Initiatives, Referenda, and Public Records Law in Idaho

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Initiatives and Referenda

What are they?

• Initiative:
  ▪ A positive right
  ▪ It creates law

• Referendum:
  ▪ A negative right
  ▪ It negates law
Initiatives and Referenda

Article III, section 1
Idaho Constitution

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

Initiatives and Referenda

Article III, section 1
Idaho Constitution

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of the governor at such general election to be adopted.*

* Underlined deleted in 1980 by amendment.
Initiatives and Referenda

History

Not a Federal Right
A State Right

- Twenty-four states allow for initiatives.
- Created in 1911 by Senate Joint Resolution 12.
- Voters passed Constitutional Amendment in 1912.
- But procedures not provided until 1933.

Initiatives and Referenda

History

- From 1933-1994, 24 initiatives and 3 referenda qualified for the ballot.
- From 1994-2013, only one initiative and one referendum passed.
  - 63 petitions circulated.
  - Four initiatives and four referenda qualified.
Initiatives and Referenda

History

- From 2013-2021, only 14 voter petitions were circulated.
  - Two initiatives qualified for ballot.
  - One initiative passed.
  - No referendum qualified.
- From 2021-present, eight petitions and one referendum were circulated.
  - Eight did not qualify.
  - One initiative qualified for ballot but was withdrawn.

Initiatives and Referenda

Notable Initiatives and Referenda

- 1938: first successful initiative created the Idaho Fish and Game Commission
- 1974: Sunshine Laws for political funds and lobbyist activity disclosure
- 1984: State Lottery Commission established
- 2012: Luna laws struck down
- 2018: Medicaid expansion
Initiatives and Referenda

History

Signature Requirements

- **1915**: enabling legislation required all signatures to be witnessed by a judge or state official; required 15% of voters in last gubernatorial election in each of Idaho’s counties for initiatives and 10% for referenda.

- Governor Moses found this fatal and did not sign.

- Legislature “set a course of deliberate” inaction for the next 18 years.

Initiatives and Referenda

History

Signature Requirements

- **1933**: enabling legislation passed requiring signatures equal to or greater than 10% of statewide votes cast in the prior gubernatorial election for both initiatives and referenda. No geographic distribution requirement.

- **1984**: legislature increased signature requirement from 10% to 20%. No geographic distribution requirement.

- Governor John Evans vetoed the bill as Idaho would have “the dubious distinction” of enacting the most restrictive conditions in the nation.
Initiatives and Referenda

History

Signature Requirements

- **1997**: Legislation required signatures from 22 counties equal to or not less than six percent (6%) of the qualified electors at the time of the last general election in each of those 22 counties.

- **2003**: Ninth Circuit struck down county distribution requirement finding it violated equal protection and the one person, one vote principle by giving more power to those signing in less populous counties. Left 6% signature requirement in place.

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Initiatives and Referenda

History

Signature Requirements

- **2003-2013**: 6% signature requirement for registered voters statewide in effect post-ICUB.

- **2013**: Legislation required 6% of registered voters at the time of the last general election in each of at least 18 of Idaho’s 35 legislative districts, provided that the total number of signatures gathered was equal to or greater than 6% of registered voters statewide at the time of the last general election.
Initiatives and Referenda

History

Signature Requirements

- **2021**: Legislation increased geographic signature requirement to all 35 legislative at the same percentage.


- Left unanswered whether 18 legislative district requirement is constitutional.

Initiatives and Referenda

Fundamental Right & Subject Matter

- Therefore, because the people of Idaho expressly "reserve[d] to themselves the power[s]" to (1) "approve or reject at the polls any act or measure passed by the legislature," and (2) "propose laws and enact the same ... independent of the legislature," when they amended the Idaho Constitution in 1912, we conclude these powers are fundamental rights.

- Accordingly, while the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject to strict scrutiny.

- Strict scrutiny: requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest.

- Generally, where the legislature may legislate, the people may initiate.

*Reclaim Idaho v. Denney*, 169 Idaho 406, 429-30 (2021);

*City of Boise City v. Keep the Commandments Coal.*, 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006)
Initiatives and Referenda

Certificate of Review Procedure

- Proposed initiative filed with signatures of 20 qualified electors with Secretary’s Office.
- Each signature sheet contains signatures from only one county.
- Initiative requires a funding source, which is reviewed by the division of financial management.
- Proposed initiative transmitted to AG for Certificate of Review, which is advisory only and must be completed and transmitted to Secretary’s Office in 20 working days.

Idaho Code §§ 34-1804 & -1809

Initiatives and Referenda

Filing Petition after Certificate of Review

- Within 15 working days after certificate’s issuance, the petitioner may file the measure with the Secretary.
- Secretary’s Office submits the measure to the Attorney General for assignment of long and short ballot titles and must return the ballot titles to the Secretary’s Office within 10 working days.
- Any dissatisfied person with the ballot titles may appeal to the Idaho Supreme Court 20 days after filing in the Secretary’s Office.

Idaho Code § 34-1809
Initiatives and Referenda

Preparation and Circulation of Finalized Petition

- Secretary transmits the approved form with the ballot titles to the petitioner with printing instructions, along with a copy of the fiscal impact statement. 34-1809(2)(b) & -1812(1).
- Upon receipt of the ballot titles, fiscal impact statement and approved form, the petitioner has an 18-month circulation period or April 30 in the election year the initiative will be held to collect signatures, whichever is earlier. 34-1802 & -1812.
- Each signature sheet shall contain signatures of qualified electors from only one county. 34-1807.

Initiatives and Referenda

Preparation and Circulation

- Signature gatherers must offer a copy of the initiative, fiscal impact statement summary, and sponsor's proposed funding source before signing. 34-1812(3).
- Signers must be Idaho residents and over 18. 34-1807.
- Signers may remove their signatures. 34-1803B(1).
- Signatures must be submitted to the appropriate county clerk for verification no later than May 1 or 18 months from the date of circulation, whichever is earlier. 34-1802(2).
Initiatives and Referenda

Preparation and Circulation

• County clerks must strike and not count the name of any signer whose name, address, or signature does not match those of a qualified elector of the proper jurisdiction or who has requested, in writing, that their name be removed. 34-1807(2) & -1803B(2).

• County clerks must within 60 calendar days of the deadline for submission of signatures, verify the signatures, but the time to do so may not extend beyond the last day of June in the year an election on the initiative will be held. 34-1802(3).

Initiatives and Referenda

Filing of Petitions

• All petitions must contain signatures of legal voters equal in number to not less than 6% of the qualified electors at the time of the last General Election in 18 of the 35 legislative districts before being considered for final filing. 34-1805(2).

• Initiatives must be filed with the Secretary's Office with the required signatures no later than 4 months before the election at which they are to be voted upon. 34-1802(4).

• Referenda must be filed not more than 60 days after the final adjournment of the session of the State Legislature which passed the bill on which the referendum is demanded. 34-1803.
Initiatives and Referenda

Voters’ Pamphlet and Arguments Pro & Con

- Any voter or group of voters may on or before July 20 prepare and file an argument not to exceed 500 words, for or against any measure. 34-1812A.
- Rebuttal Arguments, not to exceed 250 words, may be submitted no later than August 1. 34-1812B.
- Voter Pamphlets will be printed and distributed by the Secretary of State no later than September 25. 34-1812C.

Initiatives and Referenda

City Initiatives and Referendum

- Not your problem.
- If questions arise, direct to Idaho Code § 34-1801B for guidance.
- Idaho Code § 34-1801B contains the procedures governing city initiatives.
Public Records Law

SOURCES

- Idaho Code § 74-101 et seq.
- There are other manuals there including an Open Meeting Law manual.

Public Records Law

Definitions & Rule of Statutory Construction

Words are given the meaning set forth in the definition portion of the code section or chapter.

- The definition contained in code controls over the common definition of the word.
- Different chapters or code sections may define the same word slightly differently.
- If no statutory definition exists, the common meaning controls.
Public Records Law

Key Definitions

- **Custodian**: The person or persons having personal custody and control of the public records in question.
- **Writing**: Includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording.
- **Local Agency**: A county, city, school district, municipal corporation, independent public body corporate and politic, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.

Idaho Code § 74-101
Public Records Law Manual (PRLM) pp. 21-22

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Public Records Law

Key Definitions

- **Public Agency**: Any state or local agency as defined in this section.
- **Public Official**: Any state, county, local district, independent public body corporate and politic or governmental official or employee, whether elected, appointed or hired.
- **Public Record**: Any writing containing information relating to the conduct or administration of the public's business. **Personal notes created by a public official for own use shall not be a public record unless notes shared with others/entity.**

Idaho Code § 74-101
PRLM p. 22
Public Records Law
Right to Examine

• Every person has a right to examine and take a copy of any public record of this state.

• Examination of public records must be conducted during regular office or working hours.

• A public agency may establish a copying fee schedule.

Idaho Code §§ 74-102 & -119
PRLM pp. 22-26, 56

Public Records Law
Copying Fee Restrictions

1. Fee may not exceed the actual cost to the agency.

2. Fees for labor cost shall be charged per hour at rate of lowest paid staff capable of handling.

3. Public agencies may establish a fee to recover the actual labor cost associated with locating and copying documents in certain cases.

Idaho Code § 74-102
PRLM pp. 22-26
Public Records Law

Copying Fee Restrictions

4. First 2 hours of labor or 100 copies free.
5. May aggregate multiple requests if agency believes requestor(s) is segregating a request to avoid fees.
6. Advance payment may be required.

Idaho Code § 74-102
PRLM pp. 22-26

Public Records Law

How Are Requests Responded To?

- Grant or deny a person's request to examine or copy public records within three (3) working days in writing.
- If a longer period of time is needed to locate or retrieve the public record(s), the requestor shall receive the record(s) no later than ten (10) working days from date of request.
- Indicate longer time in writing.
- Sort exempt and non-exempt material.
- May inquire to narrow the request.

Idaho Code §§ 74-102(9) & -103
PRLM pp. 24, 27
Public Records Law

How Are Requests Responded To?

- If the agency fails to respond, the request shall be deemed denied ten (10) working days following the request.
- If denied, the requesting party will be notified in writing of the denial (or partial denial).
- Must indicate specific exemption relied upon.
- State statutory reason for denial.
- State right to appeal denial.

Idaho Code § 74-103
PRLM pp. 27-28

Public Records Law

Exemptions

- Exemptions provided for in state or federal law. 74-104(1)
- Law enforcement and investigatory records. 74-105(1) [see also 74-124]
- Infrastructure & emergency response plans. 74-105(4b)
- Workers comp. 74-105(10)
- Personnel records and professional discipline. 74-106(1)
- Retired employees home addresses. 74-106(2)
- Records of a personal nature. 74-106(4)
- Residential street address and telephone number of law enforcement officers. 74-106(30)

PRLM pp. 28-41
Public Records Law

Exemptions

- Trade secrets. 74-107(1)
- Production records. 74-107(2)
- Bids. 74-107(3)
- Records of risk retention or self-insurance in anticipation of litigation. 74-107(11)
- Computer programs. 74-107(15)
- Archaeological. 74-108(1&2)
- Endangered species. 74-108(1)

PRLM pp. 41-49
Public Records Law

Access to Exempt Records

- Even if the record is otherwise exempt from public disclosure, a person may inspect and copy the records pertaining to himself.
- A person may request in writing an amendment of any record pertaining to that person.
- Some exemptions apply to what can be reviewed, when pertaining to oneself:
  - Investigatory records
  - Information compiled in reasonable anticipation of civil litigation
  - Adoption records
  - Records of prisoner maintained by local agency

Idaho Code §§ 74-113, -114
PRLM pp. 51-55

Public Records Law

Proceedings to Enforce Right to Examine Public Records

- Sole remedy is civil lawsuit within 180 days of denial by the person seeking documents to compel agency to make information available in accordance with the provisions of Sections 74-101 through 74-126, Idaho Code.
- Court sets hearing within 28 days.
- Must keep all documents or records in question.
- Doesn’t limit discovery. May not be used to supplant/advance discovery in federal civil or administrative proceeding.

Idaho Code § 74-115
PRLM p. 55
Public Records Law

Order of the Court

- Court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so.
- Court may order the public official to make the requested disclosure, if reason is not justified.
- Attorney fees awarded if Court “finds that the request or refusal to provide records was frivolously pursued.”

Idaho Code § 74-116
PRLM pp. 55-56

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Public Records Law

Public Records Checklist

- Review request
  - Determine if you have the records
  - Scope of request (fees/redactions)
- Prepare response in writing
  - 10-day letter?
  - Denial/Partial Denial + Statutory Language
- Provide records/Denial
  - Retain denied records
Public Records Law

Miscellaneous Provisions

- Bad Faith Penalty. 74-117
  - Penalty against public official not to exceed $1,000.
- Immunity. 74-118
  - If public record is released in good faith attempt to comply, then no liability.
- List Prohibition. 74-120
  - Cannot distribute mailing lists or telephone number lists without first securing permission of those on list.

PRLM pp. 56-58

Questions?