

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 1
) SS:
COUNTY OF MARION) CAUSE NO. 49D01-1906-PL-024866

NATIONAL ELECTION)
DEFENSE COALITION,)
)
Plaintiff,)

v.)

)
CONNIE LAWSON,)
SECRETARY OF STATE OF THE)
STATE OF INDIANA, in her)
official capacity,)
)
Defendant.)

**REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

The National Election Defense Coalition (NEDC) attempts to use anecdotal evidence to distract from fact that the documents requested by NEDC were properly withheld from disclosure under various exemptions to disclosure under the Access to Public Records Act (APRA) by the Secretary of State of the State of Indiana (Secretary). As a result, the NEDC fails to put forth a legal basis for denying the Secretary from prevailing on motion for summary judgment, and consequently, this court should grant the Secretary's motion for summary judgment.

ARGUMENT

I. **Response to Plaintiff's statements regarding NEDC's request meeting the test for reasonable particularity.**

Despite Plaintiff's assertions, the Secretary and NEDC do *not* agree that the NEDC's request met the test for reasonable particularity. *See* Pl's Opp. to Def's Mot. for Summ. Judgment and Reply in Support of Pl's Mot. for Summ. Judgment (April 13, 2020) (hereinafter, "Plaintiff's Reply"), at 2. NEDC's requests were not "reasonably particular" as it did not specify a specific sender, recipient, date range, or subject. Though NEDC's request may have developed over time to include increasingly more specific information, the original request was not sufficiently specific. NEDC's original email request asked for a copy of "*every* correspondence" sent from the Office to anyone at the National Association of Secretaries of State (NASS), and "*every* correspondence" sent to NASS from the Office. 9/13/2018 Susan Greenhalgh email (emphasis added) (Complaint, Ex A). Such overbroad requests likely would not even satisfy the trial rules standards for discovery requests. *See* Ind. T.R. 26(B) Thus, the request was clearly not reasonably particular. Just because the parties agree on the factors that make a request "reasonably particular," it does not follow *ipso facto* that NEDC's request was, in fact, reasonably particular. Instead, "[e]ach request should be reviewed on a case-by-case basis." *Citizens Action Coalition of Indiana*, 49D01-1706-PL-025778 (quoting PAC Informal Inquiry, 14-INF-30, 2).

Although the Secretary still disputes some of Plaintiff's "Statement of Undisputed Facts" listed in Plaintiff's Motion for Summary Judgment, the

Secretary maintains that the material facts not in dispute are sufficient to entitle her to summary judgment. *See* Pl.'s Mot. for Summ. Judgment (Jan. 16, 2020), at 7-12.

II. A separate declaration or affidavit from the Secretary is unnecessary for her to be awarded summary judgment.

NEDC focuses on the lack of an affidavit in support of her Motion for Summary Judgment, but a movant need not attach evidence of this sort to his or her to be successful on summary judgment. *See* Ind. T.R. 56(C).

NEDC misunderstands the standard of review applicable in the summary judgment context. The entire purpose of summary judgment is to resolve disputes about which there is no genuine dispute as to any material facts. Ind. T.R. 56(C). The Secretary does not dispute the material facts in this matter—beyond the challenges explicated above, which do not affect the outcome of this case—and so is entitled to summary judgment as a matter of law. *Id.* Contrary to Plaintiff's assertions, the only reason the Secretary would have included any affidavits or declarations in support of her Motion for Summary Judgment would have been to create a dispute as to material fact(s). The Secretary contends she is entitled to summary judgment as a matter of law based on the facts as they currently appear before the Court. Consequently, the Secretary did not (and was not required to) submit any declarations or affidavits in support of her Motion for Summary Judgment. The only logical conclusion is that the Secretary is entitled to summary judgment as a matter of law. Indeed, even if the Court found the Secretary's

responses to Plaintiff's factual assertions to be inadequate, the Court should afford the Secretary an opportunity to further support her factual assertions.

Furthermore, some of the issues NEDC raises regarding a "lack of affidavit" are best directed at NASS, which is better suited to providing statements about their economic investment and the potential economic damage it could experience from unnecessary disclosure of the communications NEDC wants access to. However, NASS is not a party to this action, and as a nonpartisan professional organization with interests in all 50 states, the District of Columbia, and all U.S. Territories, NASS would need to maintain its position as a medium for the exchange of information between states' Secretaries of State.

III. The Secretary of State responded to NEDC's request in a timely manner.

Whether or not a response is timely under I.C. § 5-14-3-3(b) is determined on a case-by-case basis. When considering the timeliness of a response, it is critical to consider the breadth of the requests, the time and effort necessary to review and edit non-disclosable materials, and whether producing the documents materially interfere with the regular discharge of the functions and duties of the public agency. *See* PAC Advisory Opinion, 17-FC-277, 3-4 (Feb. 1, 2018); *See also* PAC Advisory Opinion, 10-FC-160, 2 (August 9, 2010). Despite the fact that the requests made by NEDC were initially extremely overbroad, and only moderately narrowed over the course of litigation, the Secretary has still provided NEDC with thousands of

responsive documents and “has kept NEDC updated to the progress of the search” as noted by the Opinion of the Public Access Counselor on this very issue.¹

NEDC conflates the issues of timeliness with the sufficiency of documents provided. NEDC’s assertions that timeliness is still at issue is simply incorrect, since the Secretary timely provided NEDC documents she determined to be available for public inspection. The documents which have not been provided are not forthcoming, and so they are not “late” – they are being withheld for appropriate reasons pursuant to valid exceptions. Therefore, this is not an issue of timeliness, because the documents subject to production have been provided within the reasonable time as contemplated by the statute. Thus, the *sufficiency* of the Secretary’s product is not truly at issue, for the reasons explicated below.

IV. The Secretary has properly withheld records pursuant to public safety, trade secret, and deliberative materials considerations.

a. Exemption from disclosure due to public safety concerns

The General Assembly accounted for the risks to public safety by requiring that unnecessary disclosures of information be prohibited if such disclosure would “have a reasonable likelihood of threatening public safety.” I.C. § 5-14-3-4.4(b). The Secretary understands that the public’s safety is of paramount importance, and so when she determined which documents implicated public safety, she did not do so unilaterally. Rather, the Secretary, in compliance with I.C. § 5-14-3-4.4(b), consulted with the Indiana Counterterrorism and Security Council, an agency specifically designed to protect the citizens of Indiana from threats to their safety.

¹ See PAC Advisory Opinion, 19-FC-16, 2 (Feb. 12, 2019)

With the risk that cyberterrorists may target our elections process, the Secretary gave deference to the reasoned judgments of the Indiana Counterterrorism and Security Council in order to balance the interests of public safety with the interests of disclosure of the requested documents. Consequently, the documents the Secretary has withheld due to the public safety exemption are being properly withheld.

NEDC argues that the Secretary has failed to provide specificity that the records she has withheld will expose election infrastructure to terrorist attack but NEDC fails to understand the entirety of I.C. § 5-14-3-4.4(b), which states, in relevant part, that the exception permits the Secretary to “[r]efuse to confirm or deny the existence of the record regardless of whether the record exists or does not exist, if the fact of the record’s existence or nonexistence would reveal information that would have a reasonable likelihood of threatening public safety.” Even under the most minimalist reading of this exception, it is clear that the legislature contemplated that, in some instances, information will be withheld without providing specific, or, for that matter, any information about the documents. With election security being of vital importance to the State of Indiana, the Secretary maintains that the requested documents are exempt from disclosure under APRA.

b. Communications with NASS are exempted deliberative materials under an intra-agency and private contractor theory.

The “deliberative materials” exception, as codified in I.C. § 5-14-3-4(b)(6) states that public records may be excepted from disclosure at the discretion of a public agency if the records “are intra-agency or interagency advisory or

deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.”

As previously stated, the primary purpose for this exception is to “prevent injury to the quality of agency decisions” and to prevent “frank discussion of legal or policy matters in writing” from being “inhibited.” *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 909-10 (Ind. Ct. App. 2003) (internal citations omitted). In these circumstances, public disclosure of deliberative agency material is likely to lead to “decisions and policies” of poor quality. *See Id.*

This exception was designed for precisely the type of relationship that exists between the Secretary and NASS, in which NASS serves as a forum for Secretaries of State to discuss and disseminate public policy. NEDC seeks to conflate what it deem a lack of “adequate specificity” with a lack of legitimacy. Again, it fails to see the underlying application of the exception to the exempted materials. Not only is it necessary to exempt these communications to protect NASS’s decision making (“deliberating”) process, but also to protect the foundation of NASS as an organization, whose primary purpose is deliberative in nature. Forgoing the application of the deliberative materials exception would not only have a chilling effect on the functions (and consequently, benefits) of NASS, but it would also be a disservice to the citizens of Indiana by ignoring an exception carved out by the General Assembly for this exact situation.

While many of the members of NASS that the Secretary communicates with are other Secretaries of sister states, some of the employees within NASS inevitably do not hold the office of Secretary of State. However, the deliberative materials exception still applies, since those members of NASS are a medley of other intra-agency members, and would *still* be afforded the protections offered under the deliberative materials exception. *See* I.C. § 5-14-3-4(b)(6). Accordingly, the requested emails are exempted deliberative materials under I.C. § 5-14-3-4(b)(6).

c. The Trade secrets exemption applies to the communications between the Secretary and NASS members.

In its regular course of business, NASS disseminates information to its members, including the Secretary, which are exempted trade secrets under Indiana law. Maintaining these trade secrets is integral to the continuation of NASS's mission to foster a candid forum for Secretaries of State to communicate openly and honestly about ongoing programs and initiatives within their respective states.

Indiana Code § 5-14-3-4(a)(4) exempts records which contain trade secrets from disclosure under APRA. I.C. § 24-2-3-2 (as incorporated via I.C. § 5-14-3-2(t)) lays out four basic characteristics of a trade secret: (1) it is information, including a formula, pattern, compilation, program, device, method, technique, or process; (2) which derives independent economic value, actual or potential; (3) from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (4) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In Plaintiff's Reply, NEDC concedes that the first and fourth characteristics referenced above are not at issue. Rather, NEDC contends that the Secretary has failed to provide sufficient evidence that her communications with NASS provide any "independent *economic* value that depends on non-disclosure." (emphasis in original). See Plaintiff's Reply at 12.

As the nation's oldest nonpartisan professional organization for public officials, NASS has served as an example of nonpartisan cooperation whose economic value is difficult to quantify. NEDC bemoans the lack of an affidavit in this regard, but it conveniently fails to recognize the obvious economic value NASS provides to its members. Additionally, NEDC fails to see that it is of the utmost importance that to continue providing value to its members, NASS's communications within its membership must remain confidential. Failing to keep NASS's communications confidential would lead to irreparable damage to its pecuniary interests, and would undoubtedly make it more difficult for NASS to escape partisan scrutiny and pressure from third parties.

NASS is a nonpartisan organization that was founded in 1904 and has had over a century to develop and perfect its proprietary processes and its methods of communication and collaboration. Subjecting these methods to public disclosure would absolutely devastate the economic value, both actual and potential, cultivated by NASS throughout its long history. The members of NASS derive immense benefit from their communications and deliberations being held in strict confidence and *not* readily ascertainable or generally known to the public. Further, NASS's inclusion of

the disclaimer at the bottom of their emails, while not the source of the Secretary's claims for the trade secret exemption, clearly demonstrate that this information is the subject of efforts that are reasonable under the circumstances to maintain secrecy.²

The Secretary and NASS's communications meet the definition for trade secrets as codified in I.C. § 24-2-3-2, and are therefore exempt under the trade secret disclosure exemption in APRA via I.C. § 5-14-3-4(a)(4).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court deny the NEDC's motion for summary judgment, and grant the Secretary's motion for summary judgment.

Respectfully submitted,
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² The disclaimer reads as follows: "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." See Memorandum in Support of Defendant's Cross Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment at 19.

CERTIFICATE OF SERVICE

I certify that on May 7, 2020, the foregoing was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing in the U.S. mail, first class postage prepaid, if exempt or non-registered user:

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