

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
) SS:	
COUNTY OF MARION)	CAUSE NO. 49D01-1906-PL-024866
NATIONAL ELECTION DEFENSE COALITION,)	
)	
Plaintiff,)	
)	
vs.)	
)	
CONNIE LAWSON, SECRETARY OF STATE OF THE STATE OF INDIANA, in her official capacity,)	
)	
Defendant.)	

FILED
October 9, 2020
CLERK OF THE COURT
MARION COUNTY
SW

ORDER ON IN-CAMERA REVIEW OF DOCUMENTS SUBMITTED BY THE DEFENDANT

I. BACKGROUND ON IN-CAMERA REVIEW

On June 23, 2020, this Court issued an order DENYING Defendant’s Cross-Motion for Summary Judgment seeking a ruling that documents sought by Plaintiff were properly withheld under the applicable terrorist-risk exception under the Access to Public Records Act (“APRA”). The Court further GRANTED Plaintiff’s request to conduct an in-camera review of the documents under Ind. Code § 5-14-3-9(h), which permits the Court to review the documents which the Secretary claims an exemption under APRA applies.

In its June 23, 2020 Order, this Court held

...the Court finds that Defendant has failed to meet her burden of proof for withholding records under the terrorism-risk exception. For the records withheld under this exemption, Defendant, or the Indiana Counterterrorism and Security Council, (“ICSC”), is required to provide some explanation of how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack pursuant to Ind.

Code § 5-14-3-4.4(b)(1). Neither Defendant nor the ICSC provided any such explanation to prove that the exception applies other than Defendant's assertion by counsel that it applies. Defendant cited the ICSC's judgment as being the basis for her decision to withhold records, however without an affidavit or any designated evidence, the Court is not able to grant summary judgment on that basis alone.

The Court ordered Defendant to submit said records to the Court within 15 days of the issuance of the June 23 Order under seal as permitted under Indiana law.

The Court granted Defendant two extensions of time to comply with the June 23 Order, the second being over the Plaintiff's objection, in light of the delays caused by COVID-19 protocols. The Court imposed an August 3, 2020 deadline, which Defendant met.

Despite having provided the documents for review, neither the Defendant nor the Indiana Counterterrorism and Security Council, ("ICSC"), had provided any explanation of how disclosure of these records would cause a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack pursuant to IC § 5-14-3-4.4(b)(1). No explanation was filed during the summary judgment or when the Defendant filed the records to be reviewed in-camera with the Court on August 3, 2020 under seal.

Defendant requested a hearing for the documents submitted, and the Court set one for September 24, 2020. Attorney Groth appeared for the Plaintiff and Attorney Rowlett for the Defendant at the hearing. The Court discussed with the parties that the Defendant had still not provided an explanation of how disclosure of these records would have a reasonable likelihood of threatening public safety by exposing vulnerability to terrorist attack pursuant to IC § 5-14-3-

4.4(b)(1). Attorney Rowlett requested that the Defendant be permitted to file such explanation. Over the Plaintiff's objection, the Court granted this request requiring the Defendant file such explanation by September 28, 2020. On September 28, 2020, Defendant filed the Affidavit of Jerold A. Bonnet with the Court. With that affidavit filed, the Court proceeded with the in-camera review.

II. RELEVANT APPLICABLE STANDARDS

Under APRA, public records can be properly withheld if there is “a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack” and thus the records were properly withheld. Ind. Code § 5-14-3-4.4(b)(1). For exceptions concerning terrorism (Ind. Code § 5-14-3-4(b) (19)) and the security of voting systems (Ind. Code § 5-14-3-4(b) (10)-(11)), Defendant can permissibly deny disclosure of records by “proving that the record falls within any one (1) of the categories of exempted records under section 4(b) ... and establishing the content of the record with adequate specificity and not by relying with a conclusory statement or affidavit.” Ind. Code § 5-14-3-9(g). If the public agency considers a record to be exempted from disclosure for the public safety risk of terrorism (Ind. Code § 5-14-3-4.4(b)(1)), the agency may “deny disclosure of the record or part of the record.” Ind. Code § 5-14-3-4.4(b)(1). In addition, however, “the agency or the counterterrorism and security council shall provide a general description of the record being withheld and how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack.” *Id.*

III. DISCUSSION

On summary judgment, Defendant argued that public disclosure of emails between the Secretary and NASS would qualify for the terrorism-risk exemption. Plaintiff challenged this assertion, arguing that Defendant has failed to meet her burden of proof that the withheld records fall within the exception.

After the Court conducted a lengthy and careful in-camera review of the 861 pages of documents submitted by the Defendants, the Court finds that most of the documents submitted by the Defendant do not contain information that have the “reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack” such that they should be exempted from disclosure under the terrorism-risk exemption.

To assist with its in-camera review, the Court reviewed the Affidavit of Jerold Bonnet as the Mr. Bonnet was not present at the September 24 hearing to provide testimony. The Affidavit states the following that is relevant to the Court’s in-camera review of the documents submitted by the Defendant:

1. Jerold A. Bonnet has been employed by the Indiana Secretary of State (“ISOS”) and acts as the general counsel for the ISOS. One of Mr. Bonnet’s job duties was to respond to the Plaintiff’s APRA request at issue in this case. Mr. Bonnet has been employed by the ISOS since 2005 as an attorney in election matters, and in the last 10 years, Mr. Bonnet has been involved in the ISOS’s oversight and engagement concerning security of electronic voting systems, which included organizing and attending conferences, security assessments, contracting for

security products and services, and litigation. In addition, Mr. Bonnet assisted the ISOS and Indiana Election Commission with the design, formation, and ongoing administration of the Voting System Technical Oversight Program (“VSTOP”); with the administration of the Help America Vote Act of 2002; and with the administration of the Statewide Voter Registration System (“SVRS”). Mr. Bonnet has been a member of the ISOS’s executive team addressing cyber security issues which have resulted in involvement with the Department of Homeland Security (“DHS”), US Cyber Command, and various National Security Agency sub-agencies. Furthermore, since 2017, Mr. Bonnet has been a member of the ISOS’s executive team on National Critical Infrastructure. (See *generally* Bonnet Aff. ¶¶ 1-15).

2. Mr. Bonnet states that 219 documents should be withheld from public access in the interest of protecting the State’s election infrastructure. Mr. Bonnet states the documents submitted to the Court for an in-camera interview were from an 8-volume collection of documents responsive to the National Election Defendant Coalition’s APRA request.
3. Mr. Bonnet states in paragraph 17 that the documents were in chronological order and marked with chronological serial

numbers which are indicated on a spreadsheet summary of all the documents

4. In support of his position, Mr. Bonnet simply states in his affidavit that these documents contain election infrastructure security information.

The Court has two major issues with Mr. Bonnet's affidavit. First, despite the assertion in paragraph 17 that the documents were in chronological order with chronological serial numbers, this is not how the documents were marked when the Court received them for review. In fact, there are no serial numbers on the documents, and some documents have page numbers while others do not. The Court was very clear with Deputy Attorney General Rowlett that the documents were not numbered or bates stamped and that the explanation or affidavit would need to be specific as to which documents were being referenced. The second issue with the Affidavit is that Mr. Bonnet does not explain why a release of these records to the Plaintiff under an APRA would have a reasonable likelihood of threatening public safety by exposing vulnerability to terrorist attack.

After completing a lengthy and careful review of the in-camera documents, having considered the argument of counsel on September 24, 2020, and having considered the affidavit of Jerold A. Bonnet, this Court finds that Defendants have not adequately shown that the documents produced should be exempted from disclosure. A majority of the of the documents are from the National Association of Secretaries of State (NASS) and simply discuss best practices in establishing policies, scheduling of meetings and conferences, and topics that

would be addressed at meetings or conferences. In addition, some of the documents address procedures for voting and operating meetings at NASS which include by-laws. The remaining documents are from the United States Department of Homeland Security, many of which appear to be accessible from the Department of Homeland Security's public website. These documents are unclassified and can be found on the internet. For example, the DHS's newsletter entitled "EIS Communique" is found on the internet. This is also true for "Election Infrastructure Subsector Government Coordinating Council Charter." The in-camera documents are also found on the website for Cyber Security & Infrastructure Security Agency. This Court finds that the Defendant has failed to satisfy an exception to the disclosure of public records under APRA under I.C. § 5-14-3-4(b)(10, (11) or (19) because the Defendant has failed to demonstrate that if these records are provided to the Plaintiff pursuant to their APRA request that there is "a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack." This is because the records reviewed by the Court which have been ordered to be provided to the Plaintiff are records the public can access on the internet, are merely general protocols, and are procedures for conducting meetings at NASS, voting procedures at NASS, and emails that involve scheduling.

IV. ORDER

Thus, the Court finds the following documents should be produced pursuant to the specific instructions below. The documents were provided in 10 separate electronic files in Odyssey. However, as previously stated, the

documents were not bates stamped or consistently numbered in chronological order. Thus, this Court merely ignored the various page numbers on the documents if they existed. Instead, the Court's citations to page number below refer to the page number of electronic PDF starting with page 1 and proceeding to the end of the PDF.

1) The first PDF file in Odyssey filing filed on August 3, 2020, consists of one page entitled "Notice to the Court".

2) The second PDF file in the Odyssey filing filed on August 3, 2020 which consists of 134 pages and begins with an email to/from Leslie Reynolds dated November 2, 2018 at 3:44 pm. The Court notes the following pages are blank and do not need to be provided: 16, 18, 23, 24, 26, 28, 30, 32, 34, 38, 46, 50, 56, 58, 60, 62, 64, 77, 100, 124, 134. However, the following documents must be provided: pages 1-10, 15, 17, 19-22, 25, 27, 29, 31, 33, 35-37, 39-45, 47-49, 51-55, 57, 59, 61, 63, 65-76; 78-99, 101-123, and 125-133. In addition, Defendant should redact page 22 NCSAR information through the end of page 22. On page 41, the Defendant shall redact the sections entitled "how to join" and "recommended actions prior to election day".

3) The third PDF file in the Odyssey filing on August 3, 2020 consists of 88 pages and begins with an email Leslie Reynolds of the NASS to its members dated August 18, 2018 at 10:33 am. The Court notes the following pages are blank and do not need to be provided: pages 14, 18, 22, 34, 46, 50, 54, 60, 64, 68, and 72. However, the following documents must be provided:

pages 1-13, (on page 5 Defendant shall redact the logistics section ending with the phone number and pin number); pages 15-17; 19-21, 23-30, 31, 32
Defendant shall redact the “Technical Specifications and Important Next Steps; pages 33, 35 (Respondent shall redact the dial in number and access code), pages 36-37 (Respondent shall redact the “Technical Specifications” section and the phone number above this section for FEMA VOC.); pages 40-45; 47-49, 52 (Respondent shall redact the “Technical Specifications” section; pages 53, 55-59, 61-63; pages 65-67; pages 69-71; and pages 73-88.

4) The fourth PDF file in the Odyssey filing filed on August 3, 2020 consists of 98 pages and begins with an email Leslie Reynolds of the NASS to Connie Lawson dated June 28, 2018 at 4:11 pm. The Court notes the following pages are blank and do not need to be provided: pages 10, 24, 25, 30, 38, 40, 42, 44, 46, 48, 50, 54, 64, 70, 92, and 98. However, the following documents must be provided: pages 1-2; 4-9;11-23; 26-29; 31-37; 39, 41, 43, 45, 47, 49, 51-53; 55-63; 65-69; 71-91; 93-97. The Court could not read page 3 as it was not legible. A readable copy shall be submitted within 7 days of this order.

5) The fifth PDF file in the Odyssey filing filed on August 3, 2020 consists of 32 pages and begins the minutes of the NASS Elections Committee Call April 11, 2018. The Court notes the following pages are blank and do not need to be provided: pages 4, 14, and 28. However, the following documents must be provided: pages 1-3; 5-13; 15-26; and 29-32. The Court could not read page 27 as it was not legible. A readable copy shall be submitted within 7 days of this order.

6) The sixth file in the Odyssey filing filed on August 3, 2020 consists of 68 pages and begins the EIS Communique dated February 21, 2018. The Court notes the following pages are blank and do not need to be provided: pages 10, 14, 18, 22, 40 and 54. However, the following documents must be provided: pages 1-9; 11-13; 15-17; 18-21; 23-39; 41-53; and 55-68.

7) The seventh file in the Odyssey filing filed on August 3, 2020 consists of 162 pages and begins with an email to and from Leslie Reynolds dated December 28, 2017 at 10:30 am. The Court notes the following pages are blank and do not need to be provided: pages 4, 6, 24, 32, 42, 62, 68, 70, 72, 84, 96, 98, 106, 116, 120, 132, 138, 146, 150, and 162. However, the following documents must be provided: pages 1-3; 5, 7-23, 25-31; 33-41; 43-61; 63-67; 69, 71, 73-83; 85-95; 97; 99-105; 107-115; 117-119; 121-131; 133-137; 139-145; 147-149; and 151-161.

8) The eighth file in the Odyssey filing filed on August 3, 2020 consists of 162 pages and begins with an email to and from Leslie Reynolds dated December 28, 2017 at 1030 am. The Court has verified these documents are identical to the seventh file and were uploaded in error.

9) The ninth file in the Odyssey filing filed on August 3, 2020 consists of 186 pages and begins with an email to and from Leslie Reynolds dated September 30, 2017 at 510 pm. The Court notes the following pages are blank and do not need to be provided: pages 16, 38, 58, 86, 96, 102, 112, 122, 126, 132, 134, 156, 158, 160, 162, 172, 176, and 186. However, the following documents must be provided: pages 1-15; 17-37; 39-57; 59-85; 87-95; 97-101;

103-111; 113-121; 123-125; 127-131; 133, 135-155; 157, 159, 161,163-171, and 177-185. The Court finds that pages 173-175 do not have to be provided as they meet the exception.

10) The tenth file in the Odyssey filing filed on August 3, 2020 consists of 116 pages and begins with an email from Leslie Reynolds to Juan Figueroa dated July 5, 2017 at 913 pm. The Court notes the following pages are blank and do not need to be provided: pages 20, 22, 50, 54, 58, 62, 66, 72, 80, 88, and 96. However, the following documents must be provided: pages 1-19; 21, 23-49; 51-53; 55-57; 59-61; 63-65; 67-71; 73-79; 81-87; 89-95; and 97-116.

However, the Court will permit additional redactions of personal cellular phone numbers, dial in phone numbers for meetings and access codes for phone meetings, any email addresses, and any direct dial phone number in all the documents which must be turned over. The above records shall be provided to Plaintiff within 15 days of the date of this order.

SO, **ORDERED, ADJUDGED**, and **DECREED** this 9th day of October 2020.

Heather A. Welch

Heather Welch, Special Judge,
Marion County Superior Court
Civil Division, Room 1

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