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March 8, 2010

Ms. Christine Monte
Deputy Attorney General
Advisory Division
Office of the Indiana Attorney General
Indiana Government Center South
302 W. Washington St.
Indianapolis, IN 46204

Re: Informal Inquiry 09-FC-48; Public Records that are Classified or Derivatively Classified and Section 9 of the Indiana Access to Public Records Act

Dear Ms. Monte:

This is in response to your informal inquiry submitted on behalf of the Indiana Department of Homeland Security ("IDHS"), Indiana State Police ("ISP"), and Indiana Intelligence Fusion Center ("IIFC"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry regarding whether Indiana's Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq*., which establishes the required content of a public agency's response to a request for public records, is preempted by federal law where classified or derivatively classified records are the subject of the request. My opinion is based on applicable provisions of the APRA and various federal authorities.

BACKGROUND

In your inquiry, you ask whether section 9 of the APRA, which establishes the required content of a public agency's response to a request for public records in part, is preempted if the public records requested are classified or derivatively classified under federal law. Additionally, your inquiry asks whether a state agency subject to a request for classified or derivatively classified information may provide any of the following responses: (1) a statement that "no records subject to the APRA exist"; (2) a statement that the agency "can neither confirm nor deny the existence or nonexistence of the records"; or a statement that the agency has "no documents responsive to the request" without stating which exception to the APRA authorizes the nondisclosure as required by I.C. § 5-14-3-9(c)(2)(A). If federal law does preempt subsection 9(2)(A), you seek my

opinion regarding what sort of response from the agency is appropriate where a requester seeks information or records that are classified under federal law.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. IDHS, ISP, and IIFC (among other law enforcement agencies that may receive federally classified or derivatively classified information) are clearly public agencies under APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy these agencies' public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA provides that records which are required by federal law to be kept confidential may not be disclosed by an agency unless disclosure is required by state or federal statute or ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a)(3). Thus, any and all records that are classified or derivatively classified under federal law would be exempt from the APRA's disclosure requirements under subsection 4(a)(3) of the APRA.

The issue here, however, is whether state agencies must still comply with the requirements of section 9 of the APRA, which includes several procedural and formal requirements that state agencies must follow when denying a request for access to public records. Under the APRA, a request for access to public records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within twenty-four (24) hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. However, when the request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exception(s) to the APRA that authorize the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c)(2)(A).

The requirements of subsection 9(c)(2)(A) of the APRA present a problem for state agencies that possess federally classified or derivatively classified information because a denial of access in the form required under section 9 is an implied acknowledgement that the requested records do, in fact, exist and are possessed by the agency. In the case of federally classified information, often the very existence of the records is itself classified information. Moreover, as you note, the federal government has prosecuted numerous individuals under various federal laws for the unauthorized

disclosure, possession of, access to, or control over classified information. *E.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

In responding to records requests at the federal level, federal agencies frequently employ a response that stems from a 1976 case before the U.S. Court of Appeals for the District of Columbia Circuit: *Phillipi v. Central Intelligence Agency*, 546 F.2d 1009, 1010-1013. You summarize the facts of that case as follows:

> In *Phillipi*, a journalist brought an action against the CIA seeking production under the FOIA of all records relating to the CIA's alleged efforts to convince the new media not to make public what it had learned about secret U.S. operations conducted by use of a vessel called the "Glomar Explorer." The CIA responded that admitting the fact of the existence or nonexistence of the records requested would related to information pertaining to intelligence sources and methods, which the Director of the CIA had the responsibility to protect from unauthorized disclosure in accordance with section 102(d)(3) of the National Security Act of 1947.

In accordance with the D.C. Circuit's decision, federal agencies often use a "Glomar response" to respond to a request for classified or derivatively classified information. *See Wolf v. C.I.A*, 473 F. 3d 370 (D.C. Cir 2007); *Smith v. F.B.I*, 2009 WL 3347186 (D.D.C., 2009) (FOIA case holding that "Glomar response to deny the request for letters of reprimand for, or suspension of, FBI agent under FOIA Exemption 6 (5 U.S.C §552(b)(6)) was properly invoked"). A Glomar response neither confirms nor denies the existence or nonexistence of the requested information. Presidential Executive Order 13292 provides federal agencies with discretion to refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of the records' existence or nonexistence is classified under that Executive Order. E.O. 13292 at §6.1(b). Moreover, the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq*. ("FOIA"), includes a provision that permits federal agencies to avoid disclosing sensitive facts that may otherwise be disclosed by stating that no records subject to the FOIA exist even when such records actually exist in the agencies' files. 5 U.S.C. § 552(c)(3).

Thus, federal authority conflicts with the APRA to the extent that section 9 *requires* state agencies to implicitly acknowledge the existence of classified records by citing the statutory authority for denying requests for access to those records. I.C. § 5-14-3-9(c)(2)(A). Consequently, it is my opinion that federal law preempts section 9 of the APRA to the extent that it requires a state agency to reveal the existence or nonexistence of a record when that information is classified or derivatively classified under federal law. As you note in your inquiry, it is "a fundamental principle of Federal constitutional law that, by reason of the Supremacy Clause, Article VI, cl. 2, of the U.S. Constitution, the lawful activities of the Federal Government may not be regulated by any State."

Citing Mayo v. United States, 319 U.S. 441, 445 (1943). Moreover, the U.S. Supreme Court has held that there is "paramount federal authority in safeguarding national security," and has acknowledged the Federal Government's "compelling interest" in protecting national security-related information from unauthorized disclosures. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 76, n. 16 (1964); *Dep't of the Navy v. Eagan*, 484 U.S. 518, 528 (1988). In *Stehney v. Perry, et al.,* 907 F.Supp.806, 824 (D. N.J. 1995), the court noted that states cannot regulate the President's constitutionally granted powers to "classify and control access to information bearing on national security"). *See also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)(California statute requiring disclosure of information related to Holocaust-era insurance policies preempted as impermissible interference with President's conduct of foreign affairs and Presidential executive agreement).

Thus, to the extent that federal law conflicts with section 9 of the APRA, in my opinion section 9 is preempted and it is appropriate for state agencies to respond to requests for records in a manner that a federal agency is permitted by federal law to respond to the same request. Moreover, where an agency's response does not comply with section 9 of the APRA but does comply with a response as required by federal law (in situations, for example, where the agency does not cite an exception to the APRA as the basis for its denial where the agency is required by federal law to maintain that it has "no documents responsive to the request" even where such classified or derivatively classified documents exist), in my opinion the agency has not violated the APRA by adhering to the form required by federal law.

I note that neither my formal nor my informal advisory opinions are binding on a court if a requester/complainant should seek judicial review of a state agency's denial of access to classified or derivatively classified information. *See* I.C. § 5-14-3-9(f). While I am confident in the foregoing analysis, I also acknowledge that a court might disagree with the scope of federal preemption as to section 9 of the APRA. Thus, I offer the following sample response for state agencies to -- at their discretion -- employ in situations where they cannot acknowledge the existence or nonexistence of the records but want to cite to the appropriate APRA exception out of an abundance of caution:

> The agency can neither confirm nor deny the existence of the records you have requested. [Or, where appropriate, "The agency has no records responsive to your request," or "No such documents exist."] However, it appears that you seek access to information that would be classified or derivatively classified under federal law. As such, to the extent that this agency were in possession of such information, it would be nondisclosable pursuant to Ind. Code § 5-14-3-4(a)(3).

This response seems to satisfy section 9 of the APRA without acknowledging the existence or nonexistence of classified or derivatively classified information. Again, however, it is my opinion that an agency does not violate the APRA where it fails to

comply with section 9 of the APRA in an effort to comply with the Federal Government's required response(s).

CONCLUSION

For the foregoing reasons, it is my opinion that subsection 9(a)(2) of the APRA is preempted by federal law insofar as the former requires a state agency to respond to a request for access to public records in such a way as to disclose classified or derivatively classified information. Thus, when state agencies respond to requests for federally classified or derivatively classified information, state agencies should comply with the requirements of federal law notwithstanding the requirements of section 9 of the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Andrew J. Kossack
Public Access Counselor