

security and trustworthiness of voting systems in the United States. Some of these statements reflect an inaccurate security profile of our election systems, a critical national security asset. As a leader of NASS, Secretary Lawson's comments can be especially influential in shaping U.S. policy necessary to secure our election infrastructure. NEDC seeks information about origins of Secretary Lawson's public statements related to her position in NASS leadership. NEDC therefore requested records of correspondence between NASS and the Secretary.

3. Over the course of the nine months since NEDC submitted its request, Secretary Lawson's office has provided repeatedly evolving explanations for its denial or delay in providing responsive documents. Despite good-faith efforts by NEDC to clarify and then explicitly narrow its request, and after considerable delay by Secretary Lawson, the Secretary has still not provided a complete response to that request. After months of fruitless exchanges and a complaint to the Public Access Counselor (PAC), NEDC has still not received the vast majority of responsive records.

PARTIES

4. Plaintiff NEDC is a non-partisan non-profit project organized under the sponsorship of Psephos Inc., an international non-profit 501(c)(3). NEDC aims to promote secure, reliable, and transparent elections. NEDC educates elected officials and the public about threats to elections, unsecure ballot machines, and legislation. As part of those efforts, NEDC makes use of public records to understand public officials' policies and discussions of election issues.

5. Defendant Lawson is the current Indiana Secretary of State, who is sued only in her official capacity.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to Ind. Code (I.C.) § 5-14-3-9(e).

7. Venue is appropriate in Marion County pursuant to Ind. Trial Rule 75(A)(5) because it is the county in which Defendant Lawson's principal office is located.

STATUTORY BACKGROUND

8. APRA establishes that "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.” I.C. § 5-14-3-1.

9. APRA requires public agencies to release requested records to the public unless specific statutory exemptions apply. In enacting APRA, the legislature declared that it “shall be liberally construed to implement this policy [of full and complete information regarding the affairs of government] and place the burden of proof for the nondisclosure of a public record on the public agency.” I.C. § 5-14-3-1.

10. When a person requests a public record, the agency must provide the records within a “reasonable time.” I.C. § 5-14-3-3(b).

11. If an agency denies all or part of a record request submitted in writing, it must provide a “a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record.” I.C. § 5-14-3-9(d)(2).

12. The PAC educates Indiana officials on public access matters and issues advisory opinions interpreting public access laws. I.C. § 5-14-4-10. Either an agency or a requesting party may request a non-binding advisory opinion from the Public Access Counselor. I.C. §§ 5-14-4-10, 5-14-3-9.5(e).

13. If an agency denies a record request, the requesting person may file an action in the circuit or superior county court of the county in which the denial occurred. I.C. §§ 5-14-3-4.4(a)(1), 5-14-3-9.

FACTUAL AND PROCEDURAL BACKGROUND

14. Secretary Lawson served as the president of NASS from July 2017 to July 2018 and now serves as its past president and co-chair of the NASS Cybersecurity Committee.

15. On September 13, 2018, Susan Greenhalgh, NEDC's Policy Director, emailed a records request to the Secretary's office. The request sought copies of (1) "every correspondence . . . sent from anyone at the Secretary of State's office . . . to anyone at the National Association of Secretaries of State" or (2) "sent to anyone at the Secretary of State's office . . . from anyone at the National Association of Secretaries of State," from May 1, 2017 through the date of the request. A copy of said email is attached as Exhibit A.

Defendant's First Explanation

16. On December 13, 2018, Jerold A. Bonnet, General Counsel to the Office of the Indiana Secretary of State, wrote a letter to NEDC and enclosed a CD-R disc containing publicly available agency records, such

as pamphlets or public announcements. A copy of said letter is attached as Exhibit B. The CD-R disc did not include correspondence between the Secretary and NASS. Mr. Bonnet added that an unspecified number of requested materials in possession of or known to the agency were “not available for public inspection” because they were “advisory or deliberative materials, trade secrets, investigatory records, administrative or technical information that would jeopardize security of public safety, diaries, journal or personal notes etc.” Mr. Bonnet did not provide a log of the records that the Secretary alleged were not available for public inspection.

17. On December 18, 2018, NEDC received the letter and the enclosed CD-R disc. That day, after receiving the disc, Ms. Greenhalgh responded by email to Mr. Bonnet, acknowledging receipt of the disc and documents, advising Mr. Bonnet that the documents provided were non-responsive to the requests for correspondence between the Secretary and NASS, and asking the Secretary to expedite the public records request given how long the request had been outstanding.

18. By email on December 18, 2018, the Secretary’s office explicitly denied the request, stating:

[I]t is our considered view that the National Association of Secretaries of State (NASS) is not a public agency (per Indiana Code 5-14-3-2 (a)) and that agency correspondence received from, or sent to NASS, is not available for public inspection pursuant to: a) federal and state authority; b) the discretion of the agency and; c) directives from NASS, which considers itself to be a private member organization and its correspondence private and confidential.

A copy of said communication is attached as Exhibit C.

19. By email on December 19, 2018, Ms. Greenhalgh wrote to Mr. Bonnet that “NASS’s status is wholly and completely irrelevant to this request” because “[t]his request is directed to the office of the secretary of state, which is a public agency.”

Defendant’s Second Explanation

20. By email on December 20, 2018, Mr. Bonnet responded to Ms. Greenhalgh, stating: “The agency remains of the view that its communications with the National Association of Secretaries of State (NASS) are (generally) not available for public inspection - relying on the authorities cited in our letter dated December 18, 2018.” Mr. Bonnet also added a new explanation not stated in his previous letters:

The agency is not foreclosing on the possibility that certain communications to and from NASS exist which are available for public inspection and copying (possibly subject to redaction). However, for reason of the request’s range of communication

types, time span, and lack of specificity or particularity, the agency does not believe the access requested is reasonable, practical or required.

21. By email on December 21, 2018, Ms. Greenhalgh clarified and narrowed NEDC's request by limiting it to email communications that were (1) sent to or from two specific email domains (@nass.org or @sso.org), (2) were not sent to or from staff who held security clearances, and (3) were not classified.

22. As of January 10, 2019, the Secretary's office still had not responded to Ms. Greenhalgh's December 21, 2018 email.

23. On January 10, 2019, NEDC filed a formal complaint with the PAC. A copy of said complaint is attached as Exhibit D.

24. On January 11, 2019, the PAC, Luke Britt, responded by email that "it does not appear that this matter is yet at an impasse" and placed the complaint "on hold" pending further discussions between NEDC and the Secretary.

Defendant's Third Explanation

25. On January 14, 2019, Mr. Bonnet emailed NEDC's undersigned counsel William Groth, stating for the first time that staff were in fact working on NEDC's request, and that "I expect we will

have an initial batch of 400 – 500 specifically identified records to discuss with you in about a week.” A copy of said email is attached as Exhibit E.

26. On January 15, 2019, Mr. Groth wrote to Mr. Bonnet, summarizing the Secretary’s arguments for denial or delay over the preceding four months, responding to those arguments, and requesting a final production and exemption log by the end of that week. A copy of said communication is attached as Exhibit F.

27. On January 18, 2019, Mr. Bonnet emailed Mr. Groth, stating that if NEDC would explicitly narrow its request to agency communications addressing only “election integrity and cybersecurity,” then this “would considerably shorten the retrieval and evaluation time involved.” Mr. Bonnet also stated that the Secretary would provide an exemption log for an initial sample of documents to NEDC “within the next 5 – 10 working days.” A copy of said communication is attached as Exhibit G.

28. On January 22, 2019, Mr. Groth wrote to Mr. Bonnet and, in response to Mr. Bonnet’s proposal to expedite the request, explicitly narrowed the records request, as suggested by Mr. Bonnet, to only those

communications containing the terms “election,” “elections,” “voting,” “executive board,” “cybersecurity,” or any abbreviations of those terms used by the Secretary or her staff. A copy of said email is attached as Exhibit H.

Defendant’s Fourth Explanation

29. By email on February 1, 2019, Mr. Bonnet wrote to Mr. Groth stating why the office would not or could not respond promptly to NEDC’s request: that the request was not sufficiently specific and particular (despite NEDC’s agreement twice to narrow the request); that all emails from NASS involved issues of trade secret and copyright because of boilerplate language stating “confidential” and “copying is prohibited”; that some materials required further review to determine whether to assert the deliberative materials exception, that consideration to “be completed in 2 – 3 weeks’ time”; and that the Secretary had initiated consultation with the Indiana Counterterrorism and Security Council to decide whether the public safety exception applied, and that “[b]ased on that consultation the agency anticipates responding to NEDC’s request with respect to both specific documents and unspecified, but generally described documents, for which these

exceptions are believed to apply, within the next 6 to 8 weeks.” A copy of said communication is attached as Exhibit I.

30. On February 7, 2019, NEDC asked the PAC to revive NEDC’s initial complaint and to amend it to include additional supporting documents. In its amended complaint, NEDC wrote that it sought to revive and amend the complaint “based on the Secretary of State’s continued refusal to provide any responsive documents, the Secretary of State’s ever lengthening estimation of the time necessary to compile the records, and a clear pattern of delay and mischaracterization of the fact and the law.” A copy of said amended complaint is attached as Exhibit J.

31. On February 12, 2019, Mr. Bonnet emailed Mr. Groth an exemption log for an initial set of documents, and mailed to Mr. Groth an initial production, purportedly in partial fulfillment of NEDC’s request.

32. On February 27, 2019, Mr. Groth emailed Mr. Bonnet acknowledging receipt of the February 12 materials but noting that these documents (many of which appeared to be identical to documents previously disclosed in December) included no communications

whatsoever responsive to Request 1 (correspondence from the Secretary's office to NASS) and only incomplete disclosure in response to Request 2 (correspondence from NASS to the Secretary's office). A copy of said communication is attached as Exhibit K.

33. On February 28, 2019, Mr. Bonnet wrote to the PAC responding to NEDC's complaint. He asserted five reasons for the Secretary's failure to respond to NEDC's request: "(A) reasonable time for production of records; (B) delay or denial on account of reasonable specificity; (C) denials based on IC 5-14-3-4 (a)(3) and (a)(4) -National Association of Secretaries of State (NASS) copyright or trade secret rights; (D) denials based on IC 5-14-3-4 (b)(6) -deliberative materials and; (E) delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19) - security and public safety." A copy of said communication is attached as Exhibit L.

34. With respect to "(A) reasonable time for production of records" and "(B) delay or denial on account of reasonable specificity," Mr. Bonnet asserted that the request involved a large volume of records and would take time to process. However, Mr. Bonnet provided no

estimated date of completion, or proposed schedule for rolling partial disclosures.

35. With respect to “(C) denials based on IC 5-14-3-4 (a)(3) and (a)(4) -National Association of Secretaries of State (NASS) copyright or trade secret rights,” Mr. Bonnet relied on standard boilerplate at the end of every email sent from NASS to the Secretary’s office:

Every email from NASS the Agency retrieved and reviewed contains the following statement:

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Mr. Bonnet further stated that NASS had “advised the [Secretary] of its position” that including this boilerplate at the bottom of every email message sent to a public agency “invokes [NASS’s] commercial proprietary rights including copyright protection under federal law.”

36. With respect to “(D) denials based on IC 5-14-3-4 (b)(6) - deliberative materials,” Mr. Bonnet stated that emails received from or sent to NASS—an outside entity that is not an agency of the Indiana

state government—nonetheless qualified as intra-agency or inter-agency “deliberative materials.”

37. With respect to “delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19) -security and public safety,” Mr. Bonnet stated:

[T]he Agency has initiated the process of seeking review and guidance from the Indiana Counterterrorism and Security Council (CTASC) pursuant to IC 5-14-3-4.4 (b). NEDC’s public record request and the particular materials the Agency believes should be excepted from public access based on security and public safety, have been placed on CTASC’s executive session and public meeting agendas for their March 13, 2019 meeting. While the Agency anticipates that CTASC will take up its requests for review and guidance at that time, it’s unknown if such guidance will be provided on that date, or at a later date.

38. The Secretary has not provided NEDC with any further information regarding the security and public safety exception, despite the passage of both March 13, 2019 (the date of the planned CTASC meeting) and March 29, 2019 (the date that is eight weeks after February 1, 2019).

**PAC’s Advisory Opinion and
Defendant’s Continued Failure to Respond**

39. On April 11, 2019, the PAC emailed an undated advisory opinion (No. 19-FC-16) to Mr. Groth. A copy of said opinion is attached

as Exhibit M. The PAC “decline[d] to issue a definitive declaration on the issue of the timeliness in this case,” opining that “five months is normally much too long to produce documents pursuant to a request” but suggesting that the initial request was broad. The PAC further speculated that some of the exemptions urged by the Secretary’s office might well apply, but emphasized that “without *in camera* review, this determination is solely on the merits of its legal arguments but not necessarily on any unknown underlying facts.”

40. As of the date of this complaint, over 65 days have elapsed since the PAC transmitted his advisory opinion.

41. As of the date of this complaint, over 275 days have elapsed since NEDC submitted its request.

42. Secretary Lawson has not produced any further documents or exemption logs since February 12, 2019.

LEGAL ALLEGATIONS

43. Defendant is a “public agency” as defined at I.C. § 5-14-3-2(q).

44. NASS is not a “public agency” as defined at I.C. § 5-14-3-2(q).

45. Each communication sought in NEDC's September 13, 2018 APRA request is a "public record" under I.C. § 5-14-3-2(r).

CAUSES OF ACTION

COUNT I: APRA - DENIAL OF RIGHT TO INSPECT RECORDS

46. Plaintiff realleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

47. Defendant's refusal to provide records constitutes an unlawful denial of disclosure and/or interference with the right to inspect and copy public records, in violation of I.C. § 5-14-3-3(b).

COUNT II: APRA - UNREASONABLE DELAY

48. Plaintiff realleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

49. Defendant has not responded to the request by providing the requested copies, allowing NEDC to make copies, or providing a final denial of disclosure under I.C. § 5-14-3-9(d) within a reasonable time after the request was received by the agency, in violation of I.C. § 5-14-3-3(b).

REQUESTED RELIEF

Wherefore, NEDC respectfully requests that the Court grant the following relief:

- a) Expedite the hearing on this action under I.C. § 5-14-3-9(l);
- b) Declare that Secretary Lawson has unlawfully denied and/or interfered with Plaintiff's right to inspect or copy public records, and/or failed to respond to within a reasonable time after the request;
- c) Order Secretary Lawson to conform with this declaration by producing all responsive and non-exempt documents, as well as an exemption log for all documents being withheld or redacted, forthwith;
- d) After Secretary Lawson has provided a proper privilege log and in the event she continues to withhold information from NEDC as being allegedly exempt from disclosure by a specific provision of APRA, perform an *in camera* review of the contract and invoices in question pursuant to the authority granted it by I.C. § 5-14-3-9(h) to determine whether any part of those documents have been properly withheld and whether each and

every one of the redactions of the contract is permitted by APRA;

- e) Award attorney's fees, court costs, and other reasonable expenses of litigation occurred by NEDC in accordance with I.C. § 5-14-3-9(i); and
- f) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

FILLENWARTH DENNERLINE
GROTH & TOWE, LLC

/s/William R. Groth
William R. Groth, #7325-49
429 East Vermont Street, Suite 200
Indianapolis, IN 46202
Phone: (317) 353-9363
Fax: (317) 351-7232
E-Mail: wgroth@fdgtlaborlaw.com

Ronald A. Fein (*petition for temporary admission forthcoming*)
John C. Bonifaz
Ben T. Clements
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
Phone: (617) 244-0234
E-Mail: rfein@freespeechforpeople.org



Susan Greenhalgh <sgreenhalgh@gmail.com>

Public Records Request

Susan Greenhalgh <susan@electiondefense.org>
To: elections@iec.in.gov

Thu, Sep 13, 2018 at 2:43 PM

To whom it may concern,

Under the **Indiana Access to Public Records Act § 5-14-3-1 et seq.**, I am requesting copies of public records:

1. A copy of every correspondence (written, email, fax, voicemail or other) sent from anyone at the Secretary of State's office, including but not limited to the Secretary and staff, to anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.
2. A copy of every correspondence (written, email, fax, voicemail or other) sent to anyone at the Secretary of State's office, including but not limited to the Secretary and staff, from anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.

The requested information is in the public interest and will contribute significantly to the public's understanding of national election integrity. This information is not being sought for commercial purposes.

The Indiana Access to Public Records Act requires a response time within seven business days. If access to the records I am requesting will take longer than seven days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Susan Greenhalgh
Policy Director
National Election Defense Coalition
917 796 8782



SECRETARY OF STATE
STATE OF INDIANA
200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204
WWW.ISOS.IN.GOV

December 13, 2018

Susan Greenhalgh, Policy Director
National Election Defense Coalition
10 Robbins, Ave.
Amityville, NY 11701


Re: Record Request

Dear MS. Greenhalgh,

I am writing in response to your request for inspection and copying of agency records delivered to this agency on September 13, 2018. A CD-R disk containing agency records is enclosed.

Pursuant to Indiana Code 5-14-3-4(b) and 20 U.S.C. §1232g *et seq.* some materials in possession of or known to the agency are not available for public inspection. Examples of materials which pursuant to state or federal law or at the discretion of the agency are not available for public inspection include: advisory or deliberative materials, trade secrets, investigatory records, administrative or technical information that would jeopardize security or public safety, diaries, journals or personal notes etc.

Truly yours,


Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

Enc-

EXHIBIT

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B

SECRETARY OF STATE

STATE OF INDIANA

200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204
WWW.SOS.IN.GOV

December 18, 2018

Susan Greenhalgh, Policy Director
National Election Defense Coalition
10 Robbins, Ave.
Amityville, NY 11701

Re: Record Request

Dear Ms. Greenhalgh,

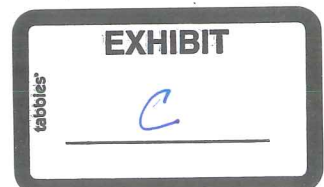
I am writing in response to your request for inspection and copying of agency records delivered to this agency on September 13, 2018, and your recent email correspondence (12/18/2018). You have advised that copies of 461 pages of records pertaining to the agency's engagement in election cybersecurity are "non-responsive" and restate, for clarification, your specific request for inspection and copying of agency communications to and from the National Association of Secretaries of State.

The National Election Defense Coalition's interest in the public's understanding of election integrity is acknowledged. On review however, it is our considered view that the National Association of Secretaries of State (NASS) is not a public agency (per Indiana Code 5-14-3-2 (a)) and that agency correspondence received from, or sent to NASS, is not available for public inspection pursuant to: a) federal and state authority; b) the discretion of the agency and; c) directives from NASS, which considers itself to be a private member organization and its correspondence private and confidential.

We rely on the Federal Critical Infrastructure Information Act of 2002 (Information Analysis and Infrastructure Protection Act) as well as Indiana Code authority pertaining to advisory, deliberative and decision making; diaries, journals and personal notes; trade secrets; investigatory records; criminal intelligence information; public safety and terrorist vulnerability etc. (Indiana Code 5-14-3-4 (a)(3); (a)(4); (b)(1); (b)(2); (b)(6); (b)(10); (b)(19) and (b)(25).

Truly yours,

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State





**OFFICE OF THE PUBLIC ACCESS COUNSELOR
FORMAL COMPLAINT**

State Form 49407 (R6 / 3-14)

PUBLIC ACCESS COUNSELOR
Indiana Government Center South
402 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 234-0906
Toll free: (800) 228-6013
Fax: (317) 233-3091

*INSTRUCTIONS: This form is to be used only when filing complaints under Indiana Code 5-14-5.
All information provided is disclosable under the Access to Public Record Act. PLEASE TYPE OR PRINT.*

FOR OFFICE USE ONLY		
Date received (month, day, year)	Complaint number	Date due (month, day, year)

COMPLAINANT INFORMATION			
Name (last, first, middle initial) Susan E. Greenhalgh, National Election Defense Coalition; Shanna Cleveland, Free Speech For People, William Groth			
Address (number and street) 10 Robbins Ave.		City Amityville	State NY
Telephone number (917)796 8782	Fax number ()	E-mail address susan@electiondefense.org; scleveland@freespeechforpeople.org; wgroth@fdgtlaborlaw.com	

INFORMATION ABOUT PUBLIC AGENCY DENYING ACCESS			
Name of public agency Secretary of State			
Address (number and street) 200 West Washington Street		City Indianapolis	State Indiana
Telephone number (317)232-6531	Fax number ()	E-mail address jbonnet@sos.in.gov	

Name of elected / appointed official or presiding officer responsible for the denial
Connie Lawson



COMPLAINT (Check all that apply.)	
<input type="checkbox"/> Open Door Law Violation <input type="checkbox"/> Executive Session <input type="checkbox"/> Notice <input type="checkbox"/> Other: _____	<input checked="" type="checkbox"/> Public Records Access Violation <input checked="" type="checkbox"/> Denial of Access <input type="checkbox"/> Denial of Electronic Access <input type="checkbox"/> Other: _____
<input type="checkbox"/> Request for priority status [See Indiana Administrative Code (62 IAC 1-1-3).] (Must include in narrative the reason for priority status.)	

IMPORTANT	
Date denied access to public record (month, day, year) 12/13/2018	Date notified of denial of access to meeting (month, day, year)

Please describe denial of access to meeting or public records below. Attach additional sheets if necessary. (Required)

The National Election Defense Coalition (NEDC) is a non-partisan, not-for-profit organization committed to promoting secure, auditable, transparent and accessible elections. Indiana Secretary of State Connie Lawson served as president of the National Association of Secretaries of State (NASS) from July 2017 to July 2018 and now serves as co-chair on the NASS Cyber Security Committee. NASS is a non-partisan professional organization of public officials.

As NASS president Secretary Lawson represented the organization on the national stage, to the press and before congress. NASS has vigorously opposed the federal government's designation of election infrastructure as Critical Infrastructure and has opposed the attachment of security requirements to federal funding for election systems. As NASS president, Secretary Lawson repeated inaccurate statements regarding the security of election systems.

On September 13, 2018 NEDC submitted a public records request to the office of Secretary Connie Lawson requesting all communication between Secretary Lawson's office and NASS from May 1, 2017 to date.

On December 18, 2018 NEDC received a set of more than 400 digital records by mail dated December 13, 2018 from the office of Secretary Lawson purporting to respond to the public records request issued September 13, 2018. The documents provided were published brochures regarding election security, and did not include any communication between NASS and the Secretary's office. On December 18, NEDC responded to Mr. Jerry Bonnet, general counsel for Secretary Lawson, asserting that the documents provided were non-responsive and requested that the Secretary's office expedite the public records request which was now two months old. (Please see attached email dated December 18, 2018.)

The office of the Secretary of State responded by email on December 19th with a letter dated December 18, for the first time asserting a privilege to deny the public records request on the grounds that NASS is a private organization. The office of the Secretary also cited agency discretion and direction from NASS to deny the request, indicating that the Secretary's office consulted with NASS and NASS directed the Secretary not to comply with the public records request.

(Please see attached letter dated December 19th.)

NEDC disputed the denial, noting that the public records law does not provide any exemption for communication with a private organization and the Secretary's office does not have authority to deny the request. (Please see attached communication dated December 19, 2018.) Moreover, while NASS may be a private organization, the Secretary and her agents are subject to the public records law and may not shield their communications from the requirements of the public records law simply by asserting that the communications were made with a private organization. That would frustrate the plain language of the statute and its purpose.

The office of the Secretary of State responded on December 21st by email with a letter dated December 20th which continued to assert the Secretary's position that communication with NASS is not available for inspection based on the authorities the Secretary's office asserted in its previous letter. The Secretary's office also shifted its position and contradicted itself slightly suggesting it had some documents that are publicly available but that the request was insufficiently specific. (Please see attached communication dated December 20th.)

NEDC responded in communication dated December 21st asserting that the Secretary's office has not provided any valid authority to deny the public records request. Communication between public agencies and private organizations is not exempt from public records requests. Moreover, Indiana state law explicitly disallows agencies discretion to deny access to public records. In an effort to facilitate the document production NEDC specified the email domain addresses which would adequately capture the requested communication making a very simple email search possible for the office of the Secretary. (Please see attached documentation dated December 21st.)

The Secretary has not provided any basis for claiming any of the exemptions referenced in its denial. For example, the Secretary references Section 5-14-3-4(a)(3) and (4), but has not provided any reference to a federal law that exempts communications with NASS (a private organization) from public records laws. Nor has the Secretary provided any evidence that the agency has reviewed communications to determine whether any of the records sought actually contain information that meets the definition of a trade secret. The Secretary's citation to Section 5-14-3-4(b)(2), (6), (10), (19), and (25) is puzzling given that the Secretary of State is not a law enforcement agency, any communications that might have been subject to the attorney work product doctrine would have waived that protection by virtue of being sent to a non-represented party, the communications can not be classified as "interagency" because NASS is not an agency (as the Secretary helpfully points out), the records at issue do not concern the types of "terrorism" contemplated by section (b)(19), and it is hard to imagine that the Secretary has been sharing "criminal intelligence" information with a private organization that is under no obligation to maintain the information in confidence. If the Secretary genuinely believes that any exemptions apply to particular records subject to this request, then the agency should provide a log identifying which documents it believes are subject to particular exemptions.

The office of the Secretary of State is flagrantly failing to comply with Indiana state law to provide access to public records. The office failed to respond to the initial request in a timely fashion, delaying its response for two months. The Secretary did not initially assert any privilege to exempt documents from inspection and instead produced irrelevant, non-responsive documents. When NEDC pointed out the non-responsiveness of the records, the office of the Secretary then attempted to assert authority to deny the documents requested; however the Secretary's office has not provided any valid exemption for its claim, and Indiana state law plainly does not include authority on which to exempt the requested documents.

The Secretary's refusal to produce these records denies the public the ability to understand significant issues that influence a vital part of the US government, our electoral system. We respectfully request a ruling from the Public Access Counselor recommending that the office of the Secretary of State comply with this public records request. We stand ready to provide any additional information or answer any questions you may have.

Thank you very much for your consideration.

PLEASE ATTACH COPIES OF ANY WRITTEN DENIAL OR DOCUMENTATION CONCERNING DENIAL.

Signature

Shanna Cleveland

Date (month, day, year)

1/10/19

From: Bonnet, Jerry (SOS) <jbbonnet@sos.IN.gov>
Sent: Monday, January 14, 2019 12:50 PM
To: William Groth <wgroth@fdgtlaborlaw.com>
Subject: National Election Defense Coalition record request - FW: formal complaint

Hello Bill,

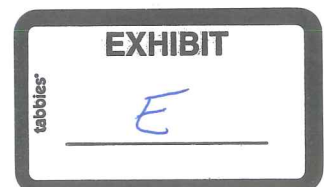
It was my understanding based on communications with Susan Greenhalgh that we would be discussing the organization's record request with counsel – with I expect is yourself.

In the meantime, staff have continued to work on searching, retrieving and reviewing the requested emails (which given the time frame and scope of the National Association of Secretaries of State's interests and activities - is considerable) which is to say that the ongoing discussion about ultimate availability of requested records is not delaying our office's administrative process. The process of creating an summary index of requested documents located so far (serial number, date, subject, pages, attachments if any, exception(s) to public access claimed (if any) – has started and I expect we will have an initial batch of 400 – 500 specifically identified records to discuss with you in about a week.

I realize that the NEDC is disappointed and frustrated with our responses and progress on the request so far – however the request has raised a few unique issues that we are researching (i.e. NASS's assertion of (federal) copyright and commercial proprietary interest (trade secret) in emails distributed to its dues paying members, and issues relating to the Department of Homeland Security (which engaged NASS as a conduit for election cyber defense information to Secretaries of State) marking and characterizing of specific emails and attachments as "classified " and "for official use only" etc. Subsidiary to those issues are some more typical exceptions (policy deliberation and legal advice for example).

A note on the timing of the handling of NEDC's request. Throughout 2018 our office has received and processed an extraordinary volume of record requests. During that time we have also been considerably occupied with several extraordinary election administration and cybersecurity issues. Just last week staff completed a record request from the Chicago Tribune for agency emails received in early July – prior to NEDC's request. For reasons I'll detail when we meet or talk, email requests, particularly those that cover extended periods to time, numerous or unspecified subjects, and numerous or unspecified individuals etc., can take a fair amount of time to complete.

I didn't intend to go into technical record request aspects in great detail in this short email however. My schedule is flexible Thursday and Friday this week if you would like to meet or have a phone conversation to discuss the issues we're working through with NEDC's request in detail. Alternatively, let me know if there are times next week that would be more convenient for you.



Thank you.

Jerry Bonnet

Jerold A. Bonnet, General Counsel

Office of the Indiana Secretary of State

Office: 317-232-6534

FILLENWARTH DENNERLINE GROTH & TOWE, LLC
ATTORNEYS AT LAW

429 E. VERMONT STREET, SUITE 200
INDIANAPOLIS, INDIANA 46202
(317) 353-9363
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FREDERICK W. DENNERLINE III
WILLIAM R. GROTH
FRED O. TOWE
OF COUNSEL

EDWARD J. FILLENWARTH, JR.
RETIRED

DAVID T. VLINK

E-Mail: wgroth@fdgtlaborlaw.com

Writer's Direct Dial Number: (317) 974-2055

January 15, 2019

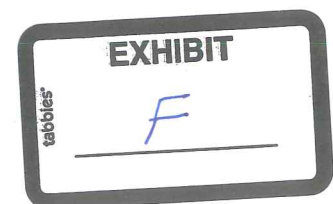
Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State
200 W. Washington Street
Indianapolis, IN 46204

Jerry,

I've recently been retained as local counsel by the National Election Defense Coalition (NEDC). My client has provided me with correspondence between you and Susan Greenhalgh of the NEDC pertaining to its request to inspect and copy certain agency records under the Indiana Access to Public Records Act (APRA), namely, certain written or email communications between the office of Secretary Lawson and the National Association of Secretaries of State (NASS). In a letter dated December 18, 2018, you denied the NEDC's request, claiming that written or email correspondence received from, or sent to, NASS is not available for public inspection pursuant to federal and state authority and "directives from the NASS."

By letter dated December 19, 2019, Ms. Greenhalgh responded, disputing your legal contentions and reiterating NEDC's request that your office produce the requested correspondence.

By letter dated December 20, 2018, you repeated your assertion that the documents the NEDC is requesting are "(generally) not available for public inspection," and you further asserted, for the first time, that the NEDC's request lacked "specificity or particularity." You also indicated that you would "be happy to discuss these issues and [the NEDC's request] with [its] legal counsel."



Ms. Greenhalgh promptly replied by letter to you of December 21, 2018, clarifying that her organization's APRA request was for any communication between Secretary Lawson and/or her staff that do not have security clearance, or did not at the time of the communication," including any "forwarded emails and attachments between the Office of Secretary of State Connie Lawson and any recipient at the email domain @nass.org or @sso.org from May 1, 2017 to present." Ms. Greenhalgh also offered to arrange a telephone call with your office after the new year.

I want to first address the new claim that you raised in your email to me yesterday indicating that the agency has been engaged in searching its records for documents responsive to NEDC's records request. This appears to contradict your December 18 and December 20 letters denying access to the communications requested by NEDC. In any event, over four months have now passed since NEDC made its initial request for documents. The statute, I.C. § 5-14-3-3(b), requires a public agency to provide the requested documents within a "reasonable time after the request is received by the agency." The Public Access Counselor has found a delay of two months and eleven days (10-FC-160) and forty-four days (14-FC-93) to be an unreasonable delay in either providing the documents or a denial with a statement of the specific exemption or exemptions that are being relied upon to withhold the records. We are unaware of the PAC finding a delay in production of four months to be reasonable. In this case, the Secretary has failed to either provide the documents NEDC has requested or state the specific exemptions being relied on for not producing a particular requested document. NEDC should not be prejudiced by the Secretary's continuing delay in adequately responding to its request. The Secretary has had ample time to review the documents and determine whether any exemptions apply.

As to your contention, first expressed in your December 20 letter, that the NEDC's requests lacked "specificity or particularity," APRA states that a request for inspection or copying must identify "with reasonable particularity the record being requested." Ind. Code § 5-14-3-3(a)(1). Although "reasonable particularity" is not defined in the statute, Indiana courts have held that a request has been made with reasonable particularity "if the request enables the subpoenaed party to identify what is sought...". *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30, 33 (Ind Ct. App. 2012) (citing *In re WTHR-TV*, 693 N.E.2d 1, 6 (Ind. 1998). More



recently, in *Anderson v. Huntington Cty. Bd. of Comm'rs*, 983 N.E.2d 613, 617 (Ind. Ct. App. 2013), the court noted, without expanding on the meaning of "reasonable particularity," that APRA places the burden on the agency for the nondisclosure of a public record.

The Indiana Public Access Counselor has held that a request is reasonably particular if it seeks electronic or written correspondence and identifies a sender and recipient within an identified time frame about a particular subject (here, election integrity and cybersecurity).

The NEDC's request clearly identifies a specific sender, recipient, a date frame, and a subject. Thus, it should not be difficult for your office to determine and search for the documents we are seeking, and indeed you have not claimed otherwise.

In your email of January 14, you also claim that NASS has raised unique issues related to (federal) copyright and trade secrets, however, it is difficult to imagine how communications with public officials covered by APRA could be characterized as proprietary or subject to copyright given that NASS should understand that any such communications would be covered by state public record laws. Indeed, had the Secretary of State been concerned that such communications should be subject to such protections, APRA provides a route for the Secretary to seek the authority to designate certain documents as confidential. Ind. Code. § 5-14-3-4(a). There is no indication that the Secretary has availed herself of that option.

Finally, you seek to rely on the designation of certain documents as "classified" or "for official use only" by the Department of Homeland Security. If documents have been marked "classified" by the Department of Homeland Security, then the agency should have no trouble identifying such documents and carrying the burden of proving that such documents are exempted. With respect to any claims of exemptions for communications that may have been designated "for official use only," there is no exemption under state law for such a classification.

Therefore, we expect you to provide all documents that are not subject to specifically delineated exemptions, and the log identifying communications that you believe are subject to specific statutory exemptions no later than the end of



the week. On the other hand, if you believe we are currently at an impasse, please say so and we'll not bother you with further communications attempting to clarify our request.

We look forward to your prompt response.

Very truly yours,

FILLENWARTH DENNERLINE GROTH

& TOWE, LLC



William R. Groth



SECRETARY OF STATE
STATE OF INDIANA
200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204
WWW.SOS.IN.GOV

January 18, 2019

William Groth, Esq.
Fillenwarth Dennerline Groth & Towe, LLC
429 E. Vermont St. Suite 200
Indianapolis, IN 46202

Re: National Election Defense Coalition (NEDS) record request

Dear Bill,

Heretofore, the directives we have received from NEDC have been for “*all communications between Secretary Lawson’s office and NASS*” (from and to “sso.org” and “nass.org”). The business of the National Association of Secretaries of State (NASS) encompasses numerous topics *in addition* to election administration (motor vehicle licensing and registration, business records administration, notary commission administration, records archiving, securities administration, meeting and conference organizing etc.). The agency engages with NASS on a variety of topics for a variety of purposes. The volume of emails NEDC requested confounded efficient and prompt handling. For example, an electronic search of just two staff accounts for the specified time period identified 9,255 emails (see attached). Review of a sampling of identified emails shows that many also include attachments which also need to be retrieved and reviewed with each email. The volume of responses to the requested search caused me to suggest that NEDC’s request might exceed the scope of “reasonable particularity”.

The 8th paragraph in your 1/15/19 letter suggests that your client would be amenable to narrowing the scope of the search for agency mails to those concerning *election integrity and cybersecurity*. Narrowing the scope of the request would considerably shorten the retrieval and evaluation time involved.

In the meantime staff continue to review and classify a sampling of requested emails (identified utilizing a “smart” sampling feature of an e-discovery program). That sample consists of 326 email strings and 339 attached documents (2,311 pages total). Barring the unforeseen I anticipate providing a detailed log (spreadsheet) identifying each document and applicable exception(s) to public inspection within the next 5 – 10 working days.

Truly yours,


Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State



Record request for NASS emails > Core ED

> Search : NASS email search JAB 1-18-19

Home ()

Holds ()

Searches ()

Exports ()

Back to saved searches ()

+ New search | v

Save | v

Open...

More v

Search query ⓘ

Sort: Date v

Individual

Showing 1-50 out of total 400

items sampled for preview; total

Re: NASS Executive Board

9,255 estimated indexed result(s)

Date: 2018-12-21 22:37:24 | S

(1.57 GB) ⓘ

Type: Email

Keywords

sso.org (c:s) nass.org

Show keyword list ⓘ

Date

Between v

2017-05-01

and

2018-12-22

Locati...

All locations ⓘ

Locations on hold ⓘ

Specific locations Modify... ()

Status: completed

Save & run

Status details

Re: NASS Executive Board

Date: 2018-12-21 20:07:54 | S

Type: Email

Re: NASS Executive Board

Date: 2018-12-21 20:07:53 | S

Type: Email

NASS Executive Board-Nr

Date: 2018-12-21 17:33:47 | S

Type: Email

Results

per

Feedback ()

From: William Groth wgroth@fdgtlaborlaw.com
Subject: RE: National Election Defense Coalition record request - FW: formal complaint
Date: January 22, 2019 at 2:34 PM
To: Bonnet, Jerry (SOS) jbonnet@sos.IN.gov
Cc: lbritt@opac.in.gov

WG

Dear Jerry,

Thank you for your letter dated January 18, 2019.

My client, NEDC, is certainly amenable to cooperating in an effort to avoid undue burden on the agency by providing reasonably specific search criteria in order to capture the requested documentation.

However, we suspect the Secretary's office may be misinterpreting or misunderstanding the search results, finding a greater number of documents than is accurate.

In your letter you indicated that a search for communication for two employees to and from @nass.org and @sso.org rendered over 9,000 emails per the attached search report. However, upon reviewing the search report it appears that the search found 9255 *results*, which may not correspond to the number of emails. The search report appears to report 9255 results in *400 emails* which we do not believe constitutes an unmanageable volume of emails.

In an effort to facilitate the document production, we agree to narrow the search to all communications, by email, fax, text, letters and voicemail from May 1, 2017 to date between the Secretary's office and NASS with the terms "election," "elections," "voting," "executive board," "cybersecurity," and any abbreviations of these terms the Secretary and her staff may use. Hope that will speed along production of the requested documents.

Bill

William R. Groth, Of Counsel
Fillenwarth Dennerline Groth & Towe LLP



429 E. Vermont Street, Ste. 200
Indianapolis, IN 46202
Telephone: (317) 353-9363
Fax: (317) 351-7232
E-mail: wgroth@fdgtlaborlaw.com

From: Bonnet, Jerry (SOS) <jbonnet@sos.IN.gov>
Sent: Friday, January 18, 2019 3:58 PM
To: William Groth <wgroth@fdgtlaborlaw.com>
Subject: RE: National Election Defense Coalition record request - FW: formal complaint

Hello Bill,

Please see follow up to your correspondence from earlier this week attached.

Thank you.

Jerry Bonnet

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

Office: 317-232-5434

From: William Groth [<mailto:wgroth@fdgtlaborlaw.com>]
Sent: Tuesday, January 15, 2019 3:31 PM
To: Bonnet, Jerry (SOS) <jbonnet@sos.IN.gov>
Cc: Susan Greenhalgh <susan@electiondefense.org>; Britt, Luke <LBritt@opac.in.gov>
Subject: RE: National Election Defense Coalition record request - FW: formal complaint

**** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ****

Jerry,

Best wishes and happy new year to you.

Sorry I wasn't able to respond earlier to your email; however, given my client's filing with the PAC and his decision to hold that complaint temporarily in abeyance, we thought it best to put our response in writing. That response is attached.

Please let us know if there is any further change in Secretary Lawson's position regarding my clients' APRA request, and when we might expect to

receive documents responsive to their APRA request.

Best regards.

Bill Groth

William R. Groth, Of Counsel
Fillenwarth Dennerline Groth & Towe, LLP
429 E. Vermont Street, Ste. 200
Indianapolis, IN 46202
Telephone: (317) 353-9363
Fax: (317) 351-7232
E-mail: wgroth@fdgtlaborlaw.com

From: Bonnet, Jerry (SOS) <jbonnet@sos.IN.gov>
Sent: Monday, January 14, 2019 12:50 PM
To: William Groth <wgroth@fdgtlaborlaw.com>
Subject: National Election Defense Coalition record request - FW: formal complaint

Hello Bill,

It was my understanding based on communications with Susan Greenhalgh that we would be discussing the organization's record request with counsel – with I expect is yourself. In the meantime, staff have continued to work on searching, retrieving and reviewing the requested emails (which given the time frame and scope of the National Association of Secretaries of State's interests and activities - is considerable) which is to say that the ongoing discussion about ultimate availability of requested records is not delaying our office's administrative process. The process of creating an summary index of requested documents located so far (serial number, date, subject, pages, attachments if any, exception(s) to public access claimed (if any) – has started and I expect we will have an initial batch of 400 – 500 specifically identified records to discuss with you in about a week.

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Thank you.

Jerry Bonnet

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

Office: 317-232-6534

From: Britt, Luke

Sent: Friday, January 11, 2019 2:04 PM

To: susan@electiondefense.org

Cc: sceleveland@freespeechforpeople.org; William Groth <wgroth@fdgtlaborlaw.com>;
Bonnet, Jerry (SOS) <jbonnet@sos.IN.gov>

Subject: formal complaint

Ms. Greenhalgh,

Please be advised I am in receipt of your formal complaint dated January 10, 2019. Based on the information provided, and specifically your letter dated December 21, it does not appear that this matter is yet at an impasse and your counsel was going to reach out to Mr. Bonnet. Both parties seem to have indicated a willingness to work together for a mutually beneficially conclusion. That said, I do not want my agency’s formal adversarial process to get between the parties and a resolution. Therefore I am placing this complaint on hold for now until it gets to a point where no movement is taking place. If it does, I will certainly revisit the issue (and consider your submission timely). I encourage both parties to continue to work together to find a solution that satisfies the public access matter.

Best,

Luke Britt
Indiana Public Access Counselor
317-233-9435

SECRETARY OF STATE
STATE OF INDIANA
200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204
WWW.SOS.IN.GOV

February 1, 2019

William Groth, Esq.
Fillenwarth Dennerline Groth & Towe, LLC
429 E. Vermont St. Suite 200
Indianapolis, IN 46202

Re: National Election Defense Coalition (NEDC) record request

Dear Bill,

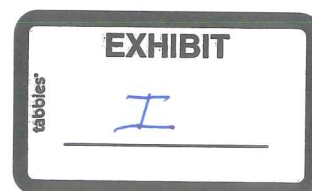
I had intended on getting back with you on NEDC's request last week and regret being unable to do so. Our office experienced an unusual confluence of personal tragedies, time-sensitive agency business, and climate related issues during the past several days. I anticipate we will be operating at better speed in the coming weeks.

At this time we do not have any emails available for NEDC's inspection. I'll summarize the agency's (previously mentioned) positions that continue to pose challenges to expediently responding to NEDC's request:

A. Specificity and Particularity (Administrative and Common Law)

Both NEDC's initial request and recently revised request encompass *all* of the NASS organization's email accounts and *all* of the Secretary of State's office email accounts. Per the tool used to access and review agency email accounts, in the 18-3/4 month date range specified, there are over 9,000 uniquely identifiable emails and attachments: to or from anyone in the NASS organization - to or from anyone in the Secretary of State's office. Since the January 22nd "narrowed" request we were able to engage a preliminary search of *two* key agency staff email accounts for the 4 search terms, for emails to and from *two* key individuals at NASS for the requested timeframe. 1,783 emails or email strings were identified with approximately 2,800 attachments.

Our office is reluctant to reject a record request outright on account of wide breadth or lack of specificity – however, email retrieval and review for a state agency is a fairly involved process and a broad request obviously takes significantly more time to complete than one that is narrowly tailored. The following statement from a recent Indiana Public Access Counselor Opinion (*Paris Lewbel v. City of Carmel* 18-FC-63) may serve as a guide in this instance:



The search parameters for emails have been honed over the past several years begin with a case cited by the City – Anderson v. Huntington County Board of Commissioners, 983 N.E.2d 616 (Ind. Ct. App. 2013). In Anderson, the court cited an opinion from the previous Public Access Counselor regarding the issue of reasonable particularity as it relates to request for emails. At the time, the only parameters were a named sender and recipient and a timeframe.

In the years subsequent, this Office has developed Anderson even further to include a reasonable time frame limitation (generally less than a year and preferably six month), added key words and subject matter to the mix, and capped the number of “lanes” or “channels” of email threads to four...

B. NASS’s Trade Secret and Copyright Rights (IC 5-14-3-4 (3) & (4))

The vast majority of emails and email strings we’ve been able to locate in agency email accounts were initiated by members of the NASS organization. Every email in possession of the agency from every sender at NASS explicitly states that the contents are confidential as between the sender and recipient and that copying is prohibited. The words “copying is prohibited” and “confidential” expressly evoke NASS’s copyright and trade secret protection rights – regularly recognized in federal and state law as (mandatory) exceptions to public access (“*Do not Forward: Why Passing Along an Email May Constitute Copyright Infringement*” April 23, 2014 Northeastern University Law Review; *Physicians Committee for Responsible Medicine v. United States Department of Agriculture*, 316 F.Supp.3d 1 (2018); *Cornucopia Inst. v. United States Dep’t of Agric.* 2018 U.S. Dist. LEXIS 166173; *Public Empl. For Envtl. Responsibility v. Office of Sci. & Tech. Policy*, 881 F.Supp.2d 8 (2012) etc.).

Notwithstanding your stated view that “NASS should understand that any such communications would be covered by state public records laws”, it’s our appreciation that by its constitution and bylaws, gathering and disseminating information to members and facilitating communications between members are protectable commercial activities. This is recognized even in the case of non-profit, “public interest” organizations. NASS makes considerable information about its activities and positions formally and jointly adopted by its members, available to the public through press releases and on its web pages. Affiliate membership (paid) is available to (non-public official) individuals and organizations. Affiliate members are entitled to participate in NASS organized conferences and some, but not all, meetings and discussions. The Secretary of State’s office also makes considerable information about its activities and policy positions available to the public via press releases, web page and print publications. As an aside, the office previously provided NEDC with an extensive collection of materials that *inform* its positions, policies and practices on election security issues.

C. Agency Deliberative Materials Discretionary Exceptions (IC 5-14-3-4 (6))

As previously mentioned, the office has access to an e-discovery tool which, as an initial function, purports to provide a random *sampling* of documents matching specified search criteria, for *preview purposes*. At the time NEDC’s “narrowed” request was received (1/22/19) the office had retrieved a sampling of 879 responsive documents, broken down as 339 emails,

537 attachments and 3,183 pages. To facilitate internal review, those documents have been serialized by date (5/1/2017 – 12/21/18) and summarized (serial #, date, time, subject, attachments (if any), attachment title(s) and number of pages) in an Excel spreadsheet a copy of which is being provided herewith.

With respect to availability for public inspection of specific emails, as of this date, the agency has not completed individual review of the 879 documents, but is proceeding to do so. An assessment of the agency's position on the applicability of the deliberative materials exception (or other specific exceptions) to public inspection of each document in this series should be completed in 2 – 3 weeks' time. Identification and evaluation of emails based on NEDC's revised search criteria will take additional time.

D. Agency Security and Public Safety Discretionary Exceptions (IC 5-14-3-4 (10), (11) & (19)).

The agency believes that some of the documents subject to NEDC's request may be withheld from public inspection and copying at its discretion in the interest of security and public safety pursuant to IC 5-14-3-4 (10), (11) and (19). Pursuant to IC 5-14-3-4.4 (b) the agency has initiated consultation with the *Indiana Counterterrorism and Security Council*. Based on that consultation the agency anticipates responding to NEDC's request with respect to both specific documents and unspecified, but generally described documents, for which these exceptions are believed to apply, within the next 6 to 8 weeks.

As an aside, we note your client's public charge last week that "the Indiana Secretary of State is hiding emails that show she and NASS killed the Fair Elections Act." We invite you to pass on the office's respectful disagreement with that characterization.

Truly yours,



Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

Enc.



OFFICE OF THE PUBLIC ACCESS COUNSELOR
FORMAL COMPLAINT
 State Form 49407 (R6 / 3-14)

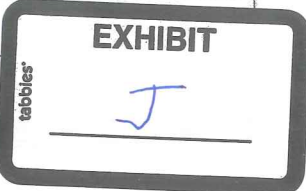
PUBLIC ACCESS COUNSELOR
 Indiana Government Center South
 402 West Washington Street
 Indianapolis, Indiana 46204
 Telephone: (317) 234-0906
 Toll free: (800) 228-6013
 Fax: (317) 233-3091

INSTRUCTIONS: This form is to be used only when filing complaints under Indiana Code 5-14-5. All information provided is disclosable under the Access to Public Record Act. PLEASE TYPE OR PRINT.

FOR OFFICE USE ONLY		
Date received (month, day, year)	Complaint number	Date due (month, day, year)

COMPLAINANT INFORMATION			
Name (last, first, middle initial) Susan E. Greenhalgh, National Election Defense Coalition; Ron Fein and Shanna Cleveland, Free Speech For People, William Groth			
Address (number and street) 10 Robbins Ave.		City Amityville	State NY
Telephone number (917)796 8782	Fax number ()	E-mail address susan@electiondefense.org; scleveland@freespeechforpeople.org; rfein@freespeechforpeople.org; wgroth@fdgtlaborlaw.com	

INFORMATION ABOUT PUBLIC AGENCY DENYING ACCESS			
Name of public agency Secretary of State			
Address (number and street) 200 West Washington Street		City Indianapolis	State Indiana
Telephone number (317)232-6531	Fax number ()	E-mail address jbonnet@sos.in.gov	
Name of elected / appointed official or presiding officer responsible for the denial Connie Lawson			



COMPLAINT (Check all that apply.)	
<input type="checkbox"/> Open Door Law Violation <input type="checkbox"/> Executive Session <input type="checkbox"/> Notice <input type="checkbox"/> Other: _____	<input checked="" type="checkbox"/> Public Records Access Violation <input checked="" type="checkbox"/> Denial of Access <input type="checkbox"/> Denial of Electronic Access <input type="checkbox"/> Other: _____
<input type="checkbox"/> Request for priority status [See Indiana Administrative Code (62 IAC 1-1-3).] (Must include in narrative the reason for priority status.)	

IMPORTANT	
Date denied access to public record (month, day, year) 2/1/2019	Date notified of denial of access to meeting (month, day, year)

Please describe denial of access to meeting or public records below. Attach additional sheets if necessary. (Required)

The National Election Defense Coalition (NEDC) is a non-partisan, not-for-profit organization committed to promoting secure, auditable, transparent and accessible elections. Free Speech For People (FSFP) is a non-partisan, not-for-profit organization dedicated to a democratic process in which all people have an equal voice and an equal vote. Indiana Secretary of State Connie Lawson served as president of the National Association of Secretaries of State (NASS) from July 2017 to July 2018 and now serves as co-chair on the NASS Cyber Security Committee. NASS is a non-partisan professional organization of public officials. NASS is not a public agency, as the Secretary of State acknowledged in its December 21, 2018 correspondence.

As NASS president Secretary Lawson represented the organization on the national stage, to the press and before Congress. NASS has vigorously opposed the federal government's designation of election infrastructure as Critical Infrastructure and has opposed the attachment of security requirements to federal funding for election systems. As NASS president, Secretary Lawson repeated inaccurate statements regarding the security of election systems.

NEDC, FSFP, and attorney William Groth initially filed a complaint against the Secretary of State for denial of access to public records on January 10, 2019 to seek a ruling on a public records request submitted by NEDC on September 13, 2018. That request to the office of Secretary Connie Lawson sought all communication between Secretary Lawson's office and NASS from May 1, 2017 to date. Now, over almost five months later, the Secretary of State has refused to provide any responsive documents.

Although NEDC, FSFP and Attorney Groth agreed to the Public Access Counselor's request to hold the initial complaint in abeyance to determine whether a resolution could be reached with the Secretary of State, the complainants now submit this amended complaint based on the Secretary of State's continued refusal to provide any responsive documents, the Secretary of State's ever lengthening estimation of the time necessary to compile the records, and a clear pattern of delay and mischaracterization of the facts and the law. We incorporate by reference the recitation of facts and law included in

the January 10, 2019 complaint.

In an attempt to resolve this matter, attorney William Groth contacted the Secretary of State's counsel Gerald Bonnet to determine whether the parties were truly at an impasse. Despite initially claiming (See January 14, 2019 Bonnet email, attached) that the agency had been working all along to identify the responsive documents and would provide a set of 400-500 specifically identified documents for discussion along with a summary index of requested documents "in about a week," Mr. Bonnet's most recent correspondence now suggests that the earliest that they may be able to provide a complete index of claimed exemptions is 6-8 weeks. (See attached correspondence from Mr. Bonnet of February 1, 2019).

The Secretary's new and extended timeline for a response is particularly unreasonable given that NEDC agreed to narrow the scope of its request to help expedite the process. (See attached correspondence from Mr. Groth to Mr. Bonnet on January 22, 2019, attached). The PAC has found response times of as little as 44 days to constitute undue delay (See 10-FC-93) and a 9-week delay for response related to email correspondence without any piecemeal production to be "contrary to any reasonable interpretation of timeliness." (See 16-FC-320). Moreover, this continued delay has deprived the Indiana public from having access to information necessary to participate meaningfully in an upcoming public meeting of the Indiana Elections Committee that will discuss election security. (See attached public meeting notice and agenda).

Complainants have worked in good faith and made concessions in an attempt to resolve this matter, but throughout this process the Secretary of State has demonstrated an attempt to avoid and delay providing the responsive documents by first providing documents unrelated to the request, then asserting contradictory claims regarding whether such documents existed and shifting arguments about claimed exemptions. As a result, complainants ask that the Public Access Counselor act upon the formal complaints lodged in this matter.

The Secretary's delay and obfuscation in this matter are especially disturbing given the importance of the issues that NEDC's request seeks to illuminate for public review. The security of the election systems and apparatus are of paramount importance to protecting the integrity of our democracy. Reports clearly indicate that the election systems in Indiana, presided over by the Secretary of State, have resulted in security issues (See attached Indianapolis Star report on Johnson County voting machines). The Secretary of State has made numerous public statements about the security of election systems as NASS president, and the public deserves to know how those statements were crafted and to what extent the Secretary may have known of inaccuracies in the statements.

The office of the Secretary of State is flagrantly failing to comply with Indiana state law to provide access to public records. The office failed to respond to the initial request in a timely fashion, delaying its response for two months. The Secretary did not initially assert any privilege to exempt documents from inspection and instead produced irrelevant, non-responsive documents. When NEDC pointed out the non-responsiveness of the records, the office of the Secretary then attempted to assert authority to deny the documents requested; however the Secretary's office has not provided any valid arguments in support of its claims for exemptions nor have they even identified whether any of the potential claims that they have raised with respect to exemptions are being asserted with respect to specific documents.

The Secretary's refusal to produce these records denies the public the ability to understand significant issues that influence a vital part of the US government, our electoral system. We respectfully request a ruling from the Public Access Counselor recommending that the office of the Secretary of State comply with this public records request. We stand ready to provide any additional information or answer any questions you may have.
Thank you very much for your consideration.

PLEASE ATTACH COPIES OF ANY WRITTEN DENIAL OR DOCUMENTATION CONCERNING DENIAL

Signature

Thomas Cleveland

Date (month, day, year)

2/7/19

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February 27, 2019

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State
200 W. Washington Street
Indianapolis, IN 46204

Dear Mr. Bonnet,

We acknowledge receipt of two sets of documents sent February 12, 2019, purportedly responsive to the NEDC's September 13, 2018 request under the Indiana Access to Public Records Act. In that request we asked the Secretary to produce the following:

1. A copy of every correspondence (written, email, fax, voicemail or other) sent from anyone at the Secretary of State's office, including but not limited to the Secretary and staff, to anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.
2. A copy of every correspondence (written, email, fax, voicemail or other) sent to anyone at the Secretary of State's office, including but not limited to the Secretary and staff, from anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.

We've reviewed the documents and found they include mostly public or publicly available documents that relate to NASS activities – NASS agendas, publications shared among NASS members or letters sent from NASS members to federal agencies - many of which were provided in the first non-responsive and incomplete document production provided by the Secretary in December of 2018. They also do not appear to include any documents responsive to Request No. 1 or all the documents sent to the Secretary's office from NASS as requested in Request No. 2. While we expect at some point these documents were likely shared between NASS and Secretary Lawson, they do *not* include communications between the Secretary's office and the NASS as requested in the outstanding APRA request. To the extent you are purporting to represent that these are *all* the documents sent to your office from NASS, or sent by NASS to your office, obviously these disclosures are woefully incomplete.

We are disheartened that the Secretary continues to refuse to follow the requirements of APRA by failing to produce all the documents the NEDC has requested.



Very truly yours,

FILLENWARTH DENNERLINE GROTH
& TOWE, LLC

A handwritten signature in black ink, appearing to read "W.R. Groth". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

William R. Groth

WRG/sc

cc: Luke Britt



OPINION OF THE PUBLIC ACCESS COUNSELOR

NAT'L ELECTION DEF. COAL.; FREE SPEECH FOR
THE PEOPLE,
Complainant,

v.

OFFICE OF THE SECRETARY OF STATE,
Respondent.

Formal Complaint No.
19-FC-16

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Secretary of the Secretary of State violated the Access to Public Records Act.¹ Chief legal counsel Jerry Bonnet filed an answer to the complaint on behalf of the Secretary. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint

¹ Ind. Code §§ 5-14-3-1 to -10



received by the Office of the Public Access Counselor on February 12, 2019.

BACKGROUND

This complaint concerns materials disseminated by the National Association of Secretaries of State (“NASS”) by and through the Indiana Secretary of State (“SOS”) who served as the former president of that Association.

On or about September 3, 2018, the National Election Defense Coalition (“NEDC”) submitted a public records request to the Indiana Secretary of State for NASS materials. The request sought all communication between Secretary Lawson’s office and NASS from May 1, 2017 to date. As of the date of the filing of NEDC’s complaint on February 7, NEDC argues no responsive materials have been made available; the documents provided were, in NEDC assessment, unresponsive to the request.

That is not to say the Indiana Secretary of State’s Office has unresponsive in terms of updates. On the contrary, it has kept NEDC updated to the progress of the search. NEDC simply takes exception to this progress as an unreasonable delay in production of public records. The SOS gave an estimated production timeline of 6-8 weeks for the production.

Timeliness aside, there are also questions of reasonable particularity of the request as well as scrutiny regarding the SOS’ potential withholding of certain documents from NASS as being copyrighted material, deliberative and/or technical security records.

It should also be noted that the SOS did provide an initial batch of responsive materials on February 12, 2019 with an attachment privilege log.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (“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.” Ind. Code § 5-14-3-1. The Office of the Secretary of State is a public agency for the purposes of the APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n).

As a result, any person has the right to inspect and copy the SOS’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

This case has a number of moving parts and the parties have expressed their arguments in a cogent and concise way. The issues will be discussed in the order in which they were presented.

2. Reasonable Particularity

A critical element of a sound public records request is that a requester set forth the parameters of a search with a certain degree of specificity. Ind. Code § 5-14-3-3(a)(1). The rationale behind reasonable particularity is simple: the more

succinct and detailed a records request is, the more efficient and timely a response should be.

In regard to email requests, this office has gone to great lengths to clarify what a reasonable particular email search should look like. If a search request is presented with an individual sender, and individual recipient, some search terms or a subject matter, and a reasonably condensed timeframe, a public agency should have no problem locating those records. Failing to set reasonable standards leads to legislation implementing search fees, or even worse, considering emails not to be a public record.²

Interestingly enough, a Marion County trial court recently considered this very issue and expanded those parameters a bit to include groups of senders and recipients.³ While this office approaches that holding with some caution, respectfully, the court does appear to hesitate at a too-technocratic application of those parameters. In that regard, we agree with that wisdom.

That stated, the request in the current case does not approach even a loose interpretation of reasonable particularity as set forth by this office. The SOS chose to accept it anyway with the caveat that a subject matter be identified. After NEDC provided some search terms, the search yielded well over 3000 pages of documents initially.

² H.B. 1629 (2019)

³ *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019).

As a result, the complainant should not feel terribly affronted that the timeline has stretched to a greater degree than if the request was more specific.

Nevertheless, this office cautions public agencies against taking on a public records request that, on its face, would yield an impractical number of emails or records to sort, review, and produce. That is why an agency should ask the requester to narrow a search at the outset and come to a reasonable middle ground before a search begins.

3. Reasonable Timeliness

Reasonably particular or not, a requester should expect to receive some emails within a reasonable time if an agency accepts a request. Ind. Code § 5-14-3-3(b). This could entail a partial or complete fulfillment of the request, depending on the circumstances.

Neither “reasonable time” nor “reasonable particularity” are defined by statute. But it stands to reason that if specificity has been established as a predicate, reasonable timeliness is simply defined by this office as practical efficiency.

In those cases where an agency accepts a cumbersome or voluminous request, a sensible approach to the search and production is to disseminate the materials in a piecemeal manner as they become available. This certainly alleviates anxiety on the part of requester that they may have been ignored.

Unfortunately, this had not been done until after the submission of the updated formal complaint. Five months is indeed a long time to wait for documents in any circumstance. While this office is sympathetic toward the practical constraints and limitations of the SOS’ office (relatively small

staff; election season duties; etc.), requests that go stale and languish often invite the ire of the requester, and rightfully so.

Therefore while it can be said that the production of documents was not reasonably timely, there is some contributory culpability on the part of the complainant for submitting a deficient request.

4. Exemptions to Disclosure

Once a portion of the records were compiled, a significant portion were omitted from the eventual disclosure based upon several exemptions to disclosure codified under APRA. The SOS compiled a table or privilege log enumerating each document and why it was withheld under the statute.

The first exemption is based upon copyright and trade secret which would fall under Indiana Code section 5-14-3-4(a)(3) (referring to the Federal Copyright Act) and section 5-14-3-4(a)(4) in regard to trade secrets.

As for the copyright portion of its argument, the SOS asserts that NASS tags all of its material as confidential and prohibits forwarding of the material. The SOS asserts that NASS has the ability to restrict dissemination of its materials as its own intellectual property.

Authorities are fairly mixed as to whether this argument by a public agency is credible and there is no authority which would directly affect Indiana. It is not clear whether courts would consider the fair use doctrine when a third party requests copyrighted material from a public agency for non-commercial purposes, but other states have not held public

agencies liable for releasing third-party materials pursuant to a public records request.

Along those same lines, there must be a commercial element to trade secrets as well. The material, if disseminated, must place the creator of the material at an economic disadvantage in its marketplace. The materials must also be closely held. *See* Ind. Code § 24-2-3-2.

It is unclear what economic value the materials from NASS contain. It is unknown what competitors exist or in which commercial marketplace NASS participates. Moreover, NASS publishes a great deal of material on its website that appears to be intellectual property.[†]

Because the materials are freely mass-distributed to public agencies, and possibly exclusively so, NASS should ostensibly have the foresight that the materials received by public agencies become public record.

The SOS also claims that some of the material is deliberative under Indiana Code section 5-14-3-4(b)(6), which exempts inter- or intra-agency deliberative materials communicated for the purposes of decision making. This exemption also applies to contractors.

Again, it is unclear what, if any, contractual relationship exists between the SOS and NASS, however, if one does exist, the materials could possibly qualify under this section. The exemption also qualifies if the communication is between other states' public agencies as well. Therefore it is quite possible much of the material cited as being deliberative is legitimately deliberative in nature and can be withheld from

[†] <https://www.nass.org>

disclosure. Without reviewing the unredacted materials, however, this office cannot make a final determination.

Finally, the SOS cites a security and public safety argument for disclosing some of the materials.⁵ Again, without the benefit of a review, it is impossible to say for sure, however, it stands to reason that election security documents may contain sensitive materials these exemptions were designed to protect.

⁵ Ind. Code §§ 5-14-3-4(b)(10), -(19).

CONCLUSION

Based on the foregoing, this office declines to issue a definitive declaration on the issue of timeliness in this case. While five months is normally much too long to produce documents pursuant to a request, the request itself did not meet reasonable standards.

The SOS has, however, carried its burden to this office that some, if not all, of the cited exemptions to disclosure could possibly apply to the withheld materials. As always, without *in camera* review, this determination is solely on the merits of its legal arguments but not necessarily on any unknown underlying facts.



Luke H. Britt
Public Access Counselor

SECRETARY OF STATE

STATE OF INDIANA

200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204

WWW.SOS.IN.GOV

February 28, 2019

Luke Britt / Kristopher Cundiff
Office of Indiana the Public Access Counselor
402 W. Washington St. Room W470
Indianapolis, IN 46204-2745

Re: Formal Complaint 19-FC-16; agency response

Dear Mr. Britt and Mr. Cundiff:

In filings with the Public Access Counselor on December 13, 2018 and February 12, 2019 the National Election Defense Coalition (NEDC) makes numerous complaints which the Secretary of State's office (Agency) summarizes and responds to as follows: (A) reasonable time for production of records; (B) delay or denial on account of reasonable specificity; (C) denials based on IC 5-14-3-4 (a)(3) and (a)(4) -National Association of Secretaries of State (NASS) copyright or trade secret rights; (D) denials based on IC 5-14-3-4 (b)(6) -deliberative materials and; (E) delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19) -security and public safety.

A. Reasonable Time for Production of Records

The Agency received and acknowledged NEDC's request for inspection and copying of public records on September 13, 2018. The Agency advised NEDC that staff would work on their request, but did not communicate further with NEDC about their request until NEDC inquired on December 13, 2018. Between December 13, 2018 and February 12, 2019 the Agency communicated frequently with NEDC by letter, email and phone. It appeared to NEDC that the agency was not working on their request, or not taking their request seriously, during the initial 90 day period. Appropriately, the Agency should account for the three to five month time period involved in responding to the request, which is as follows:

- a) Size of the Agency: the Office of the Secretary of State is a small agency in relative terms with a staff of less than 90 administering an Executive Office, Auto Dealer Licensing Division, Business Services Division, Election Division and Securities Division. Though the Secretary of State's office is the agency of record and public access provider for records numbering in the millions, it does not have a department or staff dedicated to administering non-routine, complex record requests. The Agency does not have fiscal resources to retain outside legal counsel to process large and complex record requests.



- b) Size of the request: NEDC initially requested *all communications* between the *entire government agency* and the *entire NASS organization* over a period exceeding 16 months, with no specified subject - which is significant considering the broad range of subject matter and activities that the Agency and NASS are involved with. The Agency's day-to-day engagement with NASS involves at least 10 Secretary of State Staff and at least 5 NASS staff and covers event planning, committee coordination, public outreach, monitoring and reviewing legislation, engagement with government and NGO partners, business records administration, elections administration, motor vehicle licensing administration, notary public commission administration, securities industry regulation administration – to name some but not all areas.
- c) Number of pending requests: between mid-May and mid-November 2018, the Agency responded to higher than normal volume of public record requests from the public, media, political parties and campaigns, many of which related to issues specific to the November General Election, and for which expedited handling was requested.¹
- d) Complexity of request: over the past few years, and for reasons particular to agencies involved with election administration, handling of public record requests for emails (extending back more than 30 days from a current date) have evolved from being relatively simple, to being significantly complex. Stemming from revelations in 2016 that email accounts of election administrators were targets of hacker activity (see Attachment C) and overall heightened cybersecurity concerns, Agency email archiving and access has come to involve new layers of security protocols. Retrieving staff emails for review and public access now entails multiple interagency and intra-agency administrative steps. A reviewer cannot simply directly access archived emails, and emails cannot be moved from cloud storage locations to desktop computers or copied onto media such as a CD-ROM or removable storage devices. For this Agency, a reviewer (after receiving executive office authorization and notifying email account holders) must engage Agency IT staff, who in turn must engage IOT, who in turn must engage vendors responsible for cloud storage of the Agency's archived emails. The requested data must be located, segregated and copied to a special secure (cloud based) server for which the reviewer must be issued credentials for time-limited access. Actual review of documents can only commence after a several step process, which can take time - lesser or longer, depending on staff availability and special or seasonal events such as elections, training, software and hardware upgrades, vacations and holidays etc. Also Agency IT staff must engage IOT to configure a document reviewer's computer workstation to access the material to be reviewed and install software applications for reviewing. In the case of emails that might be subject to exceptions to public access, the Agency reviewer must make photocopies, to be used to conduct consultations with email authors and executive level Agency staff

¹ Note: a Chicago newspaper's request for Agency emails about a precinct consolidation issue in Lake County that the Agency was involved with, received July 16, 2018, and not specifically related to the 2018 General Election, was fulfilled without exceptions on January 7, 2019.

(i.e. due to enhanced security protocols, emails being reviewed cannot be electronically copied or transferred to other staff for review).

- e) Extenuating operational considerations: in the instant case, between September and December 2018, the Agency was highly occupied, to the extent of being preoccupied, with General Election duties, the complexity of which was exacerbated by a heightened level of concern about cybersecurity and election interference, and new levels of federal, state, and local election cybersecurity engagement and coordination. Also, unexpectedly, in the immediate aftermath of the November General Election and months following, the Agency coordinated the investigation and response to technical election problems experienced in a two Indiana counties. These investigations required executive staff to be away from the office for extended periods of time.

The Agency determined that in order to comply with NEDC's request, all of the emails from 10 staff members (initially for 16-½ months, then 19-½ months) would need to be located and copied to a secure location for sorting and reviewing.² Though the Agency's request for email archive access was initiated shortly after receipt of NEDC's request, it was not until mid-December that the data was in place, the reviewer credentials issued, and the necessary document review software tools installed on the reviewer's workstation - so that the specific searching and reviewing could commence.³

Between mid-December 2018 and mid-January 2019, the Agency reviewer used e-discovery software sorting and sampling operations to winnow more than 10,000 emails and attachments down to a sample of about 860 documents with a high probability of being responsive and unique (i.e. removal of carbon copies and email string duplicates). Notwithstanding end of the year holidays and vacations, executive staff participation in the Winter NASS conference in Washington, DC, and the brief "polar vortex" government shutdown, considered review of the documents (which required input from Agency executive staff) was accomplished within a relatively short period of time. As of February 12, 2019 the agency had provided NEDC with two sets of documents (Attachments E and I), a spreadsheet listing of all documents found with descriptions (Attachment H) and a narrative discussing the statutory basis for excepting specific documents from public access (see February 1, 2019 Agency letter to William Groth).

The large email and attachment retrieval and review, under newer state and Agency cybersecurity protocols, was a unique and fairly significant undertaking for the Agency. Owing to experience gained however, it is expected that in the future the Agency will be able to accommodate requests for retrieval and review of large volumes of archived emails within a shorter time frame.

B. Reasonable Specificity

² At least for this agency, IOT no longer provides the service of conducting searches for particular archived emails. Now Agency staff have to retrieve a staff's emails for a date range and conduct the search.

³ The Agency might have pursued the retrieval and accessibility of archived emails with more vigor between October and November 2018, however due to the processing of previously received record requests and time-sensitive election administration duties, it's unlikely that the Agency would have made much progress reviewing the documents before January 2019 even if they had been available earlier.

On September 13, 2018 NEDC requested:

A copy of every correspondence (written, email, fax, voicemail or other) sent to or from anyone at the Secretary of State's office, including but not limited to the Secretary and staff, to anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present (a period of 16 months and 13 days).

On December 21, 2018 NEDC revised their request:

(W)e are requesting any and all communications including forwarded emails and attachments between the office of Secretary of State Connie Lawson and any recipient at the email domain @nass.org or @sso.org from May 1, 2017 to present (a period of 19 months and 21 days).

On January 15, 2019, counsel for NEDC suggested that the Agency could, or perhaps should have, *inferred* that the (missing) subject of the request was *election integrity and cybersecurity*:

The Indiana Public Access Counselor has held that a request is reasonably particular if it seeks electronic or written correspondence and identifies a sender and recipient within an identifiable time frame about a particular subject (here, election integrity and cybersecurity).⁴

On January 22, 2019 counsel for NEDC offered a further revised request:

In an effort to facilitate the document production, we agree to narrow the search for all communications, by email, fax, text, letters and voicemail from May 1, 2017 to date between the Secretary's office and NASS with the terms "election," "voting," "executive board," "cybersecurity," and any abbreviations of these terms the Secretary and her staff may use... (a period of 20 months and 22 days).

On one hand, the Agency has not, at least in the last decade, had the occasion to deny a record request outright on the basis of lack of specificity or large volume. On the other hand, the Agency doesn't recall encountering a record request without a fairly focused subject and time frame. In this instance, the Agency did not become aware of the large number of records that would need to be reviewed, or the complexity of the issues pertaining to the particular materials requested, until the search results and materials started to become available in mid-December 2018.

⁴ Based on numerous phone conversations, correspondence, NEDC initiated news media inquiries and reports, the agency did at one point hazard to infer that the NEDS was interested in the basis of the Secretary of State's information and policy positions regarding election cybersecurity and voting equipment security. However, NEDC rebuffed the agency's December 13, 2018 effort to supply information along these lines (see Attachments E and F).

On December 20, 2018, the Agency first raised the issue of specificity with NEDC (prompting the series of restatements). On January 14, 2019 the Agency advised counsel for NEDC that "...email requests, particularly those that cover extended periods of time, numerous or unspecified subjects, and numerous or unspecified individuals etc., can take a fair amount of time to complete." On January 18, 2018 the Agency advised counsel for NEDC that "(N)arrowing the scope of the request would considerably shorten the retrieval and evaluation time involved." From the Agency's perspective, none of NEDC's restatements meaningfully served to narrow or focus their request. The successive requests also added months and days to the term of the search.⁵

C. denials based on IC 5-14-3-4 (a)(3) and (a)(4)

Documents the Agency excepted from public access based on its understanding of the NASS organization's federal copyright and trade secret rights are indicated in Column 9 in the summary of documents retrieved and reviewed (Attachment H). Every email from NASS the Agency retrieved and reviewed contains the following statement:

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

The Agency was not inclined to ignore this language nor summarily dismiss its inclusion as a meaningless exercise. NASS advised the Agency of its position that the statement invokes its commercial proprietary rights including copyright protection under federal law. As a member, benefiting from the services NASS provides (policy research, advocacy, facilitating communication between members etc. - see Attachment D) the Agency appreciates the organization's position. In its February 1, 2019 letter to counsel for NEDC, the Agency explains its (admittedly somewhat limited) understanding of the proprietary issues raised by NASS and the apparent application of statutes, cases and articles cited. The Agency acknowledges that Indiana's public record laws are subject to interpretation and that there appears to be a scarcity of on-point Indiana guidance or case law on this issue. The Agency notes that the Indiana Public Records Act contemplates that on judicial review, *third parties* should be afforded the opportunity to intervene to assert such rights as they may have (i.e. IC 5-14-3-9 (e)). Thus, though the burden is on an agency to justify an exception to public access, the Agency believes that the NASS organization should have the opportunity to substantiate its rights in this area. To the

⁵ Note: NEDC also complains that a statement in the Agency's January 14, 2019 letter "...I expect we will have an initial batch of 400 - 500 specifically identified records to discuss with you in about a week..." was misleading or deceptive, because they did not shortly thereafter receive copies of emails. NEDC misinterpreted the statement however. The meaning of the statement was that once the Agency had access to documents responsive to the request and reviewed them, that it would *then* be in a position to discuss mandatory or discretionary statutory exceptions to public access – with respect to specific documents listed on a schedule. The Agency provided NEDC with a preliminary spreadsheet itemizing and detailing agency documents on February 1, 2019 and a final list containing more detail on February 12, 2019 (Attachment H).

extent that a determination on the exception claimed by the Agency, and rights asserted by NASS, must to be made in order to resolve NEDC's complaint, the Agency believes that it is at an impasse with NEDC on the issue.

D. denials based on IC 5-14-3-4 (b)(6)

Documents the Agency excepted from public access as intra-agency or interagency advisory or deliberative material are indicated in Column 10 in the summary of documents retrieved and reviewed (Attachment H). Despite the number of deliberative exceptions among this particular group of documents, the Agency's review was individualized and considered, and the Agency asserts that it is not being laconic. The Agency will note that the primary purpose of the NASS organization is after all, to serve as a medium for exchange of information between states and foster cooperation in the development of *policy*. Thus, it should not be surprising that development of agency policy underlies the existence of much (though not all) of the emails NEDC requested. The Agency will also note that volumes of material which informed its policies on election cybersecurity and infrastructure were provided to NEDC.

E. delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19)

Documents the Agency excepted from public access based on security and public safety are indicated in Column 11 in the summary of documents retrieved and reviewed (Attachment H). As indicated in the Agency's February 1, 2019 letter to NEDC's counsel, the Agency has initiated the process of seeking review and guidance from the Indiana Counterterrorism and Security Council (CTASC) pursuant to IC 5-14-3-4.4 (b). NEDC's public record request and the particular materials the Agency believes should be excepted from public access based on security and public safety, have been placed on CTASC's executive session and public meeting agendas for their March 13, 2019 meeting. While the Agency anticipates that CTASC will take up its requests for review and guidance at that time, it's unknown if such guidance will be provided on that date, or at a later date.

Thank you for providing the Secretary of State's office with the opportunity to respond to this matter and patience in reviewing the parties' submissions. I am available at your convenience if you have questions or require additional information.

Truly yours,

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

Enc.

cc: William Groth

Secretary of State response to NEDC public records access complaint

List of Attachments

- A. Record request chronology
- B. Record request and correspondence
- C. Article: “*Here 's the Email Russian Hackers Used to Try to Break Into State Voting Systems*”
- D. “Welcome to NASS, the nation’s oldest, nonpartisan professional organization for public officials”
- E. List of materials provided to National Election Defense Coalition 12/13/18
- F. RTV6 news report: “*Groups accuse Secretary of State’s Office of Flagrant Violation of Public Records Laws*”
- G. Photo of agency records located and reviewed
- H. Spreadsheet listing and describing materials located and reviewed.
- I. List of materials provided to National Election Defense Coalition 2/12/19
- J. Articles and Cases on Public Records and Trademark/Commercial Proprietary Interest and Trade Secret Rights.
 - a. *Why Passing Along an Email May Constitute Copyright Infringement* April 23, 2014 Northeastern University Law Review.
 - b. *Physicians Committee for Responsible Medicine v. United States Department of Agriculture*, 316 F.Supp.3d 1 (2018).
 - c. *Cornucopia Inst. v. United States Dep’t of Agric.* 2018 U.S. Dist. LEXIS 166173.
 - d. *Public Empl. For Envtl. Responsibility v. Office of Sci. & Tech. Policy*, 881 F.Supp.2d 8 (2012).

SECRETARY OF STATE
STATE OF INDIANA
200 W. WASHINGTON STREET, INDIANAPOLIS, IN 46204
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**National Election Defense Coalition (NEDC)– Secretary of State (SOS)
Record Request Summary Chronology**

September 10, 2018 NEDC emails request for SOS records to Indiana Election Division (IED). (Note: the Indiana Election Division is a bi-partisan administrative agency of the Indian Election Commission, effectively autonomous from the Office of the Secretary of State with respect to records). Briefly, NEDC requests copies of all communications between the SOS and the National Association of Secretaries of State (NASS) from May, 1, 2017 to September 13, 2018 (a period of 16 months and 13 days).

September 13, 2018 IED forwards NEDC record request to the SOS via email.

September 13, 2018 SOS transmits acknowledgement of NEDC's request via email and U.S. mail.

September 13, 2018 – December 13, 2018 SOS staff are working on NEDC's request.

December 13, 2018 SOS receives email from NEDC asking for status of request.

December 13, 2018 SOS provides NEDC with and update by email. By U.S. mail SOS sends NEDC an update letter and 400 page packet containing copies of 16 documents concerning the matter the agency understands NEDC is interested in, some of which came to the agency via the National Association of Secretaries of State (NASS) and some of which the SOS provided NASS for sharing with the organization's membership (see index attached). Without elaborating, the SOS advises NEDC that some materials requested will not be available.

December 18 and 19, 2018 By email and letter NEDC advises the materials sent are not responsive. NEDC restates its request adding "to present" to the timeline (a period of 19 months and 20 days). NEDC notices the agency that they are consulting counsel.

December 20, 2018 By letter the SOS acknowledges NEDC's correspondence indicating (in pertinent part) that "the agency is not foreclosing on the possibility that certain communications..." will be available. The agency invites discussion access issues with NEDC's legal counsel.

December 21, 2018 By letter, NEDC responds to the agency with authority and argument for its view that there are no applicable public records access exceptions to communications between a public agency and a private organization such as NASS.

NEDC restates its request as "...any and all communications including forwarded emails and attachments between the office of the Secretary of State Connie Lawson and any recipient at the email domain @nass.org or @sso.org from May 1, 2017 to present." NEDC advises they will arrange a phone call between counsels after the New Year.

January 7, 2019 Counsel for SOS contacts representatives from the Indiana Counterterrorism and Security Council (CTASC) to discuss materials the agency believes should be excepted from public access under IC 5-14-3-4(b)(19) and IC 5-14-3-4.4(b).

January 10, 2019 NEDC files its first complaint with the Office of the Public Access Counselor (PAC).

January 11, 2019 The PAC notes that NEDC and the agency do not appear to be at an impasse and advises that the NEDC's complaint will be held with reservation of rights, while the parties work on the request.

January 14, 2019 Counsel for SOS corresponds with counsel for NEDC via email.

January 15, 2019 Counsel for NEDC corresponds with counsel for SOS via email and letter.

January 18, 2019 Counsel for SOS corresponds with counsel for NEDC via email and letter.

January 22, 2019 Counsel for NEDC corresponds with counsel for SOS via email.

January 22, 2019 – February 1, 2019 SOS staff work on NEDC's request.¹

January 24, 2019 SOS counsel and agency staff meet with representatives of CTASC to discuss application for CTASC review of materials the agency believes should be excepted from public access per IC 5-14-3-4(b)(19) and IC 5-14-3-4.4(b). The SOS is advised that the SOS's items will be placed on the CTASC March 13, 2019 meeting executive session and public meeting agenda.

February 1, 2019 Counsel for NEDC emails counsel for SOS requesting status update.

February 1, 2019 Counsel for SOS corresponds with counsel for NEDC via email and letter.

February 7, 2019 NEDC files second complaint with PAC.

¹ Note: As alluded to in the opening of the SOS 2/1/19 letter to NEDC's counsel, agency work on the request was delayed due to a confluence of events, including the SOS's counsel's travel to a family member's funeral, an unusual "extreme polar vortex weather event", which essentially closed the agency's office for two days, and the unavailability of agency executive staff needed to review documents (attending the NASS winter conference in Washington DC, January 31 through February 4).

February 12, 2019 SOS corresponds with counsel for NEDC by letter and email providing spreadsheet summary of 876 documents retrieved and reviewed – indicating statutory exceptions claimed, if any, for each, and copies of 158 documents which the agency deems available for public access.

February 19, 2019 Notice from PAC to SOS – to respond to NEDC’s complaint by March 8, 2019.

ATTACHMENT B

From: Susan Greenhalgh
To: Shanna Cleveland
Subject: Fwd: Public Records Request
Date: Thursday, January 10, 2019 3:53:59 PM

Susan Greenhalgh
Policy Director
National Election Defense Coalition
917 796 8782

----- Forwarded message -----

From: Susan Greenhalgh <susan@electiondefense.org>
Date: Thu, Sep 13, 2018 at 2:43 PM
Subject: Public Records Request
To: <elections@iec.in.gov>

To whom it may concern,

Under the Indiana Access to Public Records Act § 5-14-3-1 et seq., I am requesting copies of public records:

1. A copy of every correspondence (written, email, fax, voicemail or other) sent from anyone at the Secretary of State's office, including but not limited to the Secretary and staff, to anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.
2. A copy of every correspondence (written, email, fax, voicemail or other) sent to anyone at the Secretary of State's office, including but not limited to the Secretary and staff, from anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.

The requested information is in the public interest and will contribute significantly to the public's understanding of national election integrity. This information is not being sought for commercial purposes.

The Indiana Access to Public Records Act requires a response time within seven business days. If access to the records I am requesting will take longer than seven days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Susan Greenhalgh
Policy Director
National Election Defense Coalition
917 796 8782

Rec'd Request

(A)

Bonnet, Jerry (SOS)

From: King, Brad
Sent: Thursday, September 13, 2018 2:47 PM
To: Bonnet, Jerry (SOS)
Cc: Simmons, Dale
Subject: FW: Public Records Request

FYI

From: Susan Greenhalgh [mailto:susan@electiondefense.org]
Sent: Thursday, September 13, 2018 2:44 PM
To: Elections <elections@iec.IN.gov>
Subject: Public Records Request

*Sent
OK mount
9/14/2018*

**** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ****

To whom it may concern,

Under the **Indiana Access to Public Records Act § 5-14-3-1 et seq.**, I am requesting copies of public records:

1. A copy of every correspondence (written, email, fax, voicemail or other) sent from anyone at the Secretary of State's office, including but not limited to the Secretary and staff, to anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.
2. A copy of every correspondence (written, email, fax, voicemail or other) sent to anyone at the Secretary of State's office, including but not limited to the Secretary and staff, from anyone at the National Association of Secretaries of State including every and all attachments and forwarded messages from May 1, 2017 to present.

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If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Susan Greenhalgh
Policy Director
National Election Defense Coalition
917 796 8782