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Service Areas

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Neither Confirm Nor Deny the Existence of Records: A Third Way in Illinois?

Under Illinois' Freedom of Information Act (FOIA), a public body has two options in dealing with requests for public records: it can comply and produce the records, or it can deny the request. (Of course, a public body may deny a portion of a request and comply with the remainder of it.) Where a public body denies a FOIA request, it must provide the requester a detailed factual basis for the denial and a citation to supporting legal authority. Moreover, if ordered by the court, the public body must provide an index of the withheld records, describing the nature or contents of the withheld information and the basis of the applicable statutory exemptions. The public body has the burden of proving the exemption by clear and convincing evidence.

Under the federal FOIA, 5 U.S.C. § 552, the federal judiciary has created a third response — one where the agency refuses to confirm or deny the existence of the requested records. Referred to as a "*Glomar* response" or a "*Glomar* denial, " the denial is based upon the premise that merely disclosing the existence of the requested records would compromise the policy underlying the statutory exemptions. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). (*Glomar* is a reference to the Hughes Glomar Explorer, a ship used by the CIA to recover a sunken Soviet submarine but disguised as a private vessel for mining on the ocean's floor.) An agency may refuse to confirm or deny the existence of records where the mere acknowledgment that records exist would cause the harm cognizable under a FOIA exception. Originating in the context of national security, the use of *Glomar* denials has spread to the sphere of law enforcement (*e.g.*, a crime ring using FOIA to determine if government agents have infiltrated its ranks), and even to the concerns of protecting personal privacy (*e.g.*, a government employee using FOIA to determine if the employee is the subject of an investigation for wrongdoing).

Because a *Glomar* response neither confirms nor denies the existence of responsive records, in order to be effective it should be employed whether such documents exist or not. Furthermore, when a *Glomar* response is challenged, an index describing the contents of withheld information, as contemplated by Section 11(e) of the Illinois FOIA (labeled a *Vaughn* index by the federal courts), is not submitted. Instead, the agency must provide a public affidavit detailing as much as possible why neither confirming nor denying the existence of responsive records is appropriate.

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Every federal circuit that has reviewed a *Glomar* response has held that its use may be appropriate where the mere confirmation of the existence of records may reveal protected information. But what about Illinois? May an Illinois public body make a *Glomar* denial under the Illinois FOIA? One Illinois court has recently acknowledged *Glomar* responses and borrowed the rationale for them in sustaining a claimed exemption from disclosure, although it did not expressly adopt them as Illinois law. In *Better Gov't Ass'n v. Zaruba*, 2014 Ill. App .2d 140071, the Better Government Association sought information from the DuPage County Sheriff about the use of the Law Enforcement Agencies Data System (LEADS). The court recognized that the federal judiciary has approved *Glomar* denials with respect to requests pertaining to the National Crime Information Center system because confirming or denying the existence of such information would reveal the subjects of an investigation, allowing those persons to take action to prevent effective law enforcement. In ruling in favor of the exemption, the Illinois court held that "[a]s federal courts have determined that the public is not entitled to information regarding NCIC inquiries, it makes sense that this type of information is not accessible to the public through LEADS."

Although the Illinois courts have not directly considered a *Glomar* response, there are clearly circumstances where an Illinois public body may deem that such a response is both appropriate and necessary. If those circumstances are present, the public body would be advised to identify and implement the federal procedures for *Glomar* responses. Then, even though not statutorily authorized, the courts may review whether Illinois public policy allows a public body to respond to a FOIA request with a statement that it is neither confirming nor denying the existence of responsive records.

For more information, please contact Charles R. Schmadeke.

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