January 11, 2006

Mr. Chris Cotterill
General Counsel and Compliance Officer
Indiana Office of Technology
Indiana Government Center North, N551
Indianapolis, IN 46204

Re: Informal Inquiry Response; Guidance on Disclaimer Statements Used in Connection With Public Records

Dear Mr. Cotterill:

The Indiana Office of Technology, to which you are General Counsel and Compliance Officer, has requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You have asked for my opinion concerning statements (usually termed "disclaimers") that often appear at the end of electronic mail messages sent by public employees in the state government complex. I would observe that disclaimers also appear regularly on facsimile cover sheets. These disclaimers have proliferated in recent years. Some typical disclaimers are set out here:

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*Please Note:*
The information contained in this E-mail and/or attachments may contain
protected health, legally privileged, or otherwise confidential information
intended only for the use of the individual(s) named above.
If you, the reader of this message, are not the intended recipient, you are
hereby notified that you may not further disseminate, distribute, disclose,
copy or forward this message or any of the content herein. If you have
received this E-mail in error, please notify the sender immediately and
delete the original.


PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT COMMUNICATION
This e-mail contains confidential and privileged information belonging to the
sender.  This information is intended only for the addressee named above.  If
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you are not the intended recipient, you are hereby notified that any disclosure, reproduction or distribution of the communication is prohibited. If you have received this e-mail in error, please immediately notify the sender by return e-mail and delete the contents of this communication from all of your files.

CONFIDENTIALITY NOTICE:
This E-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this E-mail or any attachment is prohibited. If you have received this E-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. Thank you.

You have asked whether these disclaimers are inappropriate in state government, because the Access to Public Records Act ("APRA") governs disclosure, and Indiana law governs issues concerning retention of an e-mail record. Because this administration is committed to disclosure, one wonders whether these disclaimers send the wrong message. Also, the disclaimers are used rather indiscriminately because they are set to default and would appear on even the most innocuous message that is clearly not privileged or confidential.

This guidance concerning the significance of disclaimers is limited to the operation of the public access laws, since the public access laws are my sole bailiwick. However, there is discussion aplenty regarding the legal effect of these disclaimers. The actual use of disclaimers is not governed by my office, and I do not set out any policy with respect to a disclaimer's use in any context by a state government agency or individual employee.

Under the Access to Public Records Act, any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A record that is confidential may not be disclosed under the APRA. *See* IC 5-14-3-4(a). The legislature has set out the types of records that are protected from disclosure in section 4(a) of the APRA. Unless a record meets one of the exceptions in section 4, it must be disclosed.

This office has advised the public and public officials that the APRA is not abrogated where a governmental agency enters into a confidentiality agreement with respect to a settlement agreement. *Opinion of the Public Access Counselor 03-FC-130.* The settlement agreement is a public record if it is maintained by a public agency, and it must be disclosed in spite of a confidentiality agreement, unless exempt under section 4 of the APRA. *See also Knightstown Banner vs. Town of Knightstown, No. 33A04-0504-CV-200, slip op., (Ind. Ct. App., December 13, 2005).*

I have also advised government agencies that labeling a record as "confidential" or "privileged" does not make the record nondisclosable. Rather, the record must meet one of the section 4 exemptions in order for the agency to withhold the record. I do not believe that designating a record as confidential or privileged is itself a violation of the APRA, even though the record may not meet one of the "confidential" exemptions, *so long as* the record is disclosed upon request or withheld under a specific exemption.

Often, the agency wants to ensure that the record receives the protection that is warranted under the APRA.[1] This can be a legitimate concern for the agency, where the APRA contains criminal penalties for a public employee, public official, or an employee or officer of a contractor or subcontractor of a public agency who knowingly or intentionally discloses information classified as confidential by state statute. See IC 5-14-3-10(a). Nevertheless, if a record is *not* exempt, the fact that it bears a "confidential" or "privileged" label does not mean it is exempt.

This is analogous to an e-mail message or facsimile cover sheet (the latter a public record in itself) that accompanies a document. Electronic mail is a public record under the APRA. *See* IC 5-14-3-2, defining public record as "electronically stored data...regardless of form or characteristics." Therefore, just as with a letter, memo, or other "hard copy" form of information, an e-mail must meet an exemption in order to be nondisclosable.

Where the disclaimer is meant to redirect misdirected e-mail or a facsimile to the proper person, the agencies should know that these disclaimers should not be relied upon to protect a public official or employee from liability where the information is confidential under IC 5-14-3-4(a). If the disclosure to the wrong person is knowing or intentional, criminal penalties would still apply even where the disclaimer is present. In addition, a public agency must take precautions that protect the contents of public records from unauthorized enhanced access and unauthorized access by an electronic device. IC 5-14-3-7(b). Finally, IC 5-15 and IC 5-14-3-4(e) state that a record may not be destroyed except in accordance with a record retention schedule that applies to the record. Hence, if a person who has received a misdirected e-mail is a government employee, the employee should seek guidance of their records coordinator and not rely solely on the disclaimer language directing the person to erase or delete the e-mail. A misdirected e-mail may not be a public record if it is not filed by or with the public agency that received it by mistake, but the employee may ask the advice of the public access counselor to ensure that the record is handled properly.

Hence, an agency should consider whether the use of a disclaimer is necessary or desirable because it fulfills a legitimate need of the agency. Another consideration may be whether a disclaimer sends the wrong message about the agency's commitment to withholding only those records that are exempt under the APRA. If a disclaimer automatically accompanies an employee's signature block in an e-mail or facsimile cover sheet, it may be misleading for the disclaimer to state that the information *is* confidential. An agency may determine that it prefers to adopt a disclaimer that says the information *may be* privileged or confidential.

I hope that this guidance is of assistance to you.

Sincerely,

Karen Davis

[1] A public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record. IC 5-14-3-6.5. This of course would apply only if the record meets one exemptions under IC 5-14-3-4(a).

Public Access Counselor