INDIANA COMMERCIAL COURT

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.

F I L E D
June 23, 2020
Myla A. Eldridge
CLERK OF THE COURT
MARION COUNTY
SW

CONSOLIDATED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ORDER DENYING DEFENDANTS CROSS-MOTION FOR SUMMARY JUDGMENT, AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S REQUEST FOR SUMMARY JUDGMENT ON DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's, National Election Defense Coalition ("NEDC"), Motion for Summary Judgment and Defendant's, Connie Lawson, Secretary of State of the State of Indiana ("Secretary"), Cross-Motion for Summary Judgment on Plaintiff's Complaint seeking declaration that the Secretary acted in violation of the Indiana Access to Public Records Act ("APRA").

Plaintiff filed its Motion for Summary Judgment on January 15, 2020. Defendant filed her Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment on February 21, 2020. In response, Plaintiff filed its Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment on April 13, 2020. Plaintiff requested

summary judgment be entered in favor of Plaintiff on Defendant's Cross-Motion for Summary Judgment. Defendant then filed her Reply in Support of Defendant's Motion for Cross Summary Judgment on May 7, 2020. In light of the COVID-19 pandemic, both Plaintiff and Defendant agreed to waive oral argument and permitted the Court to rule from the pleadings.

Having been fully briefed on the issues surrounding this matter, the Court hereby finds as follows:

I. UNDISPUTED FACTS

1. On September 13, 2018, Susan Greenhalgh ("Greenhalgh"), NEDC's Policy Director, sent an APRA request to the Indiana Election Commission.

2. The request sought copies of every correspondence, including every and all attachments and forwarded messages, that was either (1) sent from anyone at the Secretary's office ("the Office") to anyone at the National Association of Secretaries of State ("NASS") or (2) sent from the NASS to anyone at the Office from May 1, 2017, through September 13, 2018, the day of the request. (Complaint, Ex. A).

3. The NASS is a national professional organization for public officials, with membership open to all 50 states, U.S. territories, and the District of Columbia. "NASS serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy." (Def. Mem. in Supp. of Def.'s Cross-Mot. for Summ. J., ¶ 3).

4. The Secretary was the 2017-2018 President of NASS. (Pl. Mem. in Supp. of Pl.'s Mot. for Summ. J.).

5. On December 13, 2018, Jerold Bonnet ("Bonnet"), General Counsel for the Secretary, sent Greenhalgh a CD-R containing agency records in response to APRA request. Bonnet also sent a letter, acknowledging that some agency materials are not available for public inspection pursuant to state and federal law. (Complaint, Ex. B).

6. On December 19, 2018, Greenhalgh communicated to Bonnet that the 461 pages of records contained on the CD-R were not responsive to the request and reiterated NEDC's request, suggesting compliance without further delay. (Greenhalgh Decl., Ex. 2).

7. In response, Bonnet sent another letter to Greenhalgh on December 20, 2018, explaining that while the Office was not foreclosing the possibility that some of the communications to and from NASS may be available for public inspection and copying, the Office believed that the request was not reasonable, practical, or required due to the request's range of communication types, time span, and lack of specificity or particularity. (Greenhalgh Decl., Ex. 2).

8. On December 21, 2018, Greenhalgh then clarified the request, seeking any and all communications including forwarded emails and attachments between the Office, excluding staff with security clearances, and any recipient with the email domain @nass.org or @sso.org, from May 1, 2017, to December 21, 2018. Any classified communication was also excluded from the narrowed request. (Greenhalgh Decl., Ex. 4).

9. NEDC filed its formal complaint with the Public Access Counselor ("PAC") on January 10, 2019. (Complaint, Ex. D).

10. On January 18, 2019, Bonnet communicated to William Groth ("Groth"), counsel for NEDC, that an electronic search of two staff accounts, with parameters in accordance with the narrowed request, identified 9,255 emails with accompanying attachments. Bonnet suggested that narrowing the scope of the search to emails concerning election integrity and cybersecurity would shorten the retrieval and evaluation time involved. In the meantime, Bonnet stated that the Office would continue to review and classify a sampling of requested emails, identified utilizing a smart sampling feature of an e-discovery program, consisting of 326 email strings and 339 attached documents, totaling 2,311 pages. (Complaint, Ex. G).

11. Groth responded by email on January 22, 2019, agreeing to narrow the scope of the request to all communications between the Office and NASS containing the terms "election," "elections," "voting," "executive board," "cybersecurity," and any abbreviations of the terms the Secretary and her staff may use, from May 1, 2017, to January 22, 2019. (Complaint, Ex. H).

12. On February 1, 2019, Bonnet sent Groth an email containing an update as to the status of the Office's response to NEDC's request. Bonnet noted that the Office was in the process of reviewing documents responsive to the January 22 narrowed request, consisting of 379 emails and 537 attachments, totaling 3,183 pages. In addition, Bonnet explained the Office's position that such a broad request requires significantly more time to complete than one that is narrowly tailored, and certain records will be withheld on three grounds: 1) NASS's Trade Secret and Copyright Rights (Ind. Code § 5-14-3-4 (3) & (4)); 2) the Office's Deliberative Materials Discretionary Exceptions (Ind. Code § 5-14-3-4 (6)); and 3) the Office's Security and

Public Safety Discretionary Exceptions (Ind. Code § 5-14-3-4 (10), (11), & (19)). Regarding the Security and Public Safety Exception, Bonnet informed Groth that the Office had initiated consultation with the Indiana Counterterrorism and Security Council ("ICSC") and expected guidance with respect to applicable documents within 6-8 weeks. (Complaint, Ex. I).

13. On February 12, 2019, Bonnet provided Groth with approximately 644 pages of materials that the Office deemed to be available for public inspection. In addition, Bonnet provided a spreadsheet summarizing each of the 339 emails and 537 attachments, indicating whether the Office believes the document is exempt from public access and, if so, the Office's basis for the applicable exception(s). Bonnet also noted that the Office expected to receive guidance from the ICSC on materials exempted pursuant to Ind. Code § 5-14-4-3 (19) sometime in March. (Groth Decl., Ex. Z).

14. Groth, on February 27, 2019, acknowledged that NEDC had received the documents but disputed that the documents provided were responsive to the requests, calling the disclosures "woefully incomplete." (Complaint, Ex. K).

15. On April 11, 2019, the PAC provided an undated advisory opinion, designated No. 19-FC-16, wherein the PAC declined to issue a definitive declaration on the issue of timeliness but concluded that some, if not all, of the cited exemptions to disclosure could possibly apply to the withheld materials. (Complaint, Ex. L).

16. Specifically, the PAC declined to make a declaration on timeliness because "while five months is normally much too long to produce documents pursuant to a request, the request itself did not meet reasonable standards." (Complaint, Ex. L). Additionally, while the PAC found that the Secretary had carried its burden that

exemptions may possibly apply to the withheld materials, this determination was based "solely on the merits of its legal argument but not necessarily on any unknown underlying facts." *Id*.

17. The Office has not produced any further documents or exemption logs since those provided on February 12, 2019. (Complaint, ¶ 42).

18. Plaintiff filed this action on June 20, 2019.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the evidentiary matter designated by the parties shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Sheehan Constr. Co. v. Continental Cas. Co.*, 938 N.E.2d 685, 689 (Ind. 2010). "If the facts are undisputed, [the Court should] determine the law applicable to the undisputed facts …" *Lim v. White*, 661 N.E.2d 566, 568 (Ind. Ct. App. 1996) (citations omitted).

The Indiana Supreme Court has noted that there exists a "high bar" for a party seeking summary judgment in Indiana, and such party must affirmatively negate an opponent's claim before a court may grant them judgment as a matter of law. *Hughley v. State*, 15 N.E.3d 1000, 1003-04 (Ind. 2014). Finally, "[w]hen any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." T.R. 56(B).

III. SUMMARY OF MOTIONS AT ISSUE

Plaintiff 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, Plaintiff asks the Court to declare that Defendant 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, Plaintiff requests the Court grant partial summary judgment in Plaintiff's favor on Defendant'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 Plaintiff should be granted summary judgment on the trade secrets exemption because that must be raised by NASS not the Secretary.

Defendant responded by filing a Cross-Motion for Summary Judgment, arguing she is entitled to summary judgment because the Office properly withheld documents from Plaintiff's APRA request under appropriate exemptions. Defendant also asks the Court deny Plaintiff's Motion for Summary Judgment. Plaintiff responds by further requesting that, as to the terrorism-risk exception and wherever else the Court deems appropriate, the Court review the withheld records in camera under Ind. Code § 5-14-3-9(h).

IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court will first address Plaintiff's Motion for Summary Judgment on Counts I & II of its Complaint.

APRA permits any person to "inspect and copy the public records of any public agency," however the "request for inspecting or copying must identify with reasonable particularity the record being requested." Ind. Code § 5-14-3-3(a)(1). The public agency may not deny or interfere with a proper request and must provide the requested documents "within a reasonable time after the request is received by the agency." Ind. Code. § 5-14-3-3(b). The public policy behind APRA is "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." Ind. Code § 5-14-3-1. However, the public agency may withhold all or part of the public records sought if the records are among those exempt from disclosure under Ind. Code § 5-14-3-4. Ind. Code § 5-14-3-9(d). To the extent that a public agency objects to any aspect of the APRA request, APRA places "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." Ind. Code § 5-14-3-1.

The Public Access Counselor (PAC) oversees public access disputes and has the authority to respond to informal inquiries and "issue advisory opinions to interpret the public access laws upon the request of a person or a public agency." Ind. Code § 5-14-4-10(5-6). In matters of APRA interpretation, the PAC's interpretation on an undefined matter is given "considerable deference." *Anderson v. Huntington Cty. Bd. of Comm'rs*, 983 N.E.2d 613, 618 (Ind. Ct. App. 2013). That said, decisions involving an interpretation of APRA statute are reviewed de novo, and any ruling by the PAC is not binding on this Court. *Id*. (citing Ind. Code § 5-14-3-9(f)).

A. Whether Plaintiff's requests were "reasonably particular" pursuant to APRA

Plaintiff argues that the narrowed request from January 22, 2019, satisfies APRA's reasonable particularity requirement because it identified a specific sender, recipient, date range, and subject, thus enabling Defendant to identify the materials sought via electronic search. Defendant has challenged this claim, arguing that the request was and remains overly broad due to the failure to limit the request to a particular subject matter.

Although reasonable particularity is not defined in APRA, the Indiana Court of Appeals has held that "[w]hether a request identifies with reasonable particularity the record(s) being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records." *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d at 34 (Ind. Ct. App. 2012). The PAC has further developed the Court of Appeals' interpretation of reasonable particularity, "generally [relying] on the presence of four elements for finding email requests to be 'reasonably particular' within the meaning of APRA: 1) a specific sender, 2) recipient, 3) date frame, and 4) subject." *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019) (citing PAC Informal Inquiry, 14-INF-30, 3). "These elements are largely context specific, in that the generality or accuracy of those elements may fluctuate on a case-by-case basis." *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019) (citing PAC Informal Inquiry, 17-INF-17, 2).

"Also inherent in the reasonable particularity discussion is a standard of practicality. If first or last names are used as key words for search parameter, it would depend on whether those names are unique or if there are several individuals captured

in a search. It is often helpful for an agency if a requester gives a finite subject matter for context so that superfluous, unwanted emails are not produced." *Id*. "If the request concerns a specific subject matter within a sufficiently limited period of time, the public agency should be able to identify the emails from any of the agency's employees which would be subject to a request." *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019).

In support of its argument, Plaintiff identifies how its request satisfies each of the four particularity elements of email communications. Citing *Citizens Action Coalition*, Plaintiff argues that the *Sender* element is reasonably particular because APRA does not require requesters to name specific government agency employees. Similarly, the *Recipient* element is purportedly satisfied because APRA does not require members of the public to identify specific employees at outside organizations communicating with public agencies. Plaintiff maintains that the *Date range* of May 1, 2017 to September 13, 2018 is sufficiently particular on its face. Finally, Plaintiff argues that the *Subject* of the narrowed request, the keywords "election," "elections," "voting," "executive board," "cybersecurity," or any abbreviations of those terms used by the Secretary or her staff in their communications with NASS, are sufficiently particular to meet the requirements under APRA.

In response, Defendant argues that Plaintiff's request, even after being narrowed, is still overly broad because the subject matter is not reasonably particular. Defendant referenced the PAC advisory decision in which the PAC ruled that Plaintiff's original request "does not approach even a loose interpretation of reasonable particularity." PAC Advisory Opinion, 19-FC-16, 4. And even after Plaintiff narrowed the

request with the search terms, Defendant argues that the request remains overbroad, evidenced by well over 3,000 pages of documents initially resulting from the revised search.

In its response, Plaintiff contends that both parties agree that Plaintiff's request met the test for reasonable particularity, citing two major points. First, Plaintiff states that both parties agree that an APRA request that includes email communications is reasonably particular if it includes a sender, recipient, date range, and subject. Second, Plaintiff cites both Defendant's statement of material facts and Plaintiff's Memorandum where it alleges both parties acknowledged that NEDC's APRA request, as amended, included a specific sender, recipient, date range, and subject. Thus, Plaintiff concludes the amended APRA request from January 22, 2019 was reasonably particular as a matter of law. Whether the initial September 2018 request met this test is irrelevant to the present analysis.

Defendant replied by rejecting Plaintiff's assertion that both parties agree Plaintiff's request met the test for reasonable particularity. Defendant reiterates that Plaintiff's requests were not reasonably particular because they did not specify a specific sender, recipient, date range, or subject. Even though the requests may have been narrowed over time to seek increasingly more specific information, Defendant argues that the original request was not sufficiently specific. Defendant concludes by rebutting Plaintiff's point that the parties agreed the request was reasonably particular just because the parties agreed on the elements that make a request reasonably particular.

Based on review of the Court of Appeals opinions, this Court's decision in *Citizens Action Coalition*, and the PAC's advisory opinion on this matter, the Court finds Plaintiff's requests do not meet the "reasonable particularity" standard. While the Sender, Recipient, and Date Range of the request meet the standard, the search terms provided in the narrowed request remain overly broad when looking at the overall context of the request. The requests in this case are not like those in *Citizens Action Coalition*. The requests in *Citizens Action Coalition* had a date range of 15 days, a subject matter regarding either "Trump" or "Carrier," and necessitated identifying the emails of any of the agency's employees which would be subject to a request. *Citizens Action Coalition v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019). Specific emails were not required to be identified in the requests because the date range was sufficiently limited, and the subject matter was specific. *Id*. As for Plaintiff's present requests, however, this is not the case. The date range is from May 1, 2017 to January 22, 2019, spanning almost two years, the sender (recipient for the second request) is anyone at Defendant's office without a security clearance, the recipient (sender for the second request) is anyone at NASS with the email domain @nass.org or @sso.org, and the "subject matter" consists of five, one-word search terms and any of their potential abbreviations. With a date range that large and unspecified number of senders and recipients, such search terms do not rise to the required level of reasonable particularity so to prevent superfluous and unwanted emails from being produced. While the Court certainly understand that APRA requests of electronically stored information present challenges, search terms must comply with the

reasonable particularity standard. Thus, this Court hereby DENIES Plaintiff's Motion for Summary Judgement on the issue of reasonably particularity.

B. Whether Defendant responded in a reasonable time

Consequently, the issue of whether Defendant responded to Plaintiff's request in a reasonable time is moot. APRA dictates that the request first "must identify with reasonable particularity the records being requested." Ind. Code § 5-14-3-3(a)(1). The PAC reasoned "that if specificity has been established as a predicate, reasonable timeliness is simply defined … as practical efficiency." PAC Advisory Opinion, 19-FC-16, 5. Because Plaintiff's requests lacked the required reasonable particularity, it does not stand to reason that Defendant has failed to respond within a reasonable time. So long as the requests remain overly broad, the Court cannot find as a matter of law that Defendant has violated APRA for not responding to the deficient requests within a reasonable time. Thus, this Court hereby DENIES Plaintiff's Motion for Summary Judgment on the issue of whether the Secretary provided a response within a reasonable time.

C. Whether Defendant constructively denied the request

Furthermore, the Court rejects Plaintiff's argument that Defendant constructively denied the request by "failing" to complete her response. Plaintiff argues that Defendant's delay in addressing the remainder of the responsive records amounts to constructive denial of the right to inspect public records. The success of this argument, however, relies on the assumption that Plaintiff's request met the reasonable particularity standard to warrant a complete response within a reasonable time. This has

not been proven to be the case and, as a result, the Court cannot find as a matter of law that Defendant constructively denied Plaintiff's request.

The Court hereby DENIES Plaintiff's Motion for Summary Judgment on both Counts I and II. In addition, the Court DENIES Plaintiff's request for attorney's fees and costs as Plaintiff has not substantially prevailed in its motion.

APRA exists to provide all persons with the right "to full and complete information regarding the affairs of the government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1. The PAC exists to provide advice and assistance concerning Indiana's public access laws and functions to provide guidance when disputes arise. In future disputes over complex APRA requests, such as in the case at hand, guidance from the PAC on particularity would assist with resolving such disputes sooner and more efficiently. While the ability to determine whether a APRA request is made with reasonable particularity in this electronic age may be difficult, the PAC along with the parties shall quickly work together to arrive at a request that satisfies the reasonable particularity standard because access to public records is an important statutory right.

V. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's cross-motion for summary judgment seeks a further finding that the Secretary's stated exemptions bar the Plaintiff from further seeking the requested records subject to those exemptions as a matter of law. The Court will address the applicability of the stated exemptions to Plaintiff's requests.

A. Public safety exception for documents related to counter-terrorism measures

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(b) (19). Defendant argues that public disclosure of emails between the Secretary and NASS would qualify for this exemption. Plaintiff challenges this assertion, arguing that Defendant has failed to meet her burden of proof that the withheld records fall within the terrorism-risk exception.

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 on 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(b) (19)), 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 of how disclosure of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack." *Id*.

Alternatively, the public agency may "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* would reveal information that would have a reasonable likelihood of threatening public safety." Ind. Code § 5-14-3-4.4(b)(2) (emphasis added). In such a

case, the "agency meets its burden of proof to sustain its refusal to confirm or deny the existence of the record … by filing a public affidavit with the court that provides with reasonable specificity of detail, and not conclusory statements, the basis of the agency's claims that it cannot be required to confirm or deny the existence of the requested record." Ind. Code § 5-14-3-4.4(f). Indiana law provides for a procedure to file pleadings under seal. (See Indiana Rules on Access to Court Records).

Defendant contends that the requested records contain sensitive election security documents that, if publicly disclosed, would expose Indiana's elections as a target of cyberterrorism attacks. Citing the consultation with the ICSC, Defendant supports her position by stating that she gave deference to the judgments of the Council and, as a result, maintains that documents have been properly withheld under this exception. Defendant further argues that she is not required to be any more specific in her response because the exception permits refusal to confirm or deny the existence of a record if the fact that it exists would reveal information that may reasonably threaten public safety.

In response, Plaintiff argues that while it is true that some information about the insecurity of election infrastructure could expose a vulnerability to a terrorist attack, Defendant has failed to provide an affidavit – even under seal – that shows that the records requested by Plaintiff would do that. Citing the exemption log, Plaintiff points out that there are documents listed under this exemption that do not provide any explanation as to whether disclosure would be reasonably likely to threaten public safety by exposing a vulnerability to a terrorist attack. Acknowledging that there may be legitimate public safety concerns to protect, Plaintiff requests the Court review the public

record in camera to come to an ultimate determination on whether the public safety exemption applies.

Defendant's reply maintains the position that disclosure of the withheld records would have a reasonable likelihood of threatening public safety. Defendant rebuts Plaintiff's argument for lack of specificity by reiterating her position that the terrorism-risk exception permits her to withhold information without providing specific or any information about the documents.

While there is some merit to Defendant's argument due to the potential sensitivity of the records being sought, 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 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.

Moreover, Defendant cites to Ind. Code § 5-14-3-4.4(b)(2), which permits a public agency to confirm or deny a record's existence, as justification for not providing specificity as to the documents being withheld. While it is not made clear whether Defendant is referring to those documents listed in the exemption log or other documents not yet provided, Defendant has failed to meet her burden of proof for failing

to provide an affidavit providing "with reasonable specificity of detail, and not conclusory statements, the basis of the agency's claims that it cannot be required to confirm or deny the existence of the requested record." Ind. Code § 5-14-3-4.4(f).

The Court hereby DENIES Defendants Motion for Summary Judgment that documents were properly withheld under terrorist-risk exception. The Court further GRANTS Plaintiff's request to conduct an in camera review of the documents wherein the Secretary claims an exemption applies under Ind. Code § 5-14-3-9(h). The Defendant shall submit said records to the Court within 15 days of the issuance of this order under seal as permitted under Indiana law.

B. Intra-agency, interagency, or deliberative materials exception

APRA also permits a public agency to withhold 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). Defendant argues that emails between NASS and the Secretary and her office are protected from public disclosure because they contain advisory or deliberative material that are either intra-agency or interagency. Plaintiff contends that Defendant failed to meet her burden of proof because she failed to provide any evidence that proves the withheld documents meet the requirements of this exception and failed to provide adequate specificity for her denial.

To exempt disclosure of records as "intra-agency or interagency or deliberative material," (Ind. Code § 5-14-3-4(b)(6)), the public agency must "prove[e] that the record falls within any one (1) of the categories of exempted records under section 4(b) … and

establish[] 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). These records, "including material developed by a private contractor under a contract with a public agency," must contain material 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).

Defendant argues that communications with the NASS are subject to the interagency exemption. Defendant describes the importance of NASS and the communication it facilitates with other members and Secretaries of State and argues that public disclosure of such communications would diminish the quality of policy formulation among Secretaries of State. Without such a deliberative materials exemption, Defendant contends that Secretaries of State would not be able to offer each other any significant policymaking assistance or assist with agency decision-making if NASS members' policy positions and proposals are discoverable to the general public before a concrete policy can be formulated.

The Court finds that Defendant has failed to prove that documents exchanged with the NASS are subject to the deliberative material exemption as a matter of law. Defendant has not provided any designated evidence to prove that any communications contain intra-agency, interagency, or deliberative materials that are exempt from disclosure under Ind. Code § 5-14-3-4(b)(6). Instead, Defendant simply declares the communications as being "intra-agency" without addressing which emails contain interagency material or material developed by a private contractor. The Court understands how coordination between difference offices of Secretaries of State could be deliberative, especially in matters that could benefit from multi-state coordination

such as election security, but Defendant fails to explain how communications with NASS, an outside non-profit company separate from any public agency, are deliberative.

Summary judgment cannot be granted on the sole basis that Defendant asserts the exception applies, thus the Court hereby DENIES Defendant's Motion for Summary Judgment that documents were properly withheld under the intra-agency, interagency, or deliberative materials exception.

C. Whether any trade secret or copyright exemptions apply

Defendant argues that NEDC requests would include information that NASS distributes to Defendant and other members that is proprietary and thus is subject to the trade secrets exemption under Ind. Code § 5-14-3-4(a)(4). In response, Plaintiff argues the requests cannot be prevented from disclosure under the trade secret exemption and further seeks partial summary judgment that the NASS confidentiality disclaimer on emails does not render them exempt from disclosure under Ind. Code § 5-14-3-4(a)(3) because the disclaimer does not establish copyright and copyright law does not block APRA disclosure.

To deny disclosure of records that contain trade secret information and confidential information under federal law (Ind. Code § 5-14-3-4(a)(3) -(4)), the public agency must "establish[] 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). Under the Indiana Uniform Trade Secrets Act (IUTSA), a trade secret can be "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.

Defendant argues that information that NASS distributes constitutes trade secret information, so Plaintiff's requests seeking communications with NASS should be exempt from disclosure. The bottom of NASS emails contains the following nondisclosure provision:

> 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.

(Def. Mem. in Supp. of Def.'s Cross-Mot. for Summ. J., 19). As evidenced by this disclaimer, Defendant argues that NASS derives independent economic value from the contents of members' emails not being generally known to other persons, and the emails are not readily ascertainable because they are held in confidence, as the confidentiality disclaimer indicates. If members' emails were made subject to public disclosure, Defendant contends that NASS will be deprived of its independent economic value, causing permanent damage to the organization and possibly forever depriving Indiana the benefit of collaboration with NASS experts and Secretaries from sister states.

Plaintiff contends that the "boilerplate" copyright claim attached to NASS's emails does not in fact alter the legal status of the messages or make them confidential under federal law. Plaintiff further argues that even if information in the communication was

protected by the federal Copyright Act, the Act is not a confidentiality statute and does not require copyrighted material be kept confidential. Where states' public records statutes have exempt documents required to be kept confidential by federal law, Plaintiff alleges that such statutes have not treated the Copyright Act as a statute triggering such an exception. Finally, Plaintiff argues that NASS, the alleged copyright holder, has a statutory right to intervene but elected not to do so here indicates that NASS has forfeited any legal objection to the release of emails.

Plaintiff also argues that neither Defendant nor NASS provided an affidavit or other evidence to establish any such economic value. Plaintiff points out that NASS is a private, nongovernmental organization with its own independent economic interests and if disclosure of public records could cause NASS significant damage, then either Defendant or NASS should have been willing to present evidence establishing as much. Defendant has only presented conclusory litigation statements of counsel, and Plaintiff argues that such statements deserve no weight when deciding whether NASS derives any economic value from the withheld documents.

In response, Defendant claims that it is difficult to quantify NASS's economic value, however failing to keep NASS's communications confidential would lead to irreparable damage to its pecuniary interests. Defendant argues that subjecting NASS's methods of communication to public disclosure would devastate the economic value, both actual and potential, cultivated by NASS throughout its history. Defendant contends that while the disclaimer at the bottom of NASS emails is not the basis for her claims for the trade secret exemption, it is clear that this information is subject of efforts that are reasonable under the circumstances to maintain secrecy.

The Court finds that Defendant has failed to meet her burden to prove that the documents were properly withheld under the trade secret exception. Defendant relied on conclusory statements and provided no designated evidence to prove that the information that NASS distributes "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." Ind. Code § 24-2-3-2.

Furthermore, the Court finds that the summary judgment should be granted in favor of Plaintiff on the narrow issue of the trade secret/copyright exemption claimed by Defendant in this matter.

After denying a the right to request a public record under a public record exemption, the public agency "must notify each person who supplied any part of the public record at issue" to allow that person the opportunity to intervene in any litigation that arises from the denial of the request. Ind. Code § 5-14-3-9(e). The Court of Appeals has previously described the process that should occur when a denial of public records disclosure based on the trade secret exemption:

> The public agency must then notify each person who supplied any part of the disputed record that a request for release of the information has been denied. Id. Such persons are then entitled to intervene in any resulting litigation. The court in which the action to compel is filed shall determine the matter de novo.

Indianapolis Newspapers v. Ind. State Lottery Comm'n, 739 N.E.2d 144, 150 (Ind. Ct. App. 2000). This right for the party that provided the requested public record is necessary because that party is well-positioned to argue whether that information satisfies the necessary elements to be considered a trade secret under IUTSA. *See*

generally Id. at 155, *cf. Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n,* 810 N.E.2d 1179, 1187 (Ind. Ct. App. 2004)(finding that certain telephone companies treating the requested information as non-confidential trade secrets supported finding against the trade secret exemption). Notably, "[t[he burden of proof for the nondisclosure of a public record is on the public agency that denies access to the record. *Ind. State Lottery Comm'n.*, 739 N.E.2d at 150. Regardless whether the supplier of the alleged trade secret information intervenes, Defendant remains the party with the burden to show that the exemption applies.

Because the PAC was not afforded the opportunity to review the records, there is no advisory opinion on the matter to assist the Court. Instead, the Court must rule on the designations before it. In light of the above standards, the Court finds that Defendant has failed to designate any evidence to meet its burden to invoke the trade secret exemption. First, NASS's lack of involvement in this case cuts against Defendant's trade secret argument. The briefing on this matter does not indicate that NASS was ever notified by Defendant regarding the request for disclosure of NASS's purported trade secrets as required under Ind. Code § 5-14-3-9(e). That NASS has not intervened or otherwise shown any intention of becoming involved even after a year of litigation is strong evidence that either NASS was never notified or that NASS does feel compelled to become involved. In either case, the fact that the party who would suffer the greatest harm through the disclosure of trade secret information has not sought intervention strongly suggests that the information at issue does not meet the requirements for the trade secret exemption under Ind. Code § 5-14-3-9(e).

Second, the evidence designated in support of the trade secret exemption fails to establish the essential elements of a trade secret under IUTSA. The Court of Appeals has broadly identified four elements of a trade secret based on the IUTSA: "(1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) the subject of efforts reasonable under the circumstances to maintain its secrecy." *Ind. Bell Tel. Co.*, 810 N.E.2d at 1185. Defendant relies on the disclaimer in NASS emails establishes all elements of a trade secret for the purposes of invoking the exemption. The Court recognizes that while an email could provide probative evidence of efforts to maintain secrecy. *Cf. Weston v. Buckley,* 677 N.E.2d 1089, 1093 (Ind. Ct. App. 1997) (finding that a nondisclosure provision in an employment agreement supported a finding of misappropriation of trade secrets), the Court finds that Defendant has failed to meet its burden to establish NASS's independent economic value or how disclosure would allow other purposes to obtain economic value. The NASS would be likely be better equipped to speak on this topic as the holder of the trade secret information, *Ind. State Lottery Comm'n* 739 N.E.2d at 155, but Defendant has designated no evidence from NASS in support of finding a trade secret exemption. Even if Defendant had, there is no guarantee that the designations would support granting a trade secret exemption under the higher burden placed on the public agency pursuant to Ind. Code § 5-14-3-9(e). *See* I*nd. Bell Tel. Co.,* 810 N.E.2d at 1185.

The Defendant also seeks summary judgment on her cross-motion for summary judgment because NASS has a copyright on the material based on the language at the

bottom of the emails; and thus, this prohibits public disclosure. However, it must be NASS not the Secretary which brings such a claim because if there is a valid copyright, NASS is the copyright holder. Furthermore, NASS would have to prove infringement; it is not a given that holding a copyright entitles the party from preventing disclosure. *See cf. Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 497 n.6 (7th Cir. 2011) ("Ownership of a copyright creates a presumption of validity of the copyright, not that an infringement of that copyright occurred."). Thus, this Court finds that the copyright protection does not apply to Defendant – it applies to NASS. Thus, Defendant is not the proper party to asserts rights related to copyright and has therefore not met its burden to seek this exemption from disclosure of public records.

The public agency invoking the trade secret exemption has the burden to establish that the information at issue meets the requirement of the exemption. If NASS felt that it was in need of copyright or trade secret protection, it was and is still able to do so.

For these reasons, the Court hereby DENIES Defendant's Cross-Motion for Summary Judgment that documents were properly withheld under the trade secrets or copyright exemption and GRANTS Plaintiff's partial motion for summary judgment on Defendant's Cross-Motion for Summary Judgment on both the trade secrets and copyright exemptions because the copyright and trades secrets' exemptions must be raised by the proper party, NASS.

ORDER

The Court hereby DENIES Plaintiff's Motion for Summary Judgment on Counts I and II of Plaintiff's Complaint, and further DENIES Plaintiff's request for attorney's fees

and costs. The Court hereby DENIES Defendant's Cross-Motion for Summary Judgment for documents being properly withheld under APRA exemptions under the anti-terrorism/security exemption and under the intra-agency/interagency or deliberative materials exemption, and under the trade secrets and copyright exemptions. The Court hereby GRANTS the Plaintiff's request that partial summary judgment be entered on Defendant's Cross-Motion for Summary Judgment on the trade secrets and copyright exemptions. The Court further GRANTS Plaintiff's request to conduct an in camera review of the documents wherein the Secretary claims an exemption applies under Ind. Code § 5-14-3-9(h) & Ind. Code § 5-14-3-4.4(h). The Defendant shall submit said records to the Court within 15 days of the issuance of this order under seal as permitted under Indiana law.

SO, **ORDERED, ADJUDGED**, and **DECREED** this 23rd day of June 2020.

Heather A. Welch

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

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