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IN THE COURT OF APPEALS OF INDIANA

Holli Sullivan, Secretary of State, in her Official Capacity,

Appellant-Defendant,

v.

National Election Defense Coalition,

Appellee-Plaintiff,

January 20, 2022

Court of Appeals Case No. 21A-PL-349

Appeal from the Marion Superior Court

The Honorable Heather Welch, Judge

Trial Court Cause No. 49D01-1906-PL-24866

Robb, Judge.

Case Summary and Issues

[1] The National Election Defense Coalition ("NEDC") requested access to public records regarding election security from the office of the Indiana Secretary of State ("Secretary"). The Secretary withheld certain emails and attachments as exceptions to the Indiana Access to Public Records Act ("APRA"). NEDC then filed a complaint against the Secretary for unlawfully denying access to the records. The Secretary now appeals the trial court's determination that the Secretary failed to demonstrate the withheld records were excepted from disclosure, and also appeals the trial court's award of attorney's fees to NEDC. Concluding the trial court did not err in ordering the Secretary to disclose documents for which it had not proven an exception applied and that NEDC is entitled to reasonable trial and appellate attorney's fees for substantially prevailing in this litigation, we affirm and remand for the trial court to award a reasonable appellate attorney's fee.

Facts and Procedural History

[2] In 2017-18, then-Secretary of State Connie Lawson was president of the National Association of Secretaries of State ("NASS"). In that role, Lawson made various public statements about the security and trustworthiness of voting systems in the United States.

[3] On September 13, 2018, NEDC requested from the Secretary's office records of correspondence between the Secretary and NASS. NEDC sought information about the origins of the Secretary's public statements related to her position in NASS and asked for copies of correspondence between the Secretary's office

and NASS from May 1, 2017 to present. Several rounds of correspondence between counsel for NASS and Jerold Bonnet, General Counsel to the Secretary, ensued.

[4] Bonnet objected to the specificity and particularity of NEDC's request even after NEDC narrowed its search parameters and asserted that in the Secretary's view, "its communications with [NASS] are (generally) not available for public inspection[.]" Appellant's Appendix, Volume 2 at 98. Bonnet claimed the requested records were excepted from public disclosure by a) copyright and trade secrets protection; b) the discretion of the agency with respect to deliberative materials; and c) public safety concerns. Unsatisfied with the Secretary's response and the content of the records the Secretary did produce which "did not contain a single email message between the Secretary's office and NASS[,]" *id.* at 95, NEDC filed a complaint with the Indiana Public Access Counselor ("PAC") in early 2019.

[5] On April 11, NEDC received an advisory opinion from the PAC. The opinion notes several times that without reviewing the materials in question, the PAC was unable to make a final determination of whether any exceptions apply but concludes:

> [T]his office declines to issue a definitive declaration on the issue of timeliness [of the Secretary's response] in this case. While five months is normally much too long to produce documents pursuant to a request, the request itself did not meet reasonable standards [of specificity].

> The [Secretary] has, however, carried its burden . . . that some, if not all, of the cited exemptions to disclosure could possibly apply to the withheld materials. As always, without *in camera* review, this determination is solely on the merits of its legal arguments but not necessarily on any unknown underlying facts.

Id. at 65.

[6] On June 20, NEDC filed a complaint in Marion Superior Court alleging the Secretary had "unlawfully den[ied] access to public records regarding the reliability and security of voting machines" in violation of APRA. *Id.* at 14. NEDC alleged in Count I of its complaint that the Secretary unlawfully denied or interfered with NEDC's right to inspect records and in Count II that the Secretary unreasonably delayed in providing access to records. NEDC requested the trial court order the Secretary to produce all responsive and non-excepted documents and a log of all documents being withheld or redacted pursuant to a statutory exception; perform an *in camera* review of information allegedly excepted from disclosure by an APRA exception and determine whether the documents have been properly withheld or redacted; and award attorney's fees as provided by APRA.

[7] NEDC subsequently moved for summary judgment in its favor. The Secretary opposed NEDC's motion and filed its own cross-motion for summary judgment with an accompanying memorandum but without designating any evidence in support of its motion. The trial court summarized the motions at issue as follows:

> [NEDC] seeks summary judgment on Count I and Count II of its Complaint: denial of right to inspect records in violation of APRA and unreasonable delay in providing records in violation of APRA, respectively. In addition, [NEDC] asks the Court to declare that [the Secretary] violated APRA, award reasonable attorney's fees and costs, and grant any other relief deemed necessary to effectuate the public transparency purposes underlying APRA. In the alternative, [NEDC] requests the Court grant partial summary judgment in [its] favor on [the Secretary's] Cross-Motion for Summary Judgment holding that the copyright notice in NASS email messages does not render them exempt from disclosure under Ind. Code § 5-14-3-4(a)(3) as a matter of law and that [NEDC] should be granted summary judgment on the trade secrets exemption[1] because that must be raised by NASS not the Secretary.
>
> [The Secretary] responded by filing a Cross-Motion for Summary Judgment, arguing she is entitled to summary judgment because the Office properly withheld documents from [NEDC's] APRA request under appropriate exemptions. [The Secretary] also asks the Court deny [NEDC's] Motion for Summary Judgment. [NEDC] responds by further requesting that, as to the [public safety] exception and wherever else the Court deems appropriate, the Court review the withheld records *in camera* under Ind. Code § 5-14-3-9(h).

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[1] The statutes at issue refer to categories of records that are considered to be "excepted" from disclosure. *See, e.g.,* Ind. Code § 5-14-3-4. The trial court primarily uses the term "exemptions" and its derivatives when referring to these categories of records. Although we will refer to them as "exceptions," we have elected not to change the trial court's wording and for purposes of this opinion, we consider the two words and their derivatives to be interchangeable.

Id. at 185.[2]

[8] In a lengthy and thorough order ("Summary Judgment Order"), the trial court determined:

- NEDC's requests do not meet the "reasonable particularity" standard because the "search terms provided in the narrowed request remain overly broad when looking at the overall context of the request" and therefore NEDC's motion for summary judgment on the issue of reasonable particularity was denied, *id.* at 190-91;
- Because NEDC's requests were not reasonably particular, the question of whether the Secretary responded in a reasonable time was moot and therefore NEDC's motion for summary judgment on timeliness was denied, *id.* at 191;
- Because NEDC did not substantially prevail on its motion for summary judgment, NEDC's motion for attorney's fees and costs was denied, *id.* at 192;
- The Secretary failed to meet the burden of proof for withholding documents pursuant to the public safety exception and therefore, the Secretary's cross-motion for summary judgment that documents were properly withheld under the public safety exception was denied and

[2] A scheduled hearing on the pending summary judgment motions was cancelled after the parties agreed the trial court could rule from the paper record.

NEDC's request for the court to conduct an *in camera* review of the documents the Secretary claimed were subject to this exception was granted, *id.* at 195-96;

- The Secretary failed to prove that documents exchanged with NASS were subject to the deliberative materials exception and therefore, the Secretary's cross-motion for summary judgment that documents were properly withheld under the intra-agency or interagency deliberative materials exception was denied, *id.* at 197-98; and
- The Secretary failed to prove that documents were properly withheld under the trade secrets or copyright exceptions and therefore the Secretary's cross-motion for summary judgment that documents were properly withheld under those exceptions was denied, *id*. at 201, 204; further, because the copyright and trade secrets exceptions "must be raised by the proper party, NASS[,]" NEDC's partial motion for summary judgment on the Secretary's cross-motion for summary judgment was granted on those issues, *id.* at 204.

In sum,

> The Court hereby *denies* [NEDC's] Motion for Summary Judgment on Counts I and II of [its] Complaint, and further *denies* [NEDC's] request for attorney's fees and costs. The Court hereby *denies* [the Secretary's] Cross-Motion for Summary Judgment for documents being properly withheld under APRA exemptions under the [public safety] exemption and under the intra-agency/interagency . . . deliberative materials exemption, and under the trade secrets and copyright exemptions. The Court hereby *grants* [NEDC's] request that partial summary

> judgment be entered on [the Secretary's] Cross-Motion for Summary Judgment on the trade secrets and copyright exemptions. The Court further *grants* [NEDC's] request to conduct an *in camera* review of the documents wherein the Secretary claims an exemption applies under [the public safety exception]. The [Secretary] shall submit said records to the Court within 15 days of the issuance of this order under seal as permitted under Indiana law.

Id. at 204-05.

[9] As ordered, the Secretary provided for *in camera* review the documents it designated as confidential because alone or read in conjunction with other documents, they might disclose sensitive operational and security protocol for elections. The Secretary also asked "to be heard on any particular issue before any disclosure of the documents." Transcript of Evidence, Volume II at 5. Accordingly, the trial court held a hearing at which the Secretary requested that, if the trial court felt the records should be disclosed after reviewing them, there first be "an *in camera ex parte* hearing . . . in which the real subject matter experts, those from the Secretary of State . . . can come in and explain even page by page . . . whether a particular record represents a terrorism threat or cyber security threat." *Id.* at 6-7. In lieu of an *ex parte* hearing, the Secretary offered to "obtain an affidavit . . . from their cyber security folks explaining why all these records were withheld and why they represent . . . a threat to cyber security." *Id.* at 13.

[10] The trial court rejected the request for an *ex parte* hearing but over NEDC's objection, allowed the Secretary time to file an affidavit to "be able to explain

why that disclosure of that record represents a threat." *Id.* at 17. The trial court only allowed approximately two and one-half business days for the Secretary to file such affidavit, noting that the Secretary could have done so with its summary judgment materials or when the records were provided for *in camera* review. The Secretary thereafter filed an affidavit by Bonnet purporting to provide a general description of the records being withheld and how disclosure would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attacks.

[11] The trial court reviewed the affidavit and conducted "a lengthy and careful in-camera review of the 861 pages of documents" submitted by the Secretary. Appellant's App., Vol. 2 at 230. In its Order on In-Camera Review of Documents Submitted by the [Secretary] ("Disclsoure Order"), the trial court found that "most of the documents submitted by the [Secretary] do not contain information that ha[s] the reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack such that they should be exempted from disclosure under the [public safety] exemption." *Id.* (internal quotation omitted). "This is because the records reviewed by the Court which have been ordered to be provided to [NEDC] 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." *Id.* at 233. The Disclosure Order included a detailed list of which pages in the Secretary's submission needed to be provided to NEDC, which needed to be redacted and provided to NEDC, and which did not need to be

provided. *See id.* at 234-37. The trial court ordered the Secretary to provide the documents to NEDC within fifteen days of the date of the order.[3]

[12] NEDC then filed a petition seeking payment of attorney's fees and costs, alleging it had substantially prevailed in the action. Following a hearing, the trial court entered an order granting the petition ("Fees Order"). The trial court noted that it had previously denied NEDC's motion for attorney's fees associated with its own motion for summary judgment because that motion was denied. But based on the trial court's Summary Judgment and Disclosure Orders finding that the Secretary "had no valid exemption under APRA to not produce[] the requested records[,] . . . the Court finds that NEDC did substantially prevail in this matter and the [Secretary] was ordered to provide records to NEDC under APRA." Appellant's App., Vol. 3 at 36. The trial court awarded fees and costs to NEDC in the total amount of $48,903.15 and entered final judgment.

[13] The Secretary now appeals 1) the trial court's Summary Judgment Order finding that documents were not excepted by the trade secrets or deliberative materials exceptions; 2) the Disclosure Order determining that the public safety

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[3] There were two documents that were unreadable, and the trial court ordered the Secretary to provide readable copies of those documents to the court within seven days, which the Secretary did. The trial court then issued an amended order to account for those documents and again ordered the documents to be provided within fifteen days. *See* Appellant's App., Vol. 3 at 2-14.

In addition, following the original Disclosure Order, and again following the amended order, the Secretary filed a series of Motions for Enlargement of Time to provide the documents to NEDC, which the trial court granted. Ultimately, the documents have yet to be provided and the execution of the judgment and order to pay attorney's fees is currently stayed pending resolution of this appeal.

exception did not protect most of the documents reviewed *in camera*; and 3) the Fees Order finding that NEDC had substantially prevailed and was entitled to an award of reasonable attorney's fees.[4]

Discussion and Decision

I. Access to Public Records Act

[14] APRA provides:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

[4] Lawson left office on March 16, 2021, and Holli Sullivan replaced her. Pursuant to Indiana Appellate Rule 17(C)(1), Sullivan has been automatically substituted as a party in this case.

Ind. Code § 5-14-3-1. To achieve this policy, "[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency[.]" Ind. Code § 5-14-3-3(a). Further,

> [a] person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record.

Ind. Code § 5-14-3-9(e).

[15] Certain records are excepted from the disclosure requirements of APRA, however. *See* Ind. Code § 5-14-3-4. Some records, described in Indiana Code section 5-14-3-4(a), *may not* be disclosed by a public agency as a matter of law. Other records, described in Indiana Code section 5-14-3-4(b), are excepted from disclosure *at the discretion* of the public agency.

[16] The Secretary asserted both mandatory and discretionary exceptions justified its withholding of certain documents in response to NEDC's request:

- the mandatory exception for "[r]ecords containing trade secrets[,]" Ind. Code § 5-14-3-4(a)(4);
- the discretionary exception for "[r]ecords that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are

communicated for the purpose of decision making[,]" Ind. Code § 5-14-3-4(b)(6); and

- the discretionary exception for public safety threats, Ind. Code § 5-14-3-4(b)(19), which allows a public agency to withhold "[a] record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack."[5]

[17] Whether documents fall under an exception to APRA's general rule of disclosure is a matter of statutory construction. *J. Gazette v. Bd. of Trs. of Purdue Univ.*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Statutory interpretation presents a question of law for which summary judgment is particularly appropriate. *Speedy Wrecker Serv., LLC v. Frohman*, 148 N.E.3d 1005, 1009 (Ind.

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[5] When there is a request for a record that a public agency considers to be excepted from disclosure because its disclosure would threaten the public safety by exposing a vulnerability to a terrorist attack, the agency may consult with the counterterrorism and security council established by statute in formulating a response and may do either of the following:

> (1) Deny disclosure of the record or a part of the record. The agency or the counterterrorism and security council shall provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. . . .
> (2) Refuse 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). As the trial court noted, the Secretary did not avail itself of subsection (2) of this provision. *See* Tr., Vol. 2 at 11 (trial court noting, in regard to the Secretary's argument during the hearing on *in camera* review regarding the provision that allows the agency to refuse to confirm or deny the existence of records, that it did not "understand your logic that . . . the records don't exist. The . . . Secretary of State provided the records to the Court so they clearly exist. So we're past that stage of . . . this process.").

Ct. App. 2020). When interpreting a statute, we give the words and phrases in the statute their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself. *Saurer v. Bd. of Zoning Appeals*, 629 N.E.2d 893, 897 (Ind. Ct. App. 1994). Exceptions to public disclosure laws should be construed strictly, but expressed exceptions specified by the legislature are not to be contravened. *Robinson v. Ind. Univ.*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995), *trans. denied*.

II. Standard of Review

[18] When a trial court reviews an alleged APRA violation, it does so *de novo* – without deference to the agency – and the initial burden of proof is on the agency to sustain its denial. Ind. Code § 5-14-3-9(f). The agency meets its burden of proving it properly denied access to a public record because of a mandatory exception by "establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." *Id.* Thereafter, the record may not be disclosed. Ind. Code § 5-14-3-4(a). The agency meets its burden of proving it properly exercised a discretionary exception by proving that the record falls within any of the categories of excepted records under section 5-14-3-4(b) and, again, "establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit[.]" Ind. Code § 5-14-3-9(g)(1)(B). Once the agency has met its initial burden of proof in the case of a discretionary exception, the burden shifts to the complaining party to demonstrate that the agency's denial of access to those records was "arbitrary or capricious." Ind. Code § 5-14-3-

9(g)(2). "An arbitrary and capricious decision is one which is 'patently unreasonable' and is 'made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.'" *A.B. v. State*, 949 N.E.2d 1204, 1217 (Ind. 2011) (quoting *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998), *trans. denied*).

[19] Because the trial court's review of the agency action was *de novo*, and because the only evidence presented to the trial court here were paper records, we are in just as good a position on appeal as the trial court was to consider the merits of NEDC's complaint. *Groth v. Pence*, 67 N.E.3d 1104, 1112 (Ind. Ct. App. 2017). We need not defer to the trial court's assessment of the paper records following its *in camera* review.[6] *Id.* Accordingly, our review of the trial court's judgment is *de novo*. *Id*.

III. Proof of Exceptions

A. Trade Secrets Mandatory Exception

[20] The Secretary contended that certain records were excepted from disclosure because they contained trade secrets.[7] APRA mandates that an administrative

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[6] Having said this, the trial court's thorough and detailed Disclosure Order meticulously setting out its reasoning and listing page by page which documents needed to be provided, which did not need to be provided, and which needed to be redacted before being provided was extremely helpful in reviewing this matter.

[7] As for any earlier assertion by the Secretary that its denial was also appropriate because NASS has a copyright in records that NEDC sought, the Secretary did not advance an argument about copyright in its

agency may not disclose records containing trade secrets. Ind. Code § 5-14-3-4(a)(4). According to our Uniform Trade Secret Act,

> "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; *see also* Ind. Code § 5-14-3-2(t) (stating that for purposes of APRA, the term trade secret "has the meaning set forth in IC 24-2-3-2"). Thus, protectable trade secrets have four general characteristics: "(1) information, (2) which derives independent economic value, (3) is not generally known or readily accessible by proper means by other persons who can obtain economic value from its use, and (4) is the subject of efforts reasonable under the circumstances to maintain its secrecy." *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*, 824 N.E.2d 376, 380-81 (Ind. Ct. App. 2005). What constitutes trade secret information is a question of law for the court. *Id.* at 381.

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summary judgment materials. *See* Appellant's App., Vol. 2 at 133-34 (asserting in its memorandum in support of summary judgment that it properly withheld records under the public safety, deliberative materials, and trade secrets exceptions). We therefore do not discuss it herein.

[21] The trial court found that the Secretary failed to meet its burden of showing that documents were excepted from disclosure because they are trade secrets. We agree.

[22] For records that are mandatorily excepted from disclosure, such as trade secrets, "the public agency meets its burden of proof . . . by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." Ind. Code § 5-14-3-9(f). The Secretary describes the "content of the record" as proprietary information created and distributed by NASS to the Secretary and other members of NASS. *See* Appellant's App., Vol. 2 at 138. "NASS exists and members join the organization to take part in this confidential collaboration and communication with fellow states." *Id.* at 139. The Secretary asserts that NASS derives independent economic value from the contents of its members' emails not being generally known to other persons and that the emails are not readily ascertainable by other persons through proper means because they are kept in confidence. It also asserts that the following disclaimer appearing at the end of NASS emails is 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" and that it shows NASS is making reasonable efforts to maintain its secrecy:

> 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.

Id.

[23] Although the Secretary quotes each element of a trade secret, it simply makes conclusory statements that the emails meet each of those elements. The Secretary did not designate any evidence to establish the content of the records with adequate specificity,[8] nor in support of its assertions that NASS derives economic value from the content of the emails at issue here. Moreover, Indiana Code section 5-14-3-9(e) states that the public agency "must notify each person who supplied any part of the public record at issue" that a request for release of the record has been denied and "[s]uch persons are entitled to intervene in any litigation that results from the denial." This is a recognition by the legislature that any action brought under APRA "could implicate the interest of both public agencies and private entities and that both could actively oppose disclosure of the public records at issue." *Shepherd Props. Co. v. Int'l Union of Painters & Allied Trades, Dist. Council 91*, 972 N.E.2d 845, 852 (Ind. 2012). Here, either the Secretary did not notify NASS or NASS did not feel it necessary to intervene. As the trial court noted, NASS is the party that would suffer the greatest harm by disclosure of its trade secret information, and that it did not

[8] The Secretary did not designate an affidavit or other evidence in response to NEDC's motion for summary judgment or in support of its own motion for summary judgment as to the trade secrets issue. And only the documents alleged to be excepted from disclosure by the public safety exception were submitted to the trial court for *in camera* review. Therefore, the only information the trial court or this court has as to the contents of the records allegedly protected as trade secrets is that given by the Secretary in legal argument.

intervene "strongly suggests that the information at issue does not meet the requirements for the trade secret exemption[.]" Appellant's App., Vol. 2 at 202. The Secretary failed to meet its burden of showing the trade secrets exception supported its denial of NEDC's public records request.

B. Deliberative Materials Discretionary Exception

[24] The Secretary also contends that certain records were excepted in its discretion as deliberative materials, specifically:

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

Ind. Code § 5-14-3-4(b)(6). The purpose of excepting intra- or interagency advisory or deliberative material from public disclosure is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). "The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result." *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 910 (Ind. Ct. App. 2003), *trans. denied*. As noted above, the Secretary meets its burden of proof to sustain its denial of access by proving that the records fall within any one of the discretionary exceptions under Indiana Code section 5-14-3-4(b) and

establishing the content of the records with adequate specificity and not by relying on a conclusory statement or affidavit. Ind. Code § 5-14-3-9(g)(1).

[25] As with the trade secrets exception, the Secretary did not designate any evidence on the question of whether the records in question are deliberative materials as defined by section 5-14-3-4(b)(6). Rather, the Secretary simply asserts in its memorandum supporting its motion for summary judgment that the records are intra-agency deliberative materials because the Secretary "regularly communicate[s] 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." Appellant's App., Vol. 2 at 136.

[26] The Secretary did not prove that NASS was another public agency or that it was a private contractor under contract with the Secretary's office.[9] NASS may act "as a medium for the exchange of information between states and foster[] cooperation in the development of public policy[,]" *id.* at 136 (quotation omitted), but the Secretary has not shown that the particular records requested by NEDC – emails between the Secretary and NASS – were intra-agency communications or that they contained expressions of opinion or were speculative in nature and communicated for the purpose of decision making.

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[9] In fact, in December 2018 correspondence to NEDC, Bonnet stated, "[I]t is [the Secretary's] considered view that [NASS] is not a public agency[.]" Appellant's App., Vol. 2 at 34.

Cf. Groth, 67 N.E.3d at 1122 (holding the Governor's decision to withhold a white paper drafted by a Texas deputy solicitor general on behalf of the State of Texas and sent to the Governor by the Governor-Elect of Texas's chief of staff concerning proposed litigation over presidential executive orders on immigration was appropriate pursuant to the deliberative materials exception because the white paper was "an expression of legal opinion used by the Governor for the purpose of decision making" – namely, deciding whether to join the litigation), *trans. denied*. In short, the Secretary has not established with adequate specificity the content of the records and therefore has not met the burden of proving that they are intra-agency deliberative materials. *See* Appellant's App., Vol. 2 at 198 (trial court stating in Summary Judgment Order that "[s]ummary judgment cannot be granted on the sole basis that [the Secretary] asserts the exception applies").

C. Public Safety Discretionary Exception

[27] Finally, the Secretary asserted the public safety exception as a ground for denying disclosure of a cache of records.[10] Indiana Code section 5-14-3-4(b)(19)

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[10] NEDC claims that we should not consider the affidavit the Secretary provided for the trial court's *in camera* review in support of this exception because it was not designated as evidence during the summary judgment proceedings. Although it is true the Secretary did not designate this affidavit in support of its Cross-Motion for Summary Judgment, the trial court had already denied the Secretary's summary judgment motion and had moved forward in determining at NEDC's request whether the documents the Secretary claimed were covered by the public safety exception were properly withheld. The Secretary could have filed the same affidavit during the summary judgment proceedings (and arguably should have – the Secretary's argument in its reply in support of its motion for summary judgment that it was not required to file an affidavit or otherwise designate evidence to support its motion for summary judgment is a risky strategy when it bears the burden of proving an exception applies). However, as the Secretary notes in its reply brief,

excepts from public disclosure "[a] record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack." Records that may be withheld under this subdivision include:

- Vulnerability assessments;
- Risk planning documents;
- Needs assessments;
- Threat assessments;
- Intelligence assessments;
- Domestic preparedness strategies; and
- Infrastructure records that disclose the configuration of critical systems such as voting system and voter registration system critical infrastructure.

[28] The trial court determined that the Secretary did not meet its burden of proving most of the withheld records at issue were subject to the public safety exception. As noted above, to meet its burden of proof, the Secretary was required to establish the content of the record with adequate specificity and to show that the record falls within this exception. *See supra* ¶ 18; Ind. Code § 5-14-3-9(g)(1).

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it was not trying to overturn or submit new evidence on NEDC's motion for summary judgment. *See* Reply Brief of Appellant at 7. Instead, the trial court was essentially conducting an evidentiary hearing on still-pending issues and did not inappropriately grant the Secretary permission to file an affidavit relevant to the court's *in camera* review of the withheld documents. For that same reason, we will consider the affidavit on appeal as part of the record of proceedings.

In *J. Gazette*, disputed documents were submitted to the trial court in their entirety for *in camera* review. 698 N.E.2d at 829. We held this "obviously provides adequate specificity of the contents and nature of the documents to allow the trial court determine whether they are excluded from the disclosure requirements." *Id.* The same is true here – the disputed documents were provided to the trial court for *in camera* review thus establishing their content, and the only question is whether the Secretary showed the records fall within the public safety exception as claimed.

[29] The parties do not point us to, and our own research has not discovered, any Indiana case that specifically addresses the public safety exception. But this is, essentially, a matter of statutory construction. *See id.* at 828. And in the realm of public records, the legislature has articulated a liberal disclosure policy: "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1. "Liberal construction of a statute requires narrow construction of its exceptions"; although expressed exceptions should not be so narrowly construed as to contravene them. *Robinson*, 659 N.E.2d at 156.

[30] Because of the lack of caselaw discussing our public safety exception specifically, we have looked to other jurisdictions to generally aid in our construction of the exception. In Massachusetts, as in Indiana, access must be provided to public records unless the custodian of the records proves with specificity that an exception applies, *see* Mass. Gen. Laws ch. 66 § 10, and one

of the exceptions allows an otherwise public record to be withheld if it is sufficiently related to the safety or security of persons or infrastructure and if disclosure of the record is likely to jeopardize public safety, M.G.L. ch. 4 § 7, Twenty-sixth (n). This requires "consideration of the likely consequences of releasing the record sought." *People for the Ethical Treatment of Animals, Inc. v. Dep't of Agric. Res.*, 76 N.E.3d 227, 231 (Mass. 2017);[11] *see also Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013) ("In interpreting the 'reasonably likely' part of the test, as with all the security-related exceptions, we look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation."). A further consideration is "whether, and to what degree, the record sought resembles the records listed as examples in the statute" and would be useful to a terrorist to maximize damage and jeopardize public safety. *PETA*, 76 N.E.3d at 236.

[31] In discussing Ohio's "security records" exception[12] to disclosure of public records, the Ohio Supreme Court noted that "when a public office claims an exception based on risks that are not apparent within the records themselves, the office must provide more than conclusory statements in affidavits to support

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[11] Massachusetts' exception (n) "is unique among [its] statutory [exceptions] in including the 'reasonable judgment of the record custodian' as part of the calculation." *Id.* However, Massachusetts, like Indiana, offers no deference to the record custodian's determination but reviews it *de novo*. *Id.* at 237.

[12] This exception covers "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage[,]" or that is "assembled, prepared, or maintained by a public office . . . to prevent, mitigate, or respond to acts of terrorism[.]" Ohio Rev. Code § 149.433(A)(1) and (2).

its claim." *State ex rel. Rogers v. Dep't of Rehab. & Corr.*, 122 N.E.3d 1208, 1213 (Ohio 2018). And in Pennsylvania, courts have differentiated between sufficient and insufficient support to substantiate application of the public safety exception to disclosure by requiring an affidavit in support of the exception that includes detailed information describing the nature of the records sought; that connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; and that explains how, as a consequence of such disclosure, the public agency's ability to perform its public safety function would be impaired. *Carey*, 61 A.3d at 376 (comparing a case in which the exception was proven by an affidavit in which the affiant explained purpose of record and provided details regarding substance of record and ways a criminal might use the information to evade or avoid detection with a case in which the affidavit did nothing more than state that, based on the affiant's professional experience, the disclosure of information would create a substantial risk of harm for the agency and the public but did not connect the disclosure to a security threat).

[32] Synthesizing the approaches of our sister states with our own statute and rules of statutory construction, we conclude that where a class of documents closely resembles the records listed as examples of protected documents in our public safety exception, they are more likely to fall within the exception and proof they do meet the exception need not be as detailed. *See PETA*, 76 N.E.3d at 237 (noting that the more the record sought resembles the records listed in the Massachusetts' public safety statutory exception, the lower the record

custodian's burden to demonstrate withholding disclosure is reasonable and vice versa). However, regardless of the record sought, the public agency cannot simply rely on its own assessment of the documents and the likely risks and consequences of disclosure or a conclusory or speculative statement that disclosure has a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. Instead, it must describe *how* a vulnerability might be exposed and public safety threatened by disclosure. And where, as here, the agency alleges that the implications of the documents are not apparent to the untrained eye or that individual documents "can be aggregated and processed . . . to identify and exploit technical and social network vulnerabilities[,]" Appellant's App., Vol. 2 at 214-15, the agency must *demonstrate*, not just state, that there is, in fact, more than meets the eye. Neither the trial court on its initial review nor this court on appellate review is required to defer to the agency's conclusion.

[33] The Bonnet affidavit makes several sweeping pronouncements about election infrastructure and security. But in explaining the individual documents, many paragraphs of the affidavit describe the document but lack an explanation of the public safety risk posed by disclosure. For instance, the affidavit provides:

> 32. Document 34A3 is identified as a draft document (presumably given to the [Secretary] for review and feedback before finalization), marked "Private Instructions for the Elections Government Coordinating Council."
>
> * * *

> 34. Document 41A1 was included as an attachment to an email containing election infrastructure security information the [Secretary] believes should not be released. . . .

Id. at 219. Even where explanations are given, the affidavit does not demonstrate *how* the withheld documents could be used to threaten public safety:

> 36. Document 52A1 is a draft document from DHS concerning election infrastructure security and security audits, assessments and services, intended for state and local election administrators. The [Secretary] believes this document contains information that might be helpful to threat actors.
>
> * * *
>
> 42. Document 112A2 was included as an attachment to an email containing election infrastructure security information. The document includes information about network penetration attacks, malware threats, data encryption protocols, and medial access control protocols the [Secretary] believes should not be release[d].

Id. at 219, 220.

[34] Having reviewed the withheld documents and the Secretary's affidavit, we agree with the trial court that the Secretary has not met its burden of showing the majority of the withheld documents are "[i]nfrastructure records that disclose the configuration of critical systems such as voting system and voter registration system critical infrastructure" or other records the disclosure of which "have a reasonable likelihood of threatening public safety by exposing a

vulnerability to terrorist attack." Ind. Code § 5-14-3-4(19); *see* Appellant's App., Vol. 2 at 232 (trial court stating in Disclosure Order that Bonnet's affidavit "does not explain why a release of these records to [NEDC] . . . would have a reasonable likelihood of threatening public safety by exposing vulnerability to terrorist attack"). Accordingly, we affirm the trial court's Disclosure Order and the determinations made therein of which documents submitted under seal for *in camera* review should be disclosed to NEDC.

III. Attorney's Fees

[35] Finally, the Secretary contends the trial court erred in awarding attorney fees to NEDC. Indiana Code section 5-14-3-9(i) provides, in relevant part:

> [I]n any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:
>
> (1) the plaintiff substantially prevails; or
>
> (2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

When the requirements of the statute have been met, the award of attorney fees is mandatory. *Indianapolis Newspapers v. Ind. State Lottery Comm'n*, 739 N.E.2d 144, 156 (Ind. Ct. App. 2000), *trans. denied*.

[36] The trial court found in its Fees Order that "NEDC did substantially prevail in this matter and the [Secretary] was ordered to provide records to NEDC under

APRA" and that it was accordingly obligated by the statute to award NEDC attorney's fees and costs. Appellant's App., Vol. 3 at 36. The Secretary contends that NEDC did not "substantially prevail" because the trial court found on summary judgment that NEDC's request for records was not reasonably particular. The Secretary relies on *Anderson v. Huntington Cnty. Bd. of Comm'rs*, 983 N.E.2d 613, 615 (Ind. Ct. App. 2013), *trans. denied*, which it characterizes as holding that "[t]o substantially prevail in an APRA case and receive attorney's fees, the records request must be reasonably particular." Brief of Appellant at 30. We believe that is too broad a reading of *Anderson*, however.

[37] In *Anderson*, the trial court denied an APRA requester's complaint seeking an order compelling an agency to provide public records, concluding the request was not reasonably particular, and also denied his request for attorney's fees. We affirmed both decisions, agreeing the request was not reasonably particular and concluding that the requester did not substantially prevail in an action under APRA even though the requester obtained the records, because the agency voluntarily provided them rather than the trial court ordering it to do so. 983 N.E.2d at 619. The only substantive issue at trial was whether the request was reasonably particular, and the requester lost on that issue. Thus, the requester did not substantially prevail in his APRA action because the trial court ruled against him. We do not read *Anderson* to suggest that if a request is

not reasonably particular, the requester can never substantially prevail regardless of any other issues in the case or its ultimate outcome.[13]

[38] Here, NEDC's complaint sought access to records the Secretary withheld as excepted from disclosure. Reasonable particularity was an issue in this case, but so was the Secretary's proof that the exceptions it claimed applied to the withheld documents. The trial court explained its rulings in the case as a whole:

> NEDC prevailed completely on the [Secretary's] Cross-Motion for Summary Judgment and the [Secretary] was eventually required to turn over almost all the documents NEDC requested in their APRA request. The Court denied NEDC's Motion for Summary Judgment on the issue whether NEDC's request was reasonabl[y] particular[] and whether the [Secretary] responded in a timely fashion but the Court granted NEDC summary judgment finding that the [Secretary] had no valid exemption under APRA to not produce[] the requested records to NEDC.

Appellant's App., Vol. 3 at 36. NEDC received most of the documents it requested because of the trial court's ruling in this litigation that certain documents were not properly withheld under an exception to APRA's general policy of disclosure. NEDC therefore substantially prevailed on the merits of

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[13] The Secretary posits that allowing a requester to recover attorney's fees where he did not make a reasonably particular request would "defeat the purpose of the reasonably particular requirement" and encourage parties to request documents without any specificity on the chance of collecting fees if an agency is ultimately required to turn over documents. Reply Br. of Appellant at 13. Notably, although the Secretary objected to the reasonable particularity of NEDC's requests throughout their communications, it never denied the request on that basis, nor did it argue on summary judgment or in this appeal that NEDC was not entitled to any records for lack of specificity.

its APRA action and is entitled to an award of attorney's fees pursuant to Indiana Code section 5-14-3-9. *Cf. River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 913-14 (Ind. 2020) (noting the "ordinary and historical legal understanding" of the term prevailing party is "[a] party in whose favor judgment is rendered") (citation omitted).

[39] NEDC contends that it is also entitled to an award of appellate attorney's fees. Although no cases specifically discuss the availability of appellate attorney's fees in an APRA action, cases in an array of other contexts have held that where a statute provides for reasonable attorney's fees to be awarded to the prevailing party, appellate attorney's fees are also available. *Auto Liquidation Ctr., Inc. v. Chaca*, 47 N.E.3d 650, 656 (Ind. Ct. App. 2015) (noting the court has "consistently found that an award of attorney fees includes appellate attorney fees . . . when the party seeking appellate fees has been successful on appeal"); *see*, *e.g.*, *Templeton v. Sam Klain & Son, Inc.*, 425 N.E.2d 89, 95 (Ind. 1981) (holding in mechanics lien statute, "reasonable attorneys fees" includes appellate fees); *Benge v. Miller*, 855 N.E.2d 716, 722 (Ind. Ct. App. 2006) (holding that a plaintiff entitled to attorney's fees upon prevailing under the Crime Victim's Relief Act and the Deceptive Consumer Sales Act is also entitled to appellate attorney fees). We see no reason why the same interpretation should not apply in an APRA case with a similar attorney fee's statute, and we therefore remand to the trial court to determine and award reasonable appellate attorney's fees to NEDC.

Conclusion

[40] The Secretary failed to meet its burden of proving that it properly denied NEDC access to public records under any of the claimed exceptions. We therefore affirm the trial court's orders regarding disclosure of the records. And because NEDC substantially prevailed in its APRA action and was successful in this appeal, it is entitled to reasonable attorney's fees, both at the trial and appellate level. We affirm the trial court's attorney's fee award for trial fees and remand to the trial court to determine the appropriate amount of appellate fees and costs to be awarded to NEDC.

[41] Affirmed and remanded.

Bradford, C.J., and Altice, J., concur.