STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)	ss:
COUNTY OF MARION	)	CAUSE NO. 49D06-1906-PL-024866

NATIONAL ELECTION DEFENSE COALITION,	)
	)
Plaintiff,	)
	)
v.	)
	)
CONNIE LAWSON, SECRETARY OF STATE OF THE STATE OF INDIANA, in her official capacity,	)
	)
Defendant.	)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Issues Presented

The Indiana Access to Public Records Act requires public agencies to provide copies of public records on request within a reasonable time. The National Election Defense Coalition asked the Secretary of State for copies of correspondence (including email) with an external private non-governmental organization. The Secretary produced some records, but she has not disclosed any email messages. Sixteen months have passed since the initial request.

1. Has the Secretary unlawfully denied access to public records?

2. Has the Secretary failed to provide public records within a reasonable time?

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INTRODUCTION

This action under the Indiana Access to Public Records Act (APRA), Indiana Code (I.C.) §§ 5-14-3-1 *et seq.*, seeks access to public records—communications between the Indiana Secretary of State and an outside organization—regarding the reliability and security of voting machines.

Secretary of State Connie Lawson was the 2017-18 President of the National Association of Secretaries of State (NASS), a national non-governmental organization. As president and past president of NASS, Secretary Lawson has frequently issued statements to the media, public, and elected officials about the security and trustworthiness of voting systems in the United States. As a leader of NASS, Secretary Lawson's comments can be especially influential in shaping U.S. policy necessary to secure our election infrastructure.

The National Election Defense Coalition (NEDC), a non-partisan non-profit organization, seeks information about the 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's office on this topic.

After several months' delay, the Secretary eventually provided some records, including a "random sampling" for "preview purposes." But despite the passage of *sixteen months* since NEDC submitted its request, and good-faith efforts by NEDC to explicitly narrow its request, the Secretary has still not provided a complete response. Moreover, even in the "preview," she withheld a large number of apparently responsive documents on tenuous legal grounds, including "copyright" issues supposedly stemming from a boilerplate disclaimer at the bottom of all NASS email messages. After months of fruitless exchanges and a complaint to the Indiana Public Access Counselor, NEDC has still not received the vast majority of responsive records.

Summary judgment is appropriate here because the key facts are not in dispute and the only questions before the court are legal.[1]

STATUTORY BACKGROUND

The Access to Public Records Act (APRA) implements the state policy "that all persons are entitled to full and complete information

[1] Of note, for the vast majority of factual allegations in the complaint, the Secretary's Answer and Statement of Affirmative Defenses either admits the allegation or asserts that no response is required.

regarding the affairs of government and the official acts of . . . public officials and employees." I.C. § 5-14-3-1.

Under APRA, "[a]ny person may inspect and copy the public records of any public agency," provided that the request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). The public agency "may not deny or interfere with" the request. I.C. § 5-14-3-3(b). Rather, the agency must provide access to the materials within "a reasonable time." *Id.*

Public agencies must release requested records to the public unless specific statutory exemptions apply. If an agency denies all or part of a written record request, it must provide "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)(A). Because APRA "shall be liberally construed" to implement the policy of full and complete information regarding the affairs of government, the statute expressly "place[s] the burden of proof for the nondisclosure of a public record on the public agency." I.C. § 5-14-3-1.

STATEMENT OF UNDISPUTED FACTS

Pursuant to T.R. 56(C), Plaintiff designates the following pleadings, admissions, declarations, exhibits, and other undisputed facts upon which it relies for purposes of its motion for summary judgment.

On September 13, 2018, Susan Greenhalgh, NEDC's Policy Director, emailed an APRA records request to the Secretary's office. The request sought copies of "every correspondence" that was either (1) "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. (Compl. ¶ 15, Ex. A; Answer ¶ 15.)[2]

Three months later, the Secretary provided a response. (Compl. ¶ 16, Ex. B; Answer ¶ 16.) She disclosed materials consisting largely of publicly available agency records, such as pamphlets or public announcements. (*Id.*) However, the disclosed materials did not include

[2] Exhibits A-M were attached to the complaint; Ex. X-Z are attached to the Declaration of William Groth; and Ex. 1-4 are attached to the Declaration of Susan Greenhalgh.

any correspondence (such as email messages) between the Secretary and NASS.[3] (Compl. ¶ 16; Answer ¶ 16; Greenhalgh Decl. ¶ 6.) The Secretary added that an unspecified number of requested materials in her possession were "not available for public inspection" for various reasons. (Compl. ¶ 16, Ex. B; Answer ¶ 16.) However, after an exchange of further correspondence, on December 20, 2018, the Secretary advised NEDC that she might in fact have responsive records available, but the request (in her view) lacked specificity. (Greenhalgh Decl. ¶ 7, Ex. 2.)

In response, over the course of several further communications in December 2018 and January 2019, NEDC twice narrowed its request. First, NEDC explicitly limited the request 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. (Greenhalgh Decl. ¶ 8, Ex. 4; Ex. M, at 4.)

Second, in response to a direct suggestion from the Secretary—who had advised NEDC that it "would considerably shorten the

[3] For brevity, this brief uses "the Secretary" to refer to her office. NEDC's interactions occurred largely with her counsel.

retrieval and evaluation time involved" if NEDC would explicitly narrow its request to agency communications addressing only "election integrity and cybersecurity" (Compl. ¶ 27, Ex. G; Answer ¶ 27)—NEDC expressly narrowed its request 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. (Compl. ¶ 28, Ex. H; Answer ¶ 28.)

The Secretary informed NEDC that she had developed "a random ***sampling*** of documents matching specified search criteria, for ***preview purposes***," consisting of 339 emails with 537 attachments. (Compl. ¶ 29, Ex. I, at 2; Answer ¶ 29) (emphases in original). However, she stated that she required still more time for further consideration and consultations. (Compl. ¶ 29, Ex. I, at 3; Answer ¶ 29.)

On February 7, 2019, NEDC filed an amended complaint with the Indiana Public Access Counselor, a state official who issues advisory opinions regarding public access laws. (Compl. ¶ 30, Ex. J; Answer ¶ 30.) *See* I.C. § 5-14-4-10.

Five days later, the Secretary released the results of her analysis of the initial "sampling of materials." (Groth Decl. ¶ 5, Ex. X.) She

disclosed some of them, and provided what appeared to be an exemption log regarding that random sampling. (Groth Decl. ¶¶ 6-8, Ex. Y, Z.) She appeared to withhold records on three grounds: NASS's purported copyrights or trade secrets; deliberative process; and security or public safety. (Groth Decl. Ex. Y, Z.) Regarding the security and public safety exception, she stated that she had initiated consultations with the Indiana Counterterrorism and Security Council, and expected to receive guidance "sometime in March." (Groth Decl. Ex. Z.)

After reviewing the disclosed materials in the random sampling, NEDC determined that the documents disclosed by the Secretary's office on February 12, 2019 consisted largely of PowerPoint presentations, brochures, copies of bills, copies of testimony, handbooks from the federal Department of Homeland Security, and other materials already made public. (Greenhalgh Decl. ¶ 10.) Some of them appeared to be identical to the materials that had been disclosed in December. (Greenhalgh Decl. ¶ 10.)

NEDC informed the Secretary that the materials appeared to include *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). (Compl. ¶ 32, Ex. K; Answer ¶ 32.) In fact, the materials disclosed on February 12, 2019 did not include *a single email message*. (Greenhalgh Decl. ¶ 11.)

Later that month, the Secretary responded to the complaint before the Public Access Counselor. (Compl. ¶ 33, Ex. M; Answer ¶ 33.)[4] She repeated the assertion of denials specified in the February 12 exemption log for the initial random sampling, and defended the pace of the response based on the breadth of the request. (Ex. M; Compl. ¶¶ 33-37; Answer ¶¶ 33-37.)

On April 11, 2019, the Public Access Counselor issued an undated advisory opinion designated No. 19-FC-16.[5] (Compl. ¶ 39, Ex. L; Answer ¶ 39.) He "decline[d] to issue a definitive declaration on the issue of the timeliness in this case," opining that "five months is normally much too

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[4] Due to a scrivener's error, paragraphs 33 and 39 of the complaint inadvertently swapped the signifiers Ex. L and Ex. M. For the benefit of the court, and since it causes no prejudice to the Secretary, this memorandum refers to the exhibits attached to the complaint as they are in fact labeled.

[5] The Public Access Counselor's advisory opinions in response to formal complaints are available online at https://www.in.gov/pac/2330.htm. "Informal" advisory opinions are available at https://www.in.gov/pac/2329.htm.

long to produce documents pursuant to a request" but suggesting that the initial request was broad. (Ex. L, at 5-6.) He further speculated that some of the exemptions urged by the Secretary's office could 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." (Compl. ¶ 39, Ex. L, at 6-9; Answer ¶ 39.)

On June 20, 2019, NEDC filed this action. The Secretary has not produced any further documents or exemption logs since February 12, 2019. (Compl. ¶ 42, Answer ¶ 42.)

ARGUMENT

I. Standard of review

The court reviews de novo an action against a public agency to compel disclosure of a public record. I.C. § 5-14-3-9(f); *Scales v. Warrick Cty. Sheriff's Dep't*, 122 N.E.3d 866, 871 (Ind. Ct. App. 2019).

The burden of proof lies "on the public agency to sustain its denial." I.C. § 5-14-3-9(f); I.C. § 5-14-3-1 (burden lies on agency, "not on the person seeking to inspect and copy the record"); *Scales*, 122 N.E.3d at 870-71. Exceptions to disclosure must be construed narrowly. I.C. § 5-14-3-1 (APRA shall be "liberally construed to implement" the policy

of full and complete information"); *Consumer Atty. Servs., P.A. v. State*, 71 N.E.3d 362, 366 (Ind. 2017) (where legislature has expressly directed a statute be liberally construed, courts must give a narrow construction to its exceptions); *Ind. Bell Tel. Co. v. Ind. Utility Regulatory Comm'n*, 810 N.E.2d 1179, 1181 (Ind. Ct. App. 2004) (upholding agency's decision to construe APRA exception narrowly because "[l]iberal construction of a statute requires narrow construction of its exceptions") (quotation marks and citation omitted).

Summary judgment is appropriate where the evidence designated by the parties shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Tr. R. 56(c); *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 938 N.E.2d 685, 689 (Ind. 2010). Courts grant summary judgment to APRA requesters when agencies do not meet their burden of justifying denial of access. *E.g., Citizens Action Coalition of Ind. v. Office of the Governor*, No. 49D01-1706-PL-025778, slip op. at 11, 17 (Marion Sup. Ct. Sept. 24, 2018) (order on summary judgment).

II. NEDC's request was reasonably particular because it specified sender, recipient, date, and subject.

By January 22, 2019, NEDC had perfected an APRA request that satisfied APRA's "reasonable particularity" requirement because it identified a specific sender, recipient, date range, and subject, thus enabling the Secretary to identify the materials sought via electronic search. In general, an APRA request satisfies the reasonable particularity requirement "if the request enables the [agency] to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request." *Jent v. Fort Wayne Police Dep't*, 973 N.E.2d 30, 33 (Ind. Ct. App. 2012) (quotation marks and citation omitted) (extending definition of "reasonable particularity" from discovery rules to APRA); *cf.* Ind. Tr. R. 34(B). In *Jent*, the request lacked reasonable particularity because the agency's record-keeping software could not search its records using the requested parameters, rendering the agency literally "unable to fulfill the request." *Id.* at 34.

In the context of email communications, an APRA request satisfies reasonable particularity if it enables the agency to "identify what is sought" by specifying the types of search parameters that email

software uses to identify messages: sender, recipient, date range, and subject keywords. *See Citizens Action Coalition*, slip op. at 8 (approvingly citing guidance from Public Access Counselor); PAC Informal Inquiry No. 14-INF-30 (Nov. 18, 2014), at 4. NEDC's Request #1 specifies these elements as follows:[6]

1. *Sender*: anyone at the Secretary of State's office (Ex. A), excluding any staff member who holds a security clearance. (Greenhalgh Decl. ¶ 8, Ex. 4.) APRA does not require requesters to name specific employees of government agencies. *See Citizens Action Coalition*, *supra*, at 9-10.

2. *Recipient*: "anyone at the National Association of Secretaries of State" (Ex. A) with an email address at the domain @nass.org or @sso.org (Ex. M, at 4; Greenhalgh Decl. ¶ 8, Ex. 4.) APRA does not require members of the public to identify specific employees at outside organizations communicating with public agencies. *See Citizens Action Coalition*, *supra*, at 11.

[6] Request #2 is simply the mirror image of Request #1—the recipient in Request #1 is the sender in Request #2, and vice versa.

3. *Date range*: May 1, 2017 to September 13, 2018 (Ex. A), later extended to January 22, 2019 (Ex. H).

4. *Subject*: NEDC's request, as narrowed on January 22, 2019, seeks communications that contain the terms "election," "elections," "voting," "executive board," "cybersecurity," or any abbreviations of those terms used by the Secretary or her staff (Compl. ¶ 28, Ex. H), excluding any communication that is classified. (Greenhalgh Decl. ¶ 8, Ex. 4.)

III. The Secretary has failed to complete her response to the request within a reasonable time because sixteen months is not reasonable.

Public entities must provide a final response to an APRA request within a "reasonable time after the request is received by the agency." I.C. § 5-14-3-3(b). Here, sixteen months have passed since NEDC filed its APRA request on September 13, 2018. (Compl. ¶ 15, Ex. A.) This is an extraordinary length of time to fulfill an APRA request, and counsel is not aware of any Public Access Counselor or court decision upholding such a period as a "reasonable time."

The Secretary has not released any records or exemption logs since February 12, 2019. (Compl. ¶ 42; Answer ¶ 42.) That partial

response represented what the Secretary had described as merely "a random ***sampling*** of documents matching specified search criteria, for ***preview purposes***." (Compl. ¶ 29, Ex. I, at 2) (emphases in original). As to the remainder of the public records responsive to NEDC's requests, the Secretary has provided neither documents nor exemption logs.

The Secretary's best argument is that the initial request was broad. As of April 2019, the Public Access Counselor largely agreed with this type of argument. At that time, the Public Access Counselor concluded that "five months is normally much too long to produce documents pursuant to a request," and that "the production of documents was not reasonably timely." (Compl. ¶ 39, Ex. L, at 5, 9.) However, he "decline[d] to issue a definitive declaration on the issue of timeliness" because, in his view, there was "some contributory culpability on the part of the complainant for submitting a deficient request." (Compl. ¶ 39, Ex. L, at 6, 9.)

But whatever force that argument may have had in April 2019, the delay is certainly unreasonable *now*, a year after NEDC narrowed its request to meet the Secretary's concern. And while the Secretary did provide a small initial partial disclosure (of a "random sampling" of

responsive records) on February 12, 2019, eleven more months have passed since then, during which the Secretary has not provided any further documents or exemption logs. (Compl. ¶ 42; Answer ¶ 42.) Nor, for that matter, has she provided a final denial.

The Secretary's delay fails the "reasonable time" test whether it is measured from September 13, 2018 (submission of the APRA request), January 22, 2019 (narrowing of the subject keywords), or even the end of March 2019 (the date of the Secretary's planned resolution of questions regarding security and public safety exception).[7] Even measured from that last date, NEDC has waited ten months—twice as long as what the Public Access Counselor has termed "much too long to produce documents."

[7] The Secretary asserted in February 2019 that she would need to consult with the Indiana Counterterrorism and Security Council regarding APRA's security and public safety exception, and that this process would be complete by the end of March 2019. (Ex. I, at 3; Ex. M, at 6.) But she has not provided NEDC any further information regarding the security and public safety exception. (Compl. ¶ 38; Answer ¶ 38.)

IV. The Secretary improperly denied or interfered with the right to inspect records.

A. The Secretary has constructively denied the request by failing to complete her response.

The Secretary has not, to NEDC's knowledge, officially denied NEDC's request.[8] She described her most recent APRA response, on February 12, 2019, as addressing "a random ***sampling*** . . . for ***preview purposes***," (Compl. ¶ 29, Ex. I, at 2) (emphases in original), and the the Public Access Counselor understood it as an "initial batch" of materials. (Ex. L, at 3.) She told both NEDC and the Public Access Counselor in February 2019 that she was planning to consult with the Counterterrorism and Security Council that March. (Ex. I, at 3; Ex. M, at 6; Ex. Z.) Nonetheless, she has not produced any further documents or exemption logs since February 12, 2019. (Compl. ¶ 42; Answer ¶ 42.)

The Secretary's delay in addressing the remainder of the responsive records amounts to constructive denial of the right to inspect public records without providing the full statement of exemptions required by I.C. § 5-14-3-9(d)(2)(A).

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[8] As noted above, the Secretary's first response was in fact to provide a partial disclosure and then deny the remainder of the request. (Compl. ¶ 16, Ex. B; Compl. ¶ 18, Ex. C.) But then she began working to fulfill the request. (Compl. ¶ 25, Ex. E.)

B. The Secretary's denial of records based on NASS's purported copyrights is improper because email boilerplate does not establish copyright and, even if it did, copyrighted materials are not exempt.

The Secretary's denial of access to NASS email messages on the basis of purported copyright claims violated APRA because a boilerplate email signature does not establish copyright, and copyright law does not bar APRA disclosure anyway.

The Secretary has claimed that every email message from NASS to her office is exempt under I.C. § 5-14-3-4(a)(3) (records required to be kept confidential by federal law), based on standard boilerplate apparently found at the end of every single email sent from NASS to the Secretary's office:

> *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.*

(Compl. ¶ 35, Ex. M, at 5.)

As a matter of common sense, if an outside party could block disclosure of its communications to an Indiana public agency simply by appending a boilerplate copyright claim to its email template, then

every major corporation, lobbyist, advocacy group, or other organization communicating with state agencies would do so. That would rip an enormous hole in APRA and shield a vast trove of incoming communications from the public.

As a matter of law, the Secretary's argument fails for three different reasons.[9]

First, boilerplate disclaimers at the bottom of email messages do not alter the legal status of these messages. They may prevent forfeiture of rights, but they do not, of themselves, create rights or obligations. *See, e.g.*, *Innospan Corp. v. Intuit, Inc.*, No. 10-04422, 2011 WL 856265, at *5 (N.D. Cal. Mar. 9, 2011) (rejecting claim that automated signature block created "a binding contract to keep the contents confidential"); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 564 (S.D.N.Y. 2008) (rejecting claim that automated signature block claiming attorney-client privilege converted email into privileged communication).

[9] Cases from federal courts and other states are cited herein because, as the Secretary has noted, "there appears to be a scarcity of on-point Indiana guidance or case law on this issue." (Ex. M, at 5.) *See Piatek v. Beale,* 994 N.E.2d 1140, 1146 (Ind. Ct. App. 2013) (examining out-of-state decisions in similar situation).

Second, the fact that a document is copyrighted does not make it "required to be kept confidential by federal law" under I.C. § 5-14-3-4(a)(3). The federal Copyright Act, 17 U.S.C. §§ 101 *et seq*., is not a confidentiality statute. The purpose of copyright is not keeping secrets but rather "enriching the general public through access to creative works." *Fogerty v. Fantasy, Inc*., 510 U.S. 517, 527 (1994).

Thus, state public records statutes that exempt documents required to be kept confidential by federal law generally do not treat the Copyright Act as a statute triggering such an exception. *See Ali v. Phila. City Planning Comm'n,* 125 A.3d 92, 101 (Pa. Commw. Ct. 2015) (holding that Copyright Act "is not a federal law that exempts materials from disclosure" under state public records law because it "neither expressly makes copyrighted material private or confidential, nor does it expressly preclude a government agency, lawfully in possession of the copyrighted material, from disclosing that material to the public"); *Pictometry v. Freedom of Information Comm'n*, No. HHBCV084019021S, 2010 WL 2822759, at *9 (Conn. Super. Ct. June 23, 2010) (holding that Copyright Act does not fall within state public records law exemption for federal laws requiring confidentiality

because Copyright Act "does not require confidential treatment by the government of copyrighted material, and it does not bar disclosure").

Even where courts have found the Copyright Act to be relevant, they have repeatedly held that its "fair use" exception, 17 U.S.C. § 107, applies when government agencies disclose material under a public records disclosure law. *See, e.g., State ex rel. Rea v. Ohio Dep't of Educ.*, 692 N.E.2d 596, 602 (Ohio 1998) (rejecting copyright as basis for withholding public records because fair use applies when "the material will be used for purposes such as criticism, research, comment, and for other educational or nonprofit purposes that are not commercial in nature"); *Lindberg v. Cty. of Kitsap*, 948 P.2d 805, 813-14 (Wash. 1997) (en banc) (rejecting copyright as basis for withholding public records

because fair use applied when requesters sought copyrighted records to prepare for comments and criticism in government processes).[10]

Finally, the fact that the purported copyright holder (NASS) has a statutory right to intervene to protect any copyright interests, *see* I.C. § 5-14-3-9(e), but elected not to do so here, indicates that NASS has forfeited any legal objection to the release of the emails.

CONCLUSION

For the foregoing reasons, NEDC respectfully requests that the Court grant its motion for summary judgment on Counts I (denial of right to inspect records) and II (unreasonable delay in providing records), declare that the Secretary violated APRA, award NEDC its

[10] None of the cases the Secretary cited to the Public Access Counselor support such a broad assertion of copyright to withhold records. *See Physicians Comm. for Responsible Med. v. United States Dep't of Agric.*, 316 F. Supp. 3d 1 (D.D.C. 2018) (holding that records submitted by outside party under contract specifying that submitter retained partial ownership over records generated in course of contract work were not "agency records" under federal Freedom of Information Act); *Cornucopia Inst. v. United States Dep't of Agric.*, 312 F. Supp. 3d 85 (D.D.C. 2018) (upholding trade secret exemption for document obtained from business in the course of investigation); *Public Employees For Envtl. Responsibility v. Office of Sci. & Tech. Policy*, 881 F. Supp. 2d 8 (D.D.C. 2012) (upholding trade secret exemption for portion of one specific email from outside party whose counsel asserted that it had submitted certain information inadvertently).

reasonable attorneys' fees and costs, and grant it any other relief deemed necessary to effectuate the public transparency purposes underlying APRA.

In the alternative, NEDC respectfully requests that the Court grant partial summary judgment holding that the boilerplate assertion of copyright in NASS email messages does not render them exempt from disclosure under I.C. § 5-14-3-4(a)(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 15, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same day the foregoing document was served upon the following person(s) via IEFS:

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/s/William R. Groth
William R. Groth, #7325-49