

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.)

**Memorandum in Support of Defendant's Cross Motion for Summary
Judgment and Response in Opposition to
Plaintiff's Motion for Summary Judgment**

The Secretary of State is entitled to summary judgment because, although she disclosed thousands of pages of documents to the requesting organization, she withheld some documents for reasons well-grounded in the exemptions provided under Indiana law, a conclusion recognized by Indiana's Public Access Counselor in a published decision. While the plaintiff organization, the National Election Defense Coalition (NEDC), asks this Court to grant it summary judgment, NEDC focuses its argument on a misapprehension of the reasons why the Secretary of State withheld certain documents. Accordingly, the Court should grant summary judgment in favor of the Secretary of State.

I. The facts show that the Secretary of State properly withheld documents from public disclosure.

a. Statement of Material Facts Not In Dispute¹

The record in this case shows the following undisputed material facts:

1. On September 13, 2018, Susan Greenhalgh, the National Election Defense Coalition’s Policy Director, sent to the Indiana Election Commission (a commission independent from the Secretary of State’s Office) a request under the Access to Public Records Act. While Ms. Greenhalgh asserts that the information sought “is in the public interest and will contribute significantly to the public’s understanding of national election integrity,” the email asks a copy of “*every* correspondence” sent from the Office to anyone at the National Association for Secretaries of State (NASS), and “*every* correspondence” sent to the Office from NASS. 9/13/2018 Susan Greenhalgh email (emphasis added)(Complaint, Ex A).

2. The Secretary has historically maintained some state records, and now has duties that include chartering new businesses, regulating the securities industry, overseeing state elections, commissioning notaries public, registering trademarks, and licensing vehicle dealerships throughout Indiana. See <https://www.in.gov/sos/2362.htm> (last visited 2/21/2020).

3. The National Association of Secretaries of State (NASS) was founded in 1904, and “is the nation's oldest, nonpartisan professional organization for public officials.” Membership in NASS is open to the 50 states, the District of Columbia

¹ Defendants accept these facts as true for the purposes of summary judgment only.

and all U.S. Territories. “NASS serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy. The association has key initiatives in the areas of elections and voting, state business services, and state heritage/archives.” See <https://www.nass.org/about-nass> (last visited 2/21/2020).

4. On December 13, 2018, after having acknowledged receipt of the request, Jerold Bonnet, General Counsel for the Secretary of State, provided a CD with documents responsive to the NEDC’s request, but explained that some agency materials would be withheld under both federal and state law. December 13, 2018 Bonnet letter (Complaint Ex. 2).

5. After Ms. Greenhalgh complained that the over 400 pages of records were not responsive to the NEDC’s request, Mr. Bonnet sent another letter on December 18, 2018, explaining that NASS is not a public agency, so NASS’s communication may not be available for public inspection under Indiana law. Further, Mr. Bonnet explained that the information may also be withheld under federal (the Federal Critical Infrastructure Information Act of 2002) or state law because of security concerns and state law, including advisory, deliberative and decision-making information. 12/18/2018, Bonnet letter (Complaint Ex. C).

6. Mr. Bonnet sent another letter on December 20, 2018, explaining that, while NASS documents are generally not available for public inspection, the Office was not foreclosing the possibility that certain communications may be available for public inspection. But the breadth of NEDC’s request placed too much of a burden on the

Office, so the request was not reasonable or practical. The letter noted that the Office’s “high level of engagement on election integrity and cybersecurity issues between the Department of Homeland Security, which designated U.S. Elections as ‘critical national infrastructure’ in January 2017, and Secretaries of State (most of whom now have security clearances) and NASS, has added [a] level of complexity to the issue of public access to certain materials.” 12/20/2018 Bonnet letter (Pl. Motion for Summary Judgment Exhibit).

7. Ms. Greenhalgh, in response to Mr. Bonnet’s correspondence, limited NEDC’s request to communication between the Secretary of State’s Office and any recipient with an email domain @nass.org or @sso.org from May 1, 2017 to present. Ms. Greenhalgh noted that the parties would continue their discussion of the request after the New Year. The letter did not limit the requested documents to a particular subject. 12/21/2018 Greenhalgh letter (Pl. Motion for Summary Judgment Exhibit).

8. NEDC filed its formal complaint with the Public Access Counselor on January 10, 2019, through William Groth and other counsel. Office of the Public Access Counselor, Formal Complaint (Complaint exhibit D).

9. Luke Britt, the public access counselor, promptly notified the parties that, based on Ms. Greenhalgh’s suggestion in her January 21, 2018, letter that the parties would continue to talk in the new year, he would put NEDC’s complaint in abeyance while the parties continued their discussions because they did not appear to be at an impasse. 1/11/2019 Britt email. Complaint Ex. H).

10. Mr. Bonnet sent to Mr. Groth on January 14, 2019, an email explaining that Office staff continued to retrieve and review requested emails, reiterating that the Office needed to review the documents from several angles, including commercial proprietary interest and security concerns. 1/14/2019 Bonnet email (Complaint Ex. H).

11. In a letter dated January 15, 2019, Mr. Groth objected to the Secretary's explanations for why certain information would be withheld, and noted that the subject of the request was limited to "election integrity and cybersecurity." 1/15/2019 Groth email. (Complaint exhibit F).

12. Mr. Bonnet responded through a January 18, 2019, letter, noting that with the limitation to election integrity and cybersecurity, the Office would probably be able to provide a log of withheld documents within ten days. Mr. Bonnet also noted that Office staff was using the "smart sampling" feature of its e-discovery program to identify the likely number of responsive documents. 1/18/2019 Bonnet letter (Complaint Ex. G).

13. Mr. Groth responded on January 22, 2019, providing further clarification about the scope of NEDC's request, limiting the emails to those with the terms "election," "elections," "voting," "executive board," "cybersecurity," and any abbreviations of these terms the Office may use. 1/22/2019 Groth email. (Complaint Ex. H).

14. On February 1, 2019, Mr. Bonnet provided a more comprehensive explanation of the Office's justifications for withholding documents. Specifically, Mr. Bonnet noted NASS's trade secret protection rights; the Office's deliberative discretion rights,

which necessitated a more time-consuming review of the many documents that were retrieved through the Office's e-discovery program; and that some documents would be withheld because the Office, at its discretion, may withhold documents in the interest of security and public safety. Mr. Bonnet further explained that under Indiana Code 5-14-3-4.5(b), the Office has started consultation with the Indiana Counterterrorism and Security Council. 2/1/2019 Bonnet letter.

15. On February 12, 2019, Mr. Bonnet provided a spreadsheet describing each document withheld and providing the rationale behind the decision to withhold. In addition to the spreadsheet, Mr. Bonnet provided about 644 pages of materials determined to be available for public inspection. Mr. Bonnet also explained that the Office has continued its discussion with the Indiana Counterterrorism and Security Council about materials excepted from disclosure under Indiana Code 5-14-4-3(19). 2/12/2019 Bonnet email and letter (Pl. Motion for summary judgment exhibit).

16. Mr. Groth, on February 27, 2019, acknowledged that NEDC received the documents from the Secretary of State, but disputed that the documents provided were responsive to the requests. 2/27/2019 Groth letter (Complaint Ex. K).

17. Indiana's Public Access Counselor subsequently issued his opinion regarding the dispute, noting that the Office "has kept NEDC updated to the progress of the search." PAC opinion, p. 2. Further, the Public Access Counselor stated that NEDC's request "does not approach even a loose interpretation of reasonable particularity as set forth by [the Public Access Counselor's Office]." PAC opinion, p. 4. As far as any delay with the response to the request goes, the PAC also noted "some contributory

culpability on the part of the complainant for submitting a deficient request.” PAC opinion, p. 6. <https://www.in.gov/pac/advisory/files/19-FC-16.pdf> (last visited 2/21/2020).

18. The PAC concluded that the Secretary of State’s Office “carried its burden to this office that some, if not all, of the cited exemptions to disclosure could possibly apply to the withheld materials.” PAC opinion, p. 9. <https://www.in.gov/pac/advisory/files/19-FC-16.pdf> (last visited 2/21/2020).

b. Response to Plaintiff’s Statement of Material Facts

While the *material* facts listed above demonstrate that summary judgment should be granted in the Secretary of State’s favor, the NEDC provided a “Statement of Undisputed Facts.” The Secretary disputes some of the facts listed, but the disputed facts are not material in a way that would preclude this Court from granting summary judgment in the Secretary’s favor.

NEDC asserts that 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.” Pl. Motion for Summary Judgment, p. 8. This suggests that there was some subjective quality to the consideration that NEDC’s request was unspecific. Instead, the PAC noted that NEDC’s request “does not approach even a loose interpretation of reasonable particularity as set forth by [the Public Access Counselor’s Office].” PAC opinion, p. 4. <https://www.in.gov/pac/advisory/files/19-FC-16.pdf> (last visited 2/21/2020).

Also, the NEDC notes that the exemption log was for a “random” sampling. Pl. Motion for summary judgment, p. 11. While Mr. Bonnet did use “random” in a letter explaining the search, he later clarified that the search was through a “smart” search function through the Office’s e-discovery tool. Def. Facts, 12.

II. Summary Judgment Standard

The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *See Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361, 364 (Ind. Ct. App. 2002), trans. denied. Summary judgment should be granted when the designated materials show the moving party is entitled to judgment as a matter of law. *See Ind. R. Tr. P. 56(C); Christ v. K-Mart Corp.*, 653 N.E.2d 140, 142 (Ind. 1995). Once the moving party has shown the Court that no genuine issue of material fact exists, the non-moving party may not rest upon its pleadings alone to establish a genuine issue of material fact. *Id.* Instead, once the party moving for summary judgment has shown the absence of any genuine issue of material fact, the non-movant is then required to come forward with contrary evidence. *See Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 461 (Ind. 2002).

The mere existence of “disputed facts” will not preclude the granting of a summary judgment motion. Rather, in order to survive a motion for summary judgment, there must be a genuine issue as to material facts. Specifically, “a factual issue is genuine if it cannot be foreclosed by references to undisputed facts,” *Ewing v. Bd. of Trustees of Pulaski Mem. Hosp.*, 486 N.E.2d 1094, 1097 (Ind. Ct. App. 1985)

(citing *Jones v. City of Logansport*, 436 N.E.2d 1138, 1143 (Ind. Ct. App. 1982)), or the material issue of fact is “established by sufficient evidence supporting the claimed factual dispute to require the trier to resolve the parties’ differing versions of the truth at trial.” *Z Gas Inc. v. Hydrocarbon Transp., Inc.*, 471 N.E.2d 316, 318 (Ind. Ct. App. 1984). A fact is considered material if it helps prove or disprove an essential element of a plaintiff’s cause of action. See *Delk v. Bd. of Comm’rs of Delaware County*, 503 N.E.2d 436, 438 (Ind. Ct. App. 1987).

III. Analysis

a. NEDC acknowledged its original request was overly broad.

NEDC’s public records request related to the reliability and security of voting machines is overbroad, because it is likely to produce numerous, irrelevant materials. The Indiana Public Access Counselor (PAC) has found requests to be “reasonably particular” when they include: a specific sender, recipient, date frame, and *subject*. PAC Opinion, p. 4, fn. 3 (citing *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019)). “Each 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).

NEDC’s original request lacked a subject for email communications between the Secretary and NASS. “It is often helpful for an agency if a requester gives a finite subject matter for context so that superfluous, unwanted emails are not produced.” *Id.* NEDC’s original email request asked for a copy of “every correspondence” sent from the Office to anyone at NASS, and and “every correspondence” sent to NASS

from the Office. 9/13/2018 Susan Greenhalgh email (emphasis added)(Complaint, Ex A). The Secretary responded that the breadth of NEDC's request placed too much of a burden on the Office, because the request was not reasonable or practical, and the Office was not the custodian of NASS records. 12/20/2018 Bonnet letter (Pl. Motion for Summary Judgment Exhibit). NEDC responded by merely clarifying it requested communications between the Secretary of State's Office and *any recipient* with an email domain @nass.org or @sso.org from May 1, 2017 to present. 12/21/2018 Greenhalgh letter (Pl. Motion for Summary Judgment exhibit). This was an acknowledgement that the original request failed to include parameters recommended by PAC. But NEDC did not limit its request at that time to a particular *subject* matter, which leaves for a wide variety of communications unrelated to NEDC's inquiry into the reliability and security of voting machines.

This case is not like *Citizens Action Coalition of Indiana*, in which the requester sought communications solely related to negotiations involving Carrier in a timeframe of 15 days. 49D01-1706-PL-025778. There the Court found when a "request concerns a specific subject matter within a sufficiently limited period of time, the public agency should be able to identify the emails from any of the agency's employees which would be subject to a request." *Id.* Here, NEDC's subject matter did not provide enough information to conduct a reasonable search. In NEDC's formal complaint before PAC, PAC ruled that NEDC's original request "does not approach even a loose interpretation of reasonable particularity." PAC opinion, p. 4. Even after NEDC narrowed its request with the search terms "election," "elections," "voting,"

“executive board,” “cybersecurity,” and any abbreviations of these terms, the results “yielded well over 3000 pages of documents initially.” *Id.* 1/22/2019 Groth email. (Complaint Ex. H).

Thus, NEDC’s request is overbroad as found by PAC and the Secretary requests this Court find the same.

b. The Secretary of State has responded to NEDC’s request in a timely manner given its overly broad and burdensome request.

Under APRA a public entity must “provide the requested copies” or “allow the person to make copies” within a “reasonable time after the request is received by the agency.” I.C. § 5-14-3-3(b). The statute, however, does not define “reasonable time,” so what is reasonable is determined on a case-by-case basis. In addition, the PAC has identified factors that can help determine what is “reasonable time” in a given case: the nature of the requests (whether they are broad or narrow), whether the records must be reviewed and edited to delete non-disclosable material, PAC Advisory Opinion, 10-FC-160, 2 (August 9, 2010), and whether the production of responsive records materially interfere with the regular discharge of the functions and duties of the public agency, PAC Advisory Opinion, 17-FC-277, 3-4 (Feb. 1, 2018).

NEDC’s APRA request was, and still remains, incredibly broad. NEDC initially requested “*every* correspondence” sent from the Office to anyone at NASS, and vice versa. The Secretary promptly acknowledged receipt of the request and within three months produced over 400 pages in response. Frustrated by the inaccuracy of the results this incredibly broad request produced, NEDC attempted to narrow the scope by limited it to communication between the Secretary and any recipient with an email

domain @nass.org or @sso.org from May 1, 2017 to present. In an effort to expedite production, the Secretary suggested to run a search limited to election integrity and cyber security. Unsatisfied by the limitation, NEDC broadened the search terms by including “election,” “elections,” “voting,” “executive board,” “cybersecurity,” and any abbreviations of these terms the Secretary may use. The Secretary responded with an exemption log and additional 644 pages of responsive materials.

This summary clearly indicates that in one way or another, the Secretary has responded to and worked with NEDC to narrow the scope of the request and to make searching and producing the responsive documents more streamlined. Claiming that the Secretary has failed to respond within a “reasonable” timeframe is simply wrong. Additionally, any delay in responding to the request is justified by the broad and burdensome nature of the request. As the PAC determined on the issue of timeliness, NEDC has been contributorily culpable for submitting a deficient request. PAC Advisory Opinion, 19-FC-16, 6 (April 11, 2019).

The NEDC’s APRA request encompasses records that are exempt from disclosure under APRA. Specifically, the Secretary has identified several grounds for exemption: copyright and trade secret, deliberative privilege, and security and public safety concerns. Naturally, searching, examining and creating an exemption log takes much more time and expertise than simply searching and compiling the results. As with any request for information, “any communication” directed to the executive office, must first be located, and then must be reviewed by staff capable and authorized to determine if such communication contains information that the agency is prohibited

from releasing or information that an agency has discretion not to release. Especially where grounds for exemption concern security and public safety, any delay in production is outweighed by concern for the welfare of the public at large.

Responding to the NEDC's APRA request materially interfered with the regular discharge of the functions and duties of the Office. The NEDC submitted its request in September of 2018 – just before the November 2018 state-wide General Election. The Office was in the midst of preparing for the General Election, which required great attention to new sorts of security threats, procedures and precautions. One of the duties of the Office of the Secretary of State is oversight of state elections. Responding to the NEDC's APRA request any sooner would have interfered with one of the Office's essential responsibilities. Therefore, any delay in responding to the request was reasonable.

The Secretary has responded to NEDC's APRA request within the reasonable time contemplated by the statute. In addition, any delay can be justified by the overbreadth of NEDC's request, the presence of non-disclosable materials and the submission of the request on the eve of state election season.

c. The Secretary has properly withheld records.

APRA does not mandate disclosure of the records at issue in this case. Plaintiff conveniently ignores the Secretary's primary objection to producing emails between the Secretary and NASS and vice versa: disclosure of such emails constitutes an impermissible security risk under Indiana Code § 5-14-3-4(b)(19). Further, the Secretary's communication with NASS comprise intra-agency or interagency

advisory or deliberative material under Indiana Code § 5-14-3-4(b)(6) and are also exempted as trade secrets under Indiana Code § 5-14-3-4(a)(3).

1. The requested records are exempt from public disclosure because of public safety considerations.

First and foremost, public disclosure of email communications between the Secretary and NASS would have “a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack.” Ind. Code § 5-14-3-4(b)(19); *see also* Ind. Code § 5-14-3-4(b)(10)-(11) (concerning security of voting systems). As stated in letters to NEDC, the Secretary consulted with the Indiana Counterterrorism and Security Council in early 2019 in accordance with Indiana Code § 5-14-3-4.4(b) (“The agency may consult with the governor’s security council established by IC 10-19-8.1-2 in formulating a response [to an APRA request].”) and, as a result of that consultation, has chosen to maintain her objection on this basis. The requested records contain sensitive election security documents that should be shielded from public view or else Indiana’s elections could become the target of cyberterrorism attacks. It must be remembered that, under this exemption, APRA 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.” Ind. Code § 5-14-3-4.4(b). The Secretary maintains her position that this section is also applicable to the requested records and, thereby, that she is not required to be any more specific in response to Plaintiff than she already has been regarding the requested records.

Regardless, Plaintiff does not dispute, or even mention, this basis for refusing to provide the requested emails in its Motion for Summary Judgment, despite the PAC explicitly mentioning that election security documents “may contain sensitive materials these [public safety] exemptions were *designed to protect.*” PAC Op. at 8 (emphasis added). Consequently, having waived this argument, summary judgment should be granted to the Secretary as to the requested records on this ground alone. *See, e.g., JK Harris & Co., LLC v. Sandlin*, 942 N.E.2d 875, 882 (Ind. Ct. App. 2011). Public disclosure of the emails at issue in this matter would jeopardize the public safety of the State of Indiana and its citizens, particularly within the realm of election security. The requested emails are thereby exempt from any such disclosure under APRA. Ind. Code § 5-14-3-4(b)(19); *see also* Ind. Code § 5-14-3-4(b)(10)-(11).

2. The requested records are exempt because they constitute intra-agency deliberative material.

Emails between NASS and the Secretary and her office are also protected from public disclosure because they contain “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.” Ind. Code § 5-14-3-4(b)(6). The purpose of this exemption 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.
Id.

It should come as no surprise that the Secretary and her office regularly communicate with NASS and its members for the purpose of discussing policy and to aid the Indiana Secretary of State’s Office in making decisions as an agency, using the input and suggestions of other State Secretaries of State to help craft agency policy and inform agency decision-making. The members of NASS share information that furthers NASS’s purpose “as a medium for the exchange of information between states and fosters cooperation in the development of public policy.” (Undisputed Facts 1).

The “decisions and policies” formulated by the Secretary will be greatly diminished in quality if she cannot rely on advice and deliberations with other Secretaries of State without fear of public disclosure. Each Secretary of State NASS member tries to create uniform policies for his or her state that complement and work alongside the policies of other states. The PAC opinion explicitly recognized that “[t]he [deliberative material] exemption also qualifies if the communication is between [Indiana and] other states’ public agencies” PAC Op. at 7. Indeed, the PAC went on to say that “[t]herefore it is quite possible *much* of the material cited as being deliberative is legitimately deliberative in nature and can be withheld from disclosure.” *Id.* at 7-8 (emphasis added). Thus, to the extent the communications at issue embody correspondence between the Secretary and other Secretaries of State, even the PAC recognized that the requested records would be exempted from

disclosure, though the PAC withheld final judgment on this basis. *Id.* Fellow Secretaries of State and their offices will be unlikely to offer any significant policymaking assistance to Indiana's Secretary or assist her office with agency decision-making if NASS members' policy positions and proposals (which are often in constant development and deliberation) are discoverable to the general public before a concrete policy can be formulated.

It is exactly this sort of collaboration and intra-agency deliberation that is contemplated by Indiana Code § 5-14-3-4(b)(6). Absent such an exemption, Secretaries from different states could not even share policy proposals or work together on multi-state policy initiatives due to the chilling effect of having their communications about work-in-progress policy proposals revealed to the public at large. Public disclosure would undoubtedly result in "poorer" decisions and policies because one of the Secretary's methods of internal deliberation will now be restricted. If the Court were to enforce Plaintiff's request, simply asking the Secretary of State of a sister state for his or her input on a policy proposal (such as, perhaps, the Secretary of State's opinion on whether a policy has been successful in that sister state) would require public disclosure. But such "frank discussion of legal or policy matters in writing" with other States could not be accomplished if the Court allows Plaintiff the sort of interference that it requests.

Similarly to the public safety exemption, Plaintiff does not dispute, or even mention, this exemption in its Motion for Summary Judgment, despite the PAC explicitly mentioning that this exemption could be applicable and that it was "quite

possible *much* of the material cited as being deliberative is legitimately deliberative in nature and can be withheld from disclosure.” PAC Op. at 7-8 (emphasis added). Consequently, having waived this argument, summary judgment should be granted to the Secretary as to the requested records on this ground alone. *See, e.g., JK Harris & Co., LLC*, 942 N.E.2d at 882. The Secretary must be free to formulate policy using her own agency resources, the resources of the agencies of sister states, and the resources of NASS and its members (i.e., fellow Secretaries of State). This is why the exception exists. *See Unincorporated Operating Div. of Indiana Newspapers, Inc.*, 787 N.E.2d at 909-10; *see also* PAC Op. at 7-8. The requested emails are thereby exempt deliberative materials under APRA. Ind. Code § 5-14-3-4(b)(6).

3. The requested records of communications between the Secretary and NASS members constitute exempted trade secrets.

NASS creates and distributes proprietary information to the Secretary and the other members of NASS that constitute exempted trade secrets. Public disclosure of these communications would eviscerate the reason Secretaries of State join NASS and would effectively extinguish the organization.

Indiana Code § 5-14-3-4(a)(4) exempts “[r]ecords containing trade secrets” from disclosure under APRA. A “trade secret” is defined as:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) derives independent economic value, actual or potential, 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
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code § 24-2-3-2 (incorporated by APRA via Ind. Code § 5-14-3-2(t)). The various Secretaries of State may join NASS, which grants members the ability to confidentially communicate, collaborate, and share policy proposals, reports, and other materials with other Secretaries of State. NASS exists and members join the organization to take part in this confidential collaboration and communication with fellow states. (Undisputed fact 1). At the bottom of NASS emails is the following disclaimer:

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.

NEDC misunderstands this disclaimer to be simply a statement of copyright protection or simply boilerplate language. This disclaimer is instead a statement by NASS that the information contained in its members' emails is proprietary to the organization and its members and is the only reason why States join NASS. That is, the disclaimer is part of NASS's "efforts that are reasonable under the circumstances to maintain [the] secrecy" of the contents of its members' emails. NASS derives "independent economic value, actual or potential, from [the contents of members' emails] not being generally known to . . . other persons." Ind. Code § 24-2-3-2. The members' emails are "not . . . readily ascertainable by proper means by . . . other persons" because such emails are kept held in confidence (as the disclaimer indicates). If members' email were subject to public disclosure, no Secretary of State would join NASS, effectively destroying the organization and the purpose for which it was

established. Depriving members of the confidentiality of their emails will take membership away from NASS and deprive it of the “independent economic value, actual or potential” to which it is entitled. Thus, communications between members of NASS and the Secretary are APRA-exempt trade secrets under Indiana Code § 5-14-3-4(a)(4). This Court should act to protect NASS’s economic investment in creating a community and coordinating confidential communications between its members. If the Court does not do so, significant economic damage will be done to the organization, possibly forever depriving Indiana of the benefit of collaboration with NASS experts and Secretaries from sister states.

Summary judgment should be granted in favor of the Secretary so that she (like other NASS members) may continue to derive the benefit of her membership with NASS and so that the organization’s trade secrets are not publically disclosed to the permanent damage of the organization.

* * *

In Conclusion, the Court should grant summary judgment to the Secretary of State and deny NEDC’s motion for the foregoing reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 21, 2020, I electronically filed the foregoing using the Indiana Filing System (“IEFS”).

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