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 OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Secretary chose to proceed without providing a declaration or affidavit in support of her case. An affidavit might have bolstered her claims that certain records were properly withheld from disclosure under the Access to Public Records Act (APRA), or her counsel's implication that she has finally completed her records search and review under APRA and has nothing more to produce. But since she decided not to introduce any evidence in support of these arguments,[1] the record stands with the following points not in dispute.

1. For the records that the Secretary withheld in her February 12, 2019 partial response based on a "sampling" of responsive records, the Secretary has chosen to rest on (1) a partial exception log that identifies withheld records by limited information that is inadequately specific to enable the Court to determine whether APRA exceptions apply, and (2) litigation statements of counsel. She provided no affidavit or other evidence supporting *any* of her asserted bases for withholding records. Thus, she has not met her burden of denying disclosure.

[1] It would be too late for the Secretary to belatedly submit such an affidavit now, long after the deadline. *See* Ind. R. Tr. Proc. 56(C); *HomEq Serv. Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008).

2. As to other records that may be responsive to the National Election Defense Coalition (NEDC)'s APRA request but which were not part of that initial "sampling," the Secretary concedes that NEDC's APRA request, as perfected on January 22, 2019, specified a sender, recipient, date range, and subject—the criteria for reasonable particularity. And she does not dispute NEDC's allegation that she has still not completed her response to the request, now nearly 15 months after it was perfected. As a result, the only question for the Court is whether 15 months is a "reasonable time" to produce those records.

ARGUMENT

I. The parties agree that NEDC's request met the test for reasonable particularity.

The Secretary and NEDC agree on two major points:

1. An APRA request that includes email communications is "reasonably particular" if it includes a specific sender, recipient, date range, and subject. *See* Mem. in Support of Def.'s Cross Mot. for Summ. Judgment and Response in Opp. to Pl.'s Mot. for Summ. Judgment (Feb. 21, 2020) ("Def. Mem."), at 9.

2. By January 22, 2019, NEDC's APRA request, as amended, included a specific sender, recipient, date range, and subject. *See* Def. Mem. at 4-5 (Secretary's statement of material facts ¶¶ 7, 13); *see also* Pl. Mem. at 15-16 (enumerating how request met each element).

Thus, NEDC's APRA request, as perfected on January 22, 2019, was reasonably particular. Whether NEDC's *initial* September 13, 2018 request met this test is beside the point. NEDC's allegations concern the Secretary's delay and withholding of documents pursuant to its reasonably particular request perfected on January 22, 2019.

II. The Secretary's delay is unreasonable because she has not completed her response to the request after 15 months.

The Secretary's argument on unreasonable delay elides a critical point: the record evidence demonstrates that she has *still* not finished responding to the request. As late as her own summary judgment motion, the Secretary has provided no evidence (such as a declaration) to the contrary. The question is *not*, as the Secretary seems to suggest, whether the time span from September 13, 2018 to February 12, 2019 is a "reasonable time after the request is received by the agency" under I.C. § 5-14-3-3(b). Rather, the question is whether the time span from

January 22, 2019 *to the present day* is unreasonable. The record evidence—as opposed to litigation statements of counsel—demonstrates that the Secretary has *still not completed her response to the request*.

The materials that the Secretary produced in her February 12, 2019 partial disclosure (and the log of materials withheld) were, as the Secretary's counsel had explained 11 days earlier, the result of the Secretary's "***sampling*** of documents . . . for ***preview purposes***." Pl. Ex. I, at 2 (emphases in original); Pl. Ex. X[2] (in cover note to Feb. 12, 2019 partial disclosure, confirming that materials were "the result of reviewing "the *sampling* of materials") (emphasis added).[3]

Against this undisputed evidence stands only a rhetorical device in the Secretary's memorandum, referring to her response in the past perfect tense, as if it had been completed.[4] But the Secretary cannot create a genuine issue of material fact through evocative hinting. It

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[2] Plaintiff's exhibits A-M were attached to the complaint. Plaintiff's exhibits X-Z were attached to the Declaration of William Groth provided with NEDC's motion for summary judgment.

[3] The Secretary's counsel had earlier (January 18) described this as "smart" sampling. *See* Pl. Ex. G. Whether the sampling was "smart" or "random" does not change the undisupted point that the Secretary began by analyzing a "sampling" of responsive documents.

[4] *See, e.g.,* Def. Mem. at 11 ("The Secretary of State *has responded* to NEDC's request in a timely manner . . . .") (emphasis added), 13 (same).

would have been easy for the Secretary to provide an affidavit averring that she had completed her search and review, and that there are no more responsive documents in her possession besides those either disclosed or cited in the February 12, 2019 exception log.[5] Without such an affidavit, the undisputed record confirms that the February 12, 2019 partial production was just a "sampling" of responsive documents. And the Secretary admits that she has not provided any further materials or exception logs since then. *See* Answer ¶ 42.

Fifteen months (from January 22, 2019 to the present) is not a "reasonable time" under I.C. 5-14-3-3-(b). As the Public Access Counselor noted here, "five months is normally much too long to produce documents pursuant to a request." Pl. Ex. L, at 9. And NEDC has found no Indiana case or Public Access Counselor opinion finding that a delay even remotely approaching 15 months is "reasonable."

[5] The Secretary could hardly claim to have been unaware of NEDC's claim that the Secretary's response to date is limited to, as her own counsel explained, a "sampling" for "preview purposes." In the complaint, NEDC alleged an *ongoing* unreasonable delay. Compl. ¶¶ 3, 41, 42; *see also* Answer ¶¶ 41, 42. And NEDC's memorandum in support of its motion for summary judgment makes clear that the issue is an *ongoing* delay. *See* Pl. Mem. at 16-19.

III. The Secretary has failed to justifying denying disclosure based on any of the asserted APRA exceptions.

A. Standard of review.

If an agency denies access to public records by claiming exceptions, the burden of proof lies "on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." I.C. § 5-14-3-1. The Court gives the agency no deference; it "shall determine the matter de novo." I.C. § 5-14-3-9(f).

For a trade secret claim under I.C. § 5-14-3-4(a)(4), the Secretary meets her burden of proof for sustaining denial of disclosure "by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." I.C. § 5-14-3-9(f).

For deliberative material and terrorism-risk claims under I.C. §§ 5-14-3-4(b)(6) and (19), the Secretary meets her burden by "proving that the record falls within" those categories, and "establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." I.C. §§ 5-14-3-9(g)(1)(A)-(B). If she fails to meet her burden, then the denial of access is arbitrary or capricious and NEDC meets its burden. *See* I.C. § 5-14-3-9(g)(2); *Althaus v. Evansville Courier Co.*, 615 N.E.2d 441, 446-47 (Ind. Ct. App.

1993) (noting that if one of the requirements for statutory exception were not met, denial of disclosure would be arbitrary and capricious).

B. The Secretary has failed to introduce evidence substantiating any of the asserted APRA exceptions.

The Secretary's brief is remarkable for what it lacks: a sworn affidavit or declaration. The burden of proof to sustain a denial of access lies with the agency. I.C. §§ 5-14-3-1, 5-14-3-9(f)-(g). And summary judgment requires evidence, particularly by the party with whom the burden of proof lies. *See* Ind. R. Tr. Proc. 56(C); *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019) ("Once the movant for summary judgment has established that no genuine issue of material fact exists, the nonmovant may not rest on her pleadings but must set forth specific facts which show the existence of a genuine issue for trial.").

APRA repeatedly emphasizes that agencies may not sustain denials of access by relying on a "conclusory statement or affidavit." I.C. §§ 5-14-3-9(f), (g)(1)(B). Yet the Secretary has not provided even that. Though the "precise and certain reasons" needed to assert privileges like deliberative process are "demonstrated[] typically by affidavit," *Anderson v. Marion Cty. Sheriff's Dep't*, 220 F.R.D. 555, 561 (S.D. Ind. 2004) (citation omitted), Indiana courts have also considered testimony

in support of APRA exceptions, *see Journal Gazette v. Bd. of Trustees of Purdue Univ.*, 698 N.E.2d 826, 830 (Ind. Ct. App. 1998).

But NEDC is aware of *no* case where an Indiana agency asserted an APRA exception yet failed to provide an affidavit in support of asserting that exception. Here, the Secretary's arguments rely entirely on statements of counsel unsupported by even a conclusory affidavit, let alone a fulsome one. Since the Secretary inexplicably declined to supply essential evidence that was both necessary to meet her burden and entirely within her control, NEDC's motion should be granted, and the Secretary's cross-motion denied, on this ground alone.

C. NEDC was not required to refute the Secretary's privilege claims before she made them.

The Secretary claims that NEDC waived its ability to challenge the Secretary's withholding of documents according to particular exceptions by not getting ahead of the Secretary and refuting her arguments before she made them. *See* Def. Mem. at 15, 18.

This is backwards. The Secretary relies on a non-APRA case where the Court of Appeals held that the appellant waived an argument on appeal by not presenting it to the trial court. *See JK Harris & Co., LLC v. Sandlin*, 942 N.E.2d 875, 882 (Ind. Ct. App. 2011). But that is

irrelevant here. As APRA makes clear, "the burden of proof for the nondisclosure of a public record [lies] on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." I.C. § 5-14-3-1. Requesters are not required to anticipate the exceptions that the agency will assert in court and refute them before they are asserted.

That rule makes sense. Sometimes, a party seeking to withhold records asserts a privilege in an exception log, but then decides for reasons of litigation strategy not to pursue that exception in court. When that happens, the issue is waived. *See, e.g., Davis v. Carmel Clay Sch.*, 282 F.R.D. 201, 205 n.3 (S.D. Ind. 2012), *reconsidered in part on other grounds*, 286 F.R.D. 411. The fact that the Secretary could narrow her asserted privilege claims at the time of litigation—in fact, she did so here[6]—illustrates precisely why NEDC had no obligation to anticipate what legal theories the Secretary might raise in her summary judgment

[6] In February 2019, the Secretary asserted the federal-confidentiality-requirement exception of I.C. § 5-14-3-4(a)(3), focusing on copyright. *See* Pl. Ex. I at 2; Pl. Ex. M at 5; Pl. Ex. Y at 1 (citing I.C. § 5-14-3-4(a)(3)). On summary judgment, she has abandoned this particular exception.

papers and refute them in advance, wasting time and judicial resources by briefing an issue that the Secretary had abandoned.

D. The Secretary's denial lacks adequate specificity because the Court cannot determine from it whether records have been properly withheld.

An Indiana public agency meets its burden of sustaining a denial of disclosure by "establishing the content of the record with adequate specificity." I.C. §§ 5-14-3-9(f), (g)(1)(B). The "adequate specificity" test requires sufficient specificity "to allow the trial court to determine whether [records] are excluded from the disclosure requirements." *Journal Gazette*, 698 N.E.2d at 829.

To be sure, the Secretary's initial exception log provided *some* information about the withheld records: date, time, subject line of email, and title and number of pages for attachments. *See* Pl. Ex. Y. And no one argues that this information is completely useless. But it does not meet APRA's "adequate specificity" test, because it does not enable the trial court to determine whether the exception applies.

Consider the very first item in the log: a record entitled "NASS General Alert: Secretary of State/Lt Governor Roster for 2019." Pl. Ex. Y at 1, serial #1. This record was apparently withheld under I.C. §§ 5-

14-3-4(a)(3) (federal law confidentiality obligations), 5-14-3-4(a)(4) (trade secrets), and 5-14-3-4(b)(6) (deliberative materials).[7]

Intuitively, it is hard to credit that a message entitled "Secretary of State/Lt Governor Roster for 2019" is simultaneously an economically valuable trade secret, required to be kept confidential under federal law, and an expression of opinion or speculative material communicated for the purpose of decision making.[8] But in any event, the Secretary has not met her burden because she has not provided, either in the initial exception log or a subsequent affidavit, sufficiently specific information "to allow the trial court to determine whether [records] are excluded from the disclosure requirements." *Journal Gazette*, 698 N.E.2d at 829.

NEDC's motion should be granted on this basis alone. Alternatively, the Court should review the records in camera under I.C. § 5-14-3-9(h) to determine whether any may be withheld.

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[7] If this is not a correct reading of the partial exception log, that only goes to show that the log lacks comprehensibility as well as specificity.
[8] Based on the title alone, it seems more likely that *none* of those exceptions apply.

IV. The Secretary has failed to justify withholding documents under the trade secrets exception.

Under Indiana law, "a trade secret has four general characteristics: 1) it is information; 2) that derives independent economic value; 3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy." *ESPN Prods., Inc. v. Ind. Dep't of State Rev.*, 28 N.E.3d 378, 382 (Ind. T.C. 2015). This is a question of law, *PrimeCare Home Health v. Angels of Mercy Home Health Care, LLC,* 824 N.E.2d 376, 381 (Ind. Ct. App. 2005), but "depends upon the facts of each individual case," *Harvest Life Ins. Co., v. Getche,* 701 N.E.2d 871, 876 (Ind. Ct. App. 1998).

Everyone agrees that the communications at issue are information, and NEDC will stipulate that they are the subject of efforts to maintain their secrecy. However, the Secretary has failed to provide any evidence whatsoever that any particular communication has (or NASS communications in general have) independent *economic* value that depends on non-disclosure.

A. The Secretary does not assert enough economic value to establish a "trade secret."

The Secretary asserts that NASS derives economic value from providing a forum for secretaries of state to collaborate. *See* Def. Mot. at 19. She invokes "NASS's economic investment" and the "significant economic damage" that it could experience from disclosure. *Id.* at 20.

But since neither she nor NASS provided any affidavit or other evidence to establish any such economic value, these conclusory litigation statements of counsel deserve no weight. NASS is a private nongovernmental organization with its own independent economic interests. If disclosure of public records could cause NASS "significant economic damage," then someone—either NASS or the Secretary—should have been willing to present evidence in court so establishing.[9]

Courts have an obligation to make their own independent judgment about whether records have economic value, *see ESPN Prods.,* 28 N.E.3d at 381-82, and the lack of evidence is fatal. At best, the Secretary's litigation statements show only "limited economic value" that is insufficient to establish a trade secret. *See Cellco P'ship v. Ind.*

[9] NASS had the statutory right to intervene, *see* I.C. § 5-14-3-9(e), but declined to do so.

Util. Reg. Comm'n, 810 N.E.2d 1137, 1143 (Ind. Ct. App. 2004) (APRA intervenor did not demonstrate more than limited economic value).

B. The Secretary's own arguments suggest that there is little or no cognizable economic value associated with her email messages to and from NASS.

The Secretary implies at length that NASS is essentially a form of pass-through, just providing an email list for secretaries of state to interact with one another, and therefore functionally essentially equivalent (and reducible) to its ex officio secretary-of-state members. *See* Def. Mot. at 15-18. If communications with NASS are really just "deliberations with other Secretaries of State," "correspondence between the Secretary and other Secretaries of State," "simply asking the Secretary of State of a sister state for his or her input," and so on, *see* Def. Mot. at 16-17, then NASS is doing little more than operating an email list. If so, the Secretaries of State could replicate that at little or no cost by simply developing a confidential email chain—and NASS's email service has little independent economic value.

Yet if NASS *does* somehow derive independent economic value from maintaining a storage system for public records, then Indiana does not recognize that type of economic value. Under APRA, a public agency

may not enter into a contract or obligation for the storage of public records if the agreement "unreasonably impairs the right of the public to inspect and copy the agency's public records." I.C. § 5-14-3-3(g); *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127, 1133 (Ind. Ct. App. 2005) (noting that this provision was specifically passed to prevent an arrangement where an Indiana agency stores records with a private actor and thereby prevents public access).

V. The Secretary has failed to justify withholding documents under the deliberative materials exception.

The Secretary asserts that the requested records are "deliberative material" excepted from disclosure under I.C. § 5-14-3-4(b)(6). *See* Def. Mot. at 15-18. But she has failed to demonstrate that the deliberative materials exception applies to these communications—a problem exacerbated by her failure to provide adequate specificity for her denial.

A. The Secretary has failed to establish that the materials are intra-agency or interagency records.

The deliberative materials exception applies only to "[r]ecords that are intra-agency or interagency . . . including material developed by a private contractor under a contract with a public agency." I.C. § 5-14-3-4(b)(6). The Secretary has failed to meet her burden of establishing that

the communications between the Secretary's Office and NASS fall within any of these categories.

NASS is not a public agency. As the Secretary admits, NASS is not itself a public agency. Compl. ¶ 44; Answer ¶ 44.

No evidence establishes that NASS is a private contractor under a contract with a public agency. The Secretary has not claimed (let alone provided evidence) that NASS is "a private contractor under a contract with a public agency" under I.C. § 5-14-3-4(b)(6). If it were, the Secretary could have said so, and provided the contract.

NASS is not equivalent to other secretaries of state. The Secretary seeks to elide the distinction between NASS and other states' secretaries of state by asserting, without evidence, that her communications with the private organization NASS are in fact communications with other secretaries. *See* Def. Mot. at 16-17. But no record evidence supports the Secretary's assertion that the records here were to or from other secretaries of state, as opposed to paid staff of the private non-governmental organization NASS. Indeed, the Secretary hints that they might not all be, citing the benefits of collaboration with "NASS experts," and using oblique phrasing such as "*to the extent* the

communications at issue embody correspondence between the Secretary and other Secretaries of State." Def. Mot. at 16, 20 (emphasis added).

The Secretary's failure to identify the records with adequate specificity obscures this defect. Her exception log only provides data and subject line information; it does not identify senders or recipients. *See* Pl. Ex. Y. The APRA request specifically requested messages exchanged between the Secretary's office and NASS email addresses ending with @nass.org or @sso.org. *See* Ex. M, at 4. While it is possible that *some* messages were sent to or from other secretaries of state using a NASS email address, it is also entirely possible that some messages were sent to or from paid staff of the private non-governmental organization NASS—the aforementioned "NASS experts," *see* Def. Mot. at 20—or, perhaps, non-governmental individuals or entities that have access to certain NASS email lists.

Given the Secretary's lack of "adequate specificity" in identifying the senders or recipients of the allegedly privileged communications, and her decision not to provide an affidavit averring that *any* of the messages were, in fact, simply communications with other secretaries of

state, the court should disregard counsel's litigation statements implying as much.[10]

B. The Secretary has not demonstrated that the records were actually deliberative.

The Secretary has not established that the withheld materials "are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." I.C. § 5-14-3-4(b)(6). Her brief waxes poetic about the value of deliberation and collaboration, *see* Def. Mot. at 16-18, but provides no evidence (e.g., an affidavit) that *any* of these communications meet these requirements. This lack of evidence is magnified by her failure to provide adequate specificity for her denial. And the partial exception log does not engender confidence in the Secretary's determinations.[11]

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[10] NEDC is unaware of any case in the country applying the deliberative process exception to communications with NASS—or to any of its sister organizations, e.g., the National Governors Association, the National Lieutenant Governors Association, the National Association of Attorneys General, or the National Association of State Auditors, Comptrollers and Treasurers.

[11] The first two records for which she appears to assert this exception are entitled respectively "NASS General Alert: Secretary of State/Lt Governor Roster for 2019" and "NASS Executive Board-New Member Pairing: Mentor for OH Secretary-elect LaRose." Ex. Y at 1, serial # 1, 1a. While it may be hard to judge an email message by its subject, these do not suggest deliberative communications.

VI. The Secretary has failed to justify withholding records under the terrorism-risk exception.

The Secretary asserts that some requested records may be withheld because public disclosure would pose "a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack." I.C. § 5-14-3-4(b)(19). *See* Def. Mot. at 14-15.[12]

NEDC agrees that protecting election infrastructure is critical. Furthermore, NEDC agrees in principle that *some* information about the insecurity of election infrastructure could expose a vulnerability to terrorist attack. But the Secretary has not shown that *these* records do that. Her failure to provide an affidavit—even under seal—means that the court is left with nothing but bare assertions from counsel. The Secretary has not explained, for any of the requested records, "how disclosure would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack" as required by I.C.

[12] The Secretary also perfunctorily cites the recordkeeping system and computer code exceptions of I.C. §§ 5-14-3-4(b)(10)-(11). *See* Def. Mot. at 14) (citing these provisions, without discussion). However, the Secretary relies on the terrorism-risk exception, not these others. For example, the Secretary cites two different provisions of I.C. § 5-14-3-4.4(b), which applies to the terrorism-risk exception of section 5-14-3-4(b)(19), but not to these other two exceptions. *See* Def. Mot. at 14.

§ 5-14-3-4.4(b)(1), or which (if any) of the twelve subcategories of I.C. § 5-14-3-4(b)(19) apply.

The partial exception log does not engender confidence in the Secretary's determinations. For example, the very first record for which the Secretary asserts this exception appears to be an attachment entitled "Frank LaRose.vcf" attached to an email entitled "NASS Executive Board-New Member Pairing: Mentor for OH Secretary-elect LaRose." *See* Pl. Ex. Y at 1, serial #1a and 1aA1. This attachment appears to simply be an electronic business card for the Ohio Secretary of State.[13] The terrorism-risk exception is intended for vulnerability assessments, risk planning documents, needs assessments, and the like, *see* I.C. §§ 5-14-3-4(b)(19)(A)-(L), not NASS members' business cards.

This is not a cherry-picked example. The *second* record withheld under the terrorism exception is an email entitled "RE: Call to discuss launch of NASS Cybersecurity Committee." *See* Pl. Ex. Y at 1, serial #5a. Nothing in the Secretary's log enables the Court to ascertain

[13] A .vcf (Virtual Contact File) file is an electronic business card. *See* https://en.wikipedia.org/wiki/VCard (visited Apr. 13, 2020).

whether disclosure of this email would be reasonably likely to "threaten[] public safety by exposing a vulnerability to terrorist attack."

The Secretary cannot invoke the risk of terrorism simply because an email message includes the word "cybersecurity." Her burden is not merely asserting, but "*proving* that the record falls within" the terrorism-risk exception. I.C. § 5-14-3-9(g)(1)(A) (emphasis added). To protect legitimate public safety concerns while vindicating the public's right of access to public records that would *not* expose a vulnerability to terrorist attack if disclosed, the Court should review the public record in camera under I.C. § 5-14-3-9(h).

CONCLUSION

For the foregoing reasons, NEDC respectfully requests that the Court deny the Secretary's motion for summary judgment, grant NEDC's motion for summary judgment on Counts I and II, declare that the Secretary violated APRA, award NEDC its reasonable attorneys' fees and costs, and grant NEDC any other relief deemed necessary to effectuate the public transparency purposes underlying APRA. NEDC further respectfully requests that, as to the terrorism-risk exception

and wherever else the Court deems appropriate, the Court review the withheld records in camera under I.C. § 5-14-3-9(h).

Respectfully submitted,

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