record falls within one of the Act's twenty-two exemptions.[56]

The second change has a less significant practical effect but will result in increased general access. The right to inspect Indiana public records has been extended from "every citizen of this state"[57] to "any person,"[58] eliminating any requirement of state citizenship before disclosure can take place.[59]

D. Development of Indiana's Agency Memoranda Exemption

Typically, liberal open records laws are limited by specific exemptions;[60] Indiana's is no exception.[61] Indiana's exemption (b)(6) for agency memoranda is not a product of a particular dispute under the Hughes Anti-Secrecy Act. The narrow definition of "public records" under the

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[51]PUBLIC SERVICE, *supra* note 6, at 4.

[52]IND. CODE § 5-14-3-1 ("[T]he burden of proof for the nondisclosure of a public record [is] on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.").

[53]*See* IND. CODE §§ 5-14-1-1 to -3, -5, -6 (1982) (repealed effective Jan. 1, 1984). Indiana Code § 5-14-1-4 was repealed in 1977.

[54]ACCESS TO PUBLIC RECORDS, *supra* note 34, at 8.

[55]*Id.*

[56]*Gallagher*, 401 N.E.2d at 1365 ("[T]he dispositive issue becomes whether a particular document comes within any of the enumerated exemptions."). For an extensive discussion of the burden of proof, see *infra* notes 179-88 and accompanying text.

[57]IND. CODE § 5-14-1-3 (1982) (repealed effective Jan. 1, 1984).

[58]IND. CODE § 5-14-3-3 (Supp. 1984).

[59]As noted earlier, the new Act also incorporates an expansive definition of "public agency." *Id.* § 5-14-3-2. *See supra* note 2.

[60]*See, e.g.*, North Dakota v. Andrus, 581 F.2d 177, 179 (8th Cir. 1978); *Gallagher*, 401 N.E.2d at 1365.

[61]*See supra* note 7 and accompanying text.

former Act,[61] requiring that the record be made "by statute or rule or regulation"[63] before disclosure was required, precluded any possibility of reaching a document as amorphous as an agency memorandum. Instead, Indiana's exemption (b)(6) for written deliberative material reflects the same privilege now enjoyed by government agencies in their oral deliberative communications.[64] This protection for the internal oral communications of public agencies is found within Indiana's Open Door Law.[65] That law, while providing for broad public access to government proceedings, does not "touch the internal staff operations of public agencies."[66] Indiana's exemption (b)(6) for written deliberative communications operates in the same vein.

The specific language of Indiana's exemption (b)(6) is not borrowed from the language of the federal statute but from cases construing the scope of federal exemption.[67] Federal exemption 5 provides for the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[68] This language indicates "that Congress has attempted to incorporate into the FOIA certain principles of civil discovery law."[69] The United States Supreme Court, in *Environmental Protection Agency v. Mink*,[70] interpreted exemption 5 as "clearly [contemplating] that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[71] The Court then noted that applying litigation discovery rules under exemption 5 would be difficult because of the uncertainty surrounding these rules since "the very beginnings of the Republic."[72] The Court noted that "at best, . . . discovery rules can only be applied under Exemption 5 by way of rough analogies."[73]

Indiana avoided the difficulties of applying discovery rules under exemption (b)(6) by using language from federal court decisions construing

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[62]*See supra* notes 31-48 and accompanying text.

[63]*Gallagher*, 401 N.E.2d at 1366.

[64]Cardwell Interview, *supra* note 8. Governor Robert Orr requested that the new Act provide the same confidentiality for his staff 's written deliberative communications as that for its similar oral communications. Because there is no language limiting the exemption to the Executive's immediate staff, exemption (b)(6) will apply to all government agencies.

[65]*See* IND. CODE §§ 5-14-1.5-1 to -7 (1982). Indiana's Open Door Law provides for broad access to public agency meetings. It too was a reform of the Hughes Anti-Secrecy Act. Note, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 VAL. U.L. REV. 295, 296 (1980).

[66]Note, *supra* note 65, at 309.

[67]Cardwell Interview, *supra* note 8.

[68]5 U.S.C. § 552(b)(5).

[69]Jordan v. United States Dep't of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978).

[70]410 U.S. 73 (1973).

[71]*Id.* at 86.

[72]*Id.* (footnote omitted).

[73]*Id.*

exemption 5 rather than by using the exemption itself.[74] Leading federal decisions[75] have interpreted exemption 5 to include "*advice*, . . . *opinions*, and other material reflecting *deliberative* or policy-making processes, but not . . . factual . . . reports."[76] Indiana's exemption (b)(6) refers to agency records containing "*advisory* or *deliberative* material that are expressions of *opinion*."[77] As in the federal cases,[78] this language is designed to ensure the release of factual material found within agency memoranda while protecting the agency's ability to enjoy open, frank discussions.[79] Indiana's additional requirement that exempted communications be "for the purpose of *decisionmaking*"[80] is also derived from federal case law.[81] This provision reflects the intent to disclose final agency policy and staff instructions that affect the public,[82] material that typically arises after the decisionmaking process is complete.[83]

Several jurisdictions have adopted language almost identical to that found in federal exemption 5.[84] The drafters of Indiana's exemption (b)(6) are to be commended for avoiding the potentially confusing discovery language[85] found in the federal exemption.[86] Nevertheless, Indiana's agency memoranda exemption could have been made clearer by specific statutory language requiring the disclosure of factual data, final agency policy, and staff instructions that affect the public.[87] Instead, under the exemption's

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[74]Cardwell Interview, *supra* note 8.

[75]*See* EPA v. Mink, 410 U.S. 73 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

[76]Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (emphasis added) (footnote omitted).

[77]IND. CODE § 5-14-3-4(b)(6) (Supp. 1984) (emphasis added).

[78]*See supra* note 75.

[79]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[80]IND. CODE § 5-14-3-4(b)(6) (emphasis added). The legislature's use of "and" in the statute indicates that the document, to be withheld, must not only be an opinion but also must be an opinion espoused for the purpose of decisionmaking. *Id. See infra* text accompanying note 209.

[81]*See generally* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978).

[82]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[83]NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[84]*See, e.g.*, D.C. CODE ANN. § 1-1524(a)(4) (1981); MD. ANN. CODE art. 76A, § 3(b)(v) (1957); WYO. STAT. § 16-4-203(b)(v) (Supp. 1982).

[85]*See* O'Neill, *The Freedom of Information Act and Its Internal Memoranda Exemption: Time for a Practical Approach*, 27 SW. L.J. 806, 809-10 (1973). "The courts have at times been misled by the indirect reference to discovery law in the fifth exemption into believing that balancing need against harm, common in the context of discovery law, is an appropriate course to follow in cases involving requests for documents under the Act." *Id.* (footnote omitted).

[86]5 U.S.C. § 552(b)(5). *See supra* notes 68-73 and accompanying text.

[87]At least one state statute utilizes such language. N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1983-84) provides in part:

> 2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

present language, persons seeking disclosure of these types of material will have to depend upon general rules of statutory construction[88] to ensure their right of access.[89]

III. The Agency Memoranda Exemption: Its Policies and Limitations

Due to the expansive interpretation government agencies may seek to place on the agency memoranda exemption,[90] the imprecise language of Indiana's provision,[91] and Indiana's history of restrictive public access, it is imperative that Indiana courts look to the Act's underlying policies and limitations when interpreting exemption (b)(6).[92] The exemption for agency memoranda is not a recent development; its fundamental principles substantially predate the federal Freedom of Information Act.[93] At common law, the agency memoranda exemption was encompassed within the larger doctrine of "executive privilege."[94] Although "executive privilege" has both constitutional and common law origins,[95] the agency memoranda exemption has none of the constitutional implications.[96] Instead, the common law basis of the agency memoranda exemption was

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. . . .

(g) are inter-agency or intra-agency materials which are not:
i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public, or
iii. final agency policy or determinations
. . . .

[88]*See generally* Common Council of Peru v. Peru Daily Tribune, 440 N.E.2d 726, 729 (Ind. Ct. App. 1982); Merimee v. Brumfield, 397 N.E.2d 315, 319 (Ind. Ct. App. 1979). Words specifed in a statute, by implication, exclude other words not so specified. *See infra* text accompanying note 142. For a discussion of how this rule of statutory construction relates to exemption (b)(6), see *infra* notes 141-45 and accompanying text.

[89]Ind. Code § 5-14-3-3 (Supp. 1984).

[90]*See* Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[91]*See supra* notes 87-89 and accompanying text.

[92]*Cf.* Academy in the Public Service, *supra* note 6, at 8 ("DO remember that attitudes and practices of bureaucratic secrecy are 'out.'"). *See supra* notes 31-48 and accompanying text. For a discussion of the proper role of legislative policy in the judicial process, see *supra* note 45.

[93]*See generally* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); Kaiser Alum. & Chem. Corp. v. United States, 157 F.Supp. 939 (Ct. Cl. 1958) (discussing the executive privilege doctrine prior to the Freedom of Information Act).

[94]*Cf.* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear.").

[95]Nixon v. Sirica, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, C.J., dissenting).

[96]Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975). In reference to exemption 5 the court stated, "we mean what is usually referred to as 'executive privilege,' shorn of any constitutional overtones of separation of powers." *Id.*

rooted in the general principle that not all government business can be conducted entirely in the open.[97]

Federal exemption 5 and Indiana exemption (b)(6) are examples of the executive privilege doctrine in codified form.[98] Federal cases construing the agency memoranda exemption have consistently recognized its common law executive privilege origin.[99]

A. Policies Underlying the Agency Memoranda Exemption

The agency memoranda exemption is based on essentially three policy grounds.[100] First, and most importantly, "it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism. . . ."[101] This first policy basis is, in essence, the same as the core policy of the executive privilege at common law—frank discussion within the deliberative process.[102]

Congress was well aware of the common law executive privilege for agency opinions and recommendations when it created exemption 5 in the federal Freedom of Information Act.[103] In fact, "[a]s the legislative history makes clear, Congress' *principal purpose* in adopting Exemption 5 was to protect the confidentiality of the pre-decisional deliberative process":[104]

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."[105]

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[97]Nixon v. Sirica, 487 F.2d 700, 764 (D.C. Cir. 1973) (Wilkey, C.J., dissenting).

[98]*Cf. id.* at 763 (Wilkey, C.J., dissenting). "[T]he common sense-common law privilege of confidentiality necessary in government administration . . . has been partly codified in statutes such as the Freedom of Information Act . . . ." *Id.*

[99]*See, e.g.*, NLRB V. Sears, Roebuck & Co., 421 U.S. 132 (1975); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969).

[100]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[101]*Id.*

[102]*See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979, (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

[103]EPA v. Mink, 410 U.S. 73, 86 (1973); Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[104]Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978).

[105]S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

On the federal level, this protection for full and frank agency discussion is found within exemption 5's discovery clause protecting memoranda that a private party could not discover in litigation with an agency.[106] This clause was the vehicle used by Congress to interject the executive's traditional privilege against civil discovery of pre-decisional agency deliberations into exemption 5.[107] In Indiana, this is accomplished through the language of exemption (b)(6) which expressly protects the advisory and deliberative portions of agency memoranda.[108]

The second policy of the agency memoranda exemption is "to protect against premature disclosure of proposed policies before they have been finally formulated or adopted."[109] Congress' concern was that such premature disclosure "might impede the proper functioning of the administrative process."[110] "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position."[111]

Congress' intent to prevent the premature disclosure of nonfinal agency opinions is stated in the House of Representatives report that led to the adoption of the FOIA:[112]

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause [exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.[113]

Again, on the federal level, this protection against premature/pre-decisional disclosure is found within exemption 5's discovery clause.[114] In Indiana, the same policy goal is accomplished by exempting memoranda "that are communicated for the purpose of decisionmaking."[115]

The final policy ground for the agency memoranda exemption purports to "protect against confusing the issues and misleading the public

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[106]5 U.S.C. § 552(b)(5).

[107]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975). For a discussion of the difficulties in applying discovery law to exemption 5, see *supra* notes 71-74 and accompanying text.

[108]IND. CODE § 5-14-3-4(b)(6).

[109]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[110]S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965).

[111]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Implicit within this policy is the rule that final agency opinions remain open to disclosure. *See infra* notes 147-57 and accompanying text.

[112]H.R. REP. No. 1497, 89th Cong., 2nd Sess. 1, 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427-28.

[113]*Id.* at 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS, 2418, 2427-28.

[114]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[115]IND. CODE § 5-14-3-4(b)(6).

by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."[116] This policy appears not to have arisen from Congress,[117] but from the federal courts.[118] Although the United States Supreme Court has used similar language,[119] it is important to note that the District of Columbia Court of Appeals, which apparently originated this policy ground,[120] did not base its decision on this ground.[121] Instead, the court harkened back to the first ground, full and frank agency discussion.

Unlike the exemption's first policy ground protecting the agency's full and frank discussions, and the second policy ground preventing the premature disclosure of proposed policies, this third policy ground claims to protect the public itself from being misled and to guard against confusing the issues.[122] This philosophy of protecting the disclosure-seeking public from itself is not in tune with the stated policy of public records disclosure: "A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master."[123] To the contrary, the third policy ground allows government agencies and the courts to deny access on the premise of protecting the unwitting public from possible confusion.[124]

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[116]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (citation omitted).

[117]*See* Note, *supra* note 10, at 1049. "This exemption . . . is based on two specific policy considerations which should define its scope: (1) preventing permature disclosure . . . and (2) eliminating the inhibition of a free and frank exchange . . . ." *Id.* The Note refers to the House and Senate reports as the sources of these two grounds. No reference is made to a third policy ground. *Id.*

[118]*Cf.* Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978). The *Jordan* court cites Sterling Drug Inc. v. FTC, 450 F.2d 698, 706-08 (D.C. Cir. 1971) as the older of two sources of this third policy ground. The absence of this policy ground from the House and Senate reports, *see supra* note 113, indicates a judicial source.

[119]*See* Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 186 (1974). "[R]elease of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading." *Id.* (citations omitted); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975). "The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground." *Id.*

[120]*See supra* notes 117-18 and accompanying text.

[121]"The possible inaccuracies and omissions in these memoranda are not, however, the most important consideration affecting our conclusion that they need not be disclosed. We are primarily motivated by our belief that there is a great need to preserve the free flow of ideas." Sterling Drug Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

[122]*See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[123]IND. CODE § 5-14-3-1.

[124]*Cf.* Grumman Aircraft Eng. Corp. v. Renegotiation Board, 482 F.2d 710, 718 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975) (stating that "the public might be misled by exposure to discussions occurring before policy affecting it were actually determined").

Noting that an agency might seek to avoid disclosure on the claim that a final decision was never reached, the District of Columbia Court of Appeals, in *Vaughn v. Rosen*,[125] presented a much more persuasive analysis: "The public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made."[126] The reasoning of the *Vaughn* decision best serves Indiana's new liberal policy of public disclosure[127] as well as the ultimate goal of public records disclosure—"an informed, intelligent electorate."[128] Because this approach promotes, rather than discourages, a well informed public, Indiana courts should encourage disclosure where possible, and not prohibit disclosure where the fear is merely that the public may be misled.

The policies of protecting open, frank agency discussions and preventing the premature disclosure of nonfinal agency opinions provide ample protection to the agency's deliberative process. The policy of protecting the public from being misled, on the other hand, could go too far in protecting the agency. In the final analysis, liberal records disclosure[129] and the public's broad interest in agency decisions[130] militates against the application of this third, questionable policy ground.

B. Limitations on the Agency Memoranda Exemption

Indiana's exemption (b)(6) is designed to place the same limits on nondisclosure as those found under federal exemption 5.[131] Because of the similarity in goals, Indiana courts will find federal case law helpful in interpreting the scope of Indiana's Act. Under federal case law, full and frank agency discussion is protected as is prevention of premature disclosure.[132] Yet, in applying these policies, the courts have consistently required the disclosure of factual material[133] and final agency opinions.[134] These two areas have evolved as the main limitations on the agency memoranda exemption,[135] and will probably evolve as the major limitations on the Indiana exemption as well.[136]

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[125]523 F.2d 1136 (D.C. Cir. 1975).

[126]*Id.* at 1146.

[127]IND. CODE § 5-14-3-1.

[128]H.R. REP. NO. 1497, 89th Cong., 2nd Sess. 12, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2429.

[129]*See* IND. CODE § 5-14-3-1.

[130]*See Vaughn*, 523 F.2d at 1146.

[131]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17. For a discussion of why federal law is useful as a guideline, see *supra* note 10.

[132]*See supra* note 101-07, 109-14 and accompanying text.

[133]*See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973).

[134]*See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[135]*See generally* Note, *supra* note 10, at 1049-63.

[136]The policies and goals of the FOIA and the Indiana Public Records Act are very similar. Federal case law, therefore, provides a useful guide. *See supra* note 10.

1. Disclosure of Factual Material.—The factual portions of agency memoranda were available for disclosure at common law;[137] the clear distinction between nondisclosable opinions and disclosable facts was also recognized.[138] The United States Supreme Court, in *Environmental Protection Agency v. Mink*,[139] specifically noted the fact-opinion dichotomy: "Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other."[140] The language of Indiana's exemption (b)(6) establishes the fact-opinion dichotomy by implication.[141]

Disclosure of factual material, in Indiana, rests upon statutory interpretation: "When certain items or words are specified or enumerated in [a] statute, then, by implication, other items or words not so specified are excluded."[142] Hence, exemption (b)(6)'s reference to the nondisclosure of "advisory or deliberative material . . . expressions of opinion or . . . speculative"[143] matters reserves factual material as open for disclosure.[144] The federal judiciary has applied a similar construction of exemption 5: "[C]ommunications not consisting of advice and opinions—such as those containing purely factual material—are not 'intra-agency memorandums' in the sense that Congress used that term and so are not exempt from disclosure."[145] Thus, factual material contained in a document should be disclosed in Indiana, even when the document as a whole is not subject to disclosure.[146]

2. Disclosure of Final Agency Opinions.—Courts have stated that final agency opinions must be disclosed[147] "even though the information is admittedly recommendatory and subjective."[148] The United States Supreme Court, in *NLRB v. Sears, Roebuck & Co.*,[149] set out the policy behind requiring such disclosures: "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency . . . ."[150]

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[137]*See* Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)("The objective facts . . . are otherwise available.").

[138]*See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

[139]410 U.S. 73 (1973).

[140]*Id.* at 89 (footnote omitted).

[141]*See* IND. CODE § 5-14-3-4(b)(6); Cardwell Interview, *supra* note 8.

[142]Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (citation omitted).

[143]IND. CODE § 5-14-3-4(b)(6).

[144]Cardwell Interview, *supra* note 8.

[145]Note, *supra* note 10, at 1049-50 (footnotes omitted).

[146]*See infra* notes 198-201 and accompanying text.

[147]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[148]Note, *supra* note 10, at 1058.

[149]421 U.S. 132 (1975).

[150]*Id.* at 152-53.

The District of Columbia Court of Appeals, in *Sterling Drug Inc. v. FTC*,[151] noted that the fundamental "policy of promoting the free flow of ideas . . . does not apply"[152] where final agency opinions are involved:

> [P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.[153]

On the federal level, the FOIA affirmatively provides for the release of agency "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public."[154] There is no such provision in the Indiana law. Instead, in Indiana, the clause requiring that the communication be made "for the purpose of decisionmaking"[155] is intended to spawn the release of an agency's working law.[156] Once a final decision has been reached, its communication within the agency is no longer "for the purpose of decisionmaking" and the quality of the deliberative process is no longer endangered, "as long as prior communications and the ingredients of the decisionmaking process are not disclosed."[157] Although it would have been preferable for the Indiana Act to expressly provide for the release of final agency opinions,[158] the final clause requiring the purpose of decisionsmaking, if interpreted liberally to promote disclosure, will result in the release of final agency opinions and staff instructions affecting the public.

IV. Indiana's Exemption (b)(6): A Practical Approach

Indiana courts do not rule upon public records disputes until relatively late in the overall process. The process begins when an individual requesting disclosure identifies "with reasonable particularity the record being requested."[159] Following this request, if the public agency permits disclosure no dispute is raised. However, when the public agency denies disclosure,[160]

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[151]450 F.2d 698 (D.C. Cir. 1971).

[152]*Id.* at 708.

[153]*Id.* (citation omitted).

[154]5 U.S.C. § 552(a)(2)(A), (B), (C).

[155]Ind. Code § 5-14-3-4(b)(6). *See supra* note 80.

[156]Cardwell Interview, *supra* note 8.

[157]*Sears*, 421 U.S. at 151.

[158]*See supra* notes 87-89 and accompanying text.

[159]Ind. Code § 5-14-3-3(a).

[160]*Id.* § 5-14-3-9 providing in part:

(a) A denial of disclosure by a public agency occurs when:

the requesting individual may file an action to compel disclosure "in the circuit or superior court of the county in which the denial occurred."[161] At this stage, the courts will be asked to determine whether disclosure or nondisclosure of the particular record is mandated.[162] The courts have not yet had an opportunity to rule under the new Act.[163] However, when those rulings become necessary, the courts are instructed to follow a number of procedures and give consideration to a number of policies. The court procedures discussed in this Note are derived from the entire Act and thus apply to all public records disputes.[164] The policies discussed focus only on exemption (b)(6) and the considerations it will likely raise.[165] In combination, these court procedures and exemption (b)(6) policy considerations provide a thorough analysis for cases arising under exemption (b)(6).

A. Procedural Devices Under the Indiana Public Records Act

Public records disputes do not, in general, fit squarely within the traditional adversarial system.[166] While one party has total knowledge of the disputed record's contents, the opposing party has little, if any, such knowledge.[167] In this context, the importance of the proper application of court procedures becomes apparent. First, the all-inclusive definition of "public records" in the new statute[168] precludes any need to decide whether or not the record was required to be made by statute, rule, or regulation.[169] Instead, almost all documents within the possession of a public agency are presumed to be "public records,"[170] and the court must

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> (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 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.

[161] *Id.* § 5-14-3-9(b). Although generally administrative remedies must be exhausted before a party seeks judicial review, *see Evans v. Stanton*, 419 N.E.2d 353, 355 (Ind. Ct. App. 1981), the Indiana Public Records Act institutes its own procedures for judicial review. IND. CODE § 5-14-3-9.

[162] IND. CODE § 5-14-3-9(b), (c).

[163] *Id.* §§ 5-14-3-1 to -9.

[164] *See infra* text accompanying notes 168-201. The new Act provides for both mandatory court procedures ("The court shall determine the matter de novo . . . ." IND. CODE § 5-14-3-9(c)), and discretionary court procedures ("The court may review the public record in camera . . . .") *Id.*

[165] *See infra* text accompanying notes 202-24.

[166] *See* Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).

[167] *Id.* at 823.

[168] IND. CODE § 5-14-3-2 (Supp. 1984). *See supra* text accompanying notes 49-51.

[169] *See* IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984).

[170] *See* FINAL REPORT, *supra* note 6, at 3.

decide if the document falls under one of the twenty-two exemptions.[171] As the court stated in *Gallagher v. Marion County Victim Advocate Program, Inc.*,[172] "the dispositive issue [is] whether [the] particular document comes within any of the enumerated exemptions."[173]

Second, in determining whether the document is exempted, the court must construe the exemptions narrowly. Although the new Act does not specifically require that its exemptions be narrowly construed, it does require liberal construction to implement the broad policy of disclosure.[174] In addition, Indiana courts have recognized the general rule that exceptions to a statute are to be strictly construed,[175] particularly with respect to public disclosure laws.[176] The federal judiciary has consistently recognized this rule when considering the agency memoranda exemption:[177] "The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly."[178]

Third, Indiana places the burden of proof on the nondisclosing agency in emphatic terms: "[T]he burden of proof for the nondisclosure of a public record [is] on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record."[179] Further, the General Assembly reiterated the burden requirement within the section setting forth court-compelled disclosure: "[T]he burden of proof [is] on the public agency to sustain its denial."[180] Although the Indiana statute does not specify the weight of this burden,[181] its practical application is significant.

Placing the burden of proof on the nondisclosing agency is of particular importance in the realm of public records disputes:

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[171] *See* IND. CODE § 5-14-3-4.

[172] 401 N.E.2d 1362 (Ind. Ct. App. 1980).

[173] *Id.* at 1365 (citation omitted).

[174] IND. CODE § 5-14-3-1.

[175] *E.g.*, Merimee v. Brumfield, 397 N.E.2d 315 (Ind. Ct. App. 1979).

[176] *See* Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) ("Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.").

[177] *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 756 (D.C. Cir. 1978); Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

[178] Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

[179] IND. CODE § 5-14-3-1.

[180] *Id.* § 5-14-3-9(c).

[181] *See id.* §§ 5-14-3-1, -9. The Indiana Act does not indicate whether a balancing, clear and convincing, or reasonable doubt standard should be applied. For state statutes requiring the public agency to prove that nondisclosure "clearly outweighs" the public's interest in disclosure, see CONN. GEN. STAT. ANN. § 1-19(b)(1) (West Supp. 1983); MICH. COMP. LAWS ANN. sec. 15.243, § 13(1)(n) (West 1981); OR. REV. STAT. § 192.500(2)(a) (Supp. 1983).

> [T]he party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . .
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . . The best [the party seeking disclosure] can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain [solely nondisclosable] information.
>
> . . . .
>
> This lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.[182]

This fundamentally unequal relationship points up the need to impose the burden of proof on the agency. Otherwise, the agency will simply claim an exemption, often an expansive one,[183] and effectively shift the burden to the "comparatively helpless" party seeking disclosure.[184] In Indiana, the agency meets its burden of proof for nondisclosure by proving that the record falls within one of the statute's discretionary exemptions.[185] In order to prevent an Indiana agency from claiming broad exemptions in an attempt to shift its burden, the court should require the agency to claim a specific exemption and to provide a relatively detailed affidavit or oral statement explaining how the particular exemption applies to the document sought.[186] The affidavit/oral statement requirement is useful for three reasons: it reflects the high statutory burden placed on the nondisclosing agency;[187] it aids the court in addressing the issues involved; and, most importantly, it reduces the agency's incentive to claim broad, nonapplicable exemptions.[188]

The fourth procedural device, de novo review, is closely related to the placement of the burden of proof. Indiana's de novo review

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[182]Vaughn v. Rosen, 484 F.2d 820, 823-24 (D.C. Cir. 1973). The reader should distinguish this decision from *Vaughn v. Rosen* reported at 523 F.2d 1136 which arose from a remand of the earlier *Vaughn* decision.

[183]*See, e.g.*, Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973) ("Thus, as a tactical matter, it is conceivable that any agency could gain an advantage by claiming overbroad exemptions.").

[184]*Id.* at 825-26.

[185]IND. CODE § 5-14-3-9(c).

[186]*See* Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

[187]IND. CODE §§ 5-14-3-1, -9.

[188]*See, e.g.*, Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

provision[189] requires that the judge consider the disclosure dispute anew, without any special consideration provided to the nondisclosing public agency. Thus, the usual deference given to administrative determinations is rejected[190] and "the agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."[191]

Fifth, Indiana courts "may review the public record in camera to determine whether any part of it may be withheld under this chapter."[192] As a practical matter, in camera inspection will allow the judge to review the disputed record in private so as to determine whether it should be disclosed, partially disclosed, or completely withheld.

The courts should use in camera inspection "to determine whether the Government has properly characterized the information as exempt."[193] Such an inspection partially compensates for the advantage held by the agency over the party seeking disclosure.[194] Although in camera inspection is not required by the Indiana statute,[195] it should be liberally used where the records sought are not extensive.[196] In light of the adversarial advantage enjoyed by nondisclosing agencies,[197] the use of in camera inspection should not be neglected.

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[189]IND. CODE § 5-14-3-9(c).

[190]*Cf.* Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (referring to the FOIA).

[191]Mead Data Central Inc. v. United States Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

[192]IND. CODE § 5-14-3-9(c).

[193]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973). While the decision in *Vaughn* does not expressly state that in camera inspection should be used, it does indicate the usefulness of such a procedure. In *Vaughn*, the court noted the difficulties in utilizing such a procedure:

> [T]he trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

Id. at 825.

After noting the difficulties inherent in in camera inspections, the court approved such inspections indicating that the agency could be required to index the requested documents, thus aiding the court's review of the document. *Id.* at 826-28. Such an indexing system could be utilized in Indiana as well. The court could require that indexes of requested documents accompany the agency's affidavit which is offered to prove that the document falls under an enumerated exemption. *See supra* notes 186-88. Those indexes would direct the court to specific portions of the document which support the agency's claimed exemption. *See Vaughn*, 484 F.2d at 826-28.

[194]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

[195]*See* IND. CODE § 5-14-3-9(c).

[196]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

[197]*See supra* notes 182-84 and accompanying text.

Sixth, the new Indiana Act requires public agencies to separate nondisclosable information from disclosable information and to provide for public access to the latter.[198] Likewise, this duty should be enforced by the judiciary. The United States Supreme Court has recognized the value of severing documents between portions privileged and nonprivileged.[199] The recognized rule is that "an entire document is not exempt merely because an isolated portion need not be disclosed."[200] Indiana's partial disclosure provision is closely related to exemption (b)(6).[201] Under exemption (b)(6), partial disclosure will permit agencies to withhold deliberative material that expresses opinions or is speculative, and is communicated for the purpose of decisionmaking, but will require those agencies to release the factual data, staff instructions affecting the public, and final agency opinions found within the same document. In camera inspection is the vehicle Indiana courts should rely on to institute partial document disclosure. The procedural devices provided in the statute are essential to the proper application of exemption (b)(6).

B. Specific Considerations Under Exemption (b)(6)

Utilizing the above procedures, Indiana courts, ruling on exemption (b)(6) claims, must decide whether the requested material is factual data or a final agency opinion subject to disclosure, or a properly withheld exempt document. These two areas of disclosable information set the final framework for a decision under exemption (b)(6).

1. Factual Material: Practical Considerations.—Recognizing that exemption (b)(6) compels the disclosure of factual data found in an agency memorandum,[202] the courts should, as a rule, extract all factual material and provide access to it.[203] However, there is one narrow limitation on the disclosure of factual material: "Factual information may be protected only if it is inextricably intertwined with policy-making processes."[204] To withhold factual information, it must be shown that its release would "so expose the deliberative process within an agency"[205] as to inhibit the free and frank exchange of ideas, a very high standard. Typically, extraction of the factual matter from an agency memorandum will not expose an

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[198]IND. CODE § 5-14-3-6.

[199]*See* EPA v. Mink, 410 U.S. at 91.

[200]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973) (footnote omitted).

[201]ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[202]*See supra* notes 137-45 and accompanying text.

[203]*Cf.* IND. CODE § 5-14-3-6 (partially disclosable records).

[204]Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (footnote omitted). Sensitive facts, in Indiana, will likely be exempted as confidential records under exemption (a)(1). *See* IND. CODE § 5-14-3-4(a)(1).

[205]Mead Data Central Inc. v. United States Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

author's opinions or recommendations. Thus, protection for the factual portion of an agency memorandum should only rarely be granted.

2. Final Agency Opinions: Practical Considerations.—The analysis regarding the release of final agency opinions is a complicated one. As noted by the United States Supreme Court, the line between a non-disclosable agency opinion and a disclosable final agency opinion "may not always be a bright one."[206]

As outlined by the District of Columbia Court of Appeals, two requirements must be met before a record can be withheld under the agency opinion prong of the agency memoranda exemption.[207] "First, the document must be '*pre*-decisional.'"[208] Second, "the communication must be 'deliberative', that is, it must actually be related to the process by which policies are formulated."[209] The first requirement, "pre-decisional," is time-based. To be exempt, a communication must be "actually *antecedent to the adoption of an agency policy*. Communications that occur *after* a policy has already been settled upon . . . *are not* privileged."[210] Thus, staff instructions that affect the public, by their very nature, connote an already-existing policy and must be released as the decisionmaking is complete and only policy implementation remains.

"However, timing alone does not determine whether a specified document is protected by the privilege."[211]

> [T]he document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.[212]

Indiana courts should examine the give-and-take of the deliberative process in a four-part, fact-sensitive analysis. First, if the document is "weighing the pros and cons of agency adoption of one viewpoint or another,"[213] discussing "the wisdom or merits of a particular agency policy, or recommend[ing] new agency policy,"[214] it is most likely exempt.

Second, if the memorandum reflects the personal opinions and subjective thoughts of the writer,[215] and is "so candid . . . that public

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[206] *Sears*, 421 U.S. at 152 n.19.

[207] Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978).

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

[213] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[214] *Id.* at 869.

[215] *See id.* at 866, 869.

disclosure is likely in the future to stifle honest and frank communication within the agency,"[216] it should generally be withheld. Public ridicule or criticism of pre-decisional opinions can do great damage to the deliberative process.[217]

Third, a document that has "been widely distributed throughout the agency"[218] is more likely a final agency opinion or policy directive, often containing staff instructions that affect the public. Narrow distribution tends to indicate the document's lack of finality by implying that the document is not yet ready for agency-wide use. Thus, the distribution pattern of a document is indicative of its finality.

The fourth consideration has been termed "crucial" by the United States Supreme Court in one agency memoranda decision.[219] This consideration requires courts to determine what role the particular document plays in the particular agency's administrative process.[220] The "flow of advisory material"[221] is central to this consideration. For example, if the document "flow[s] from a superior with policy-making authority to a subordinate who carries out the policy"[222] it is more likely the agency's working law and should be disclosed. In contrast, "a document from a subordinate to a superior official is more likely to be predecisional. . . ."[223] "The important criterion is whether those who consult the opinions have discretion to follow the opinions or not, based on their persuasive value rather than their character as working law . . . ."[224]

Various elements of this framework will prove useful depending upon the character of the information sought, whether factual data or final agency opinions. The most important elements, however, in an exemption (b)(6) analysis remain those general procedural devices affirmatively provided by the legislature and the more narrow policies of factual and final agency opinion disclosure.

V. Conclusion

The Indiana General Assembly has taken a bold step forward with the new Public Records Act. Public disclosure is now the rule; agency secrecy is the exception. Records in any form, containing any information, are assumed open for public inspection, limited only by specific exemptions.

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[216] *Id.* at 866.

[217] *Id.* at 869.

[218] Pies v. United States Internal Revenue Servs., 668 F.2d 1350, 1352 (D.C. Cir. 1981).

[219] *Sears*, 421 U.S. at 138.

[220] *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980).

[221] Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

[222] *Id.* (footnote omitted).

[223] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

[224] Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

Although exemption (b)(6) presents public agencies with language fertile for overbroad application and record-restricting misuse, the state courts have the power and the duty to make the definitive determinations. Burden of proof requirements, de novo review, in camera inspection, and partial record disclosure combine as potent tools to ensure proper disclosure within exemption (b)(6). Applied with an eye toward the release of factual data and final agency opinions, the interrelationship of broad, liberal disclosure and protected agency deliberations has a sturdy potential for success.

The importance of this interrelationship is well-stated in the words of James Madison: " 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'"[225]

ERIC J. GRANINGER

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[225]EPA v. Mink, 410 U.S. at 110-11 (Douglas, J., dissenting) (quoting Letter from James Madison to W. T. Barry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910)).