

STATE OF INDIANA) IN THE MARION CIRCUIT/SUPERIOR COURT
) ss:
COUNTY OF MARION) CAUSE NO.

NATIONAL ELECTION DEFENSE)
COALITION,

Plaintiff,

v.

CONNIE LAWSON, SECRETARY OF)
STATE OF THE STATE OF)
INDIANA, in her official capacity,

Defendant.

COMPLAINT

INTRODUCTION

1. Plaintiff National Election Defense Coalition (NEDC) brings this complaint under the Indiana Access to Public Records Act (APRA), Ind. Code §§ 5-14-3 *et seq.*, against the Indiana Secretary of State, Connie Lawson, for unlawfully denying access to public records regarding the reliability and security of voting machines.

2. Secretary Lawson was the 2017-18 President of the National Association of Secretaries of State (NASS). As president and past president of NASS, Secretary Lawson has frequently issued statements to the media, public, elected officials and the U.S. Congress about the

security and trustworthiness of voting systems in the United States. Some of these statements reflect an inaccurate security profile of our election systems, a critical national security asset. As a leader of NASS, Secretary Lawson's comments can be especially influential in shaping U.S. policy necessary to secure our election infrastructure. NEDC seeks information about origins of Secretary Lawson's public statements related to her position in NASS leadership. NEDC therefore requested records of correspondence between NASS and the Secretary.

3. Over the course of the nine months since NEDC submitted its request, Secretary Lawson's office has provided repeatedly evolving explanations for its denial or delay in providing responsive documents. Despite good-faith efforts by NEDC to clarify and then explicitly narrow its request, and after considerable delay by Secretary Lawson, the Secretary has still not provided a complete response to that request. After months of fruitless exchanges and a complaint to the Public Access Counselor (PAC), NEDC has still not received the vast majority of responsive records.

PARTIES

4. Plaintiff NEDC is a non-partisan non-profit project organized under the sponsorship of Psephos Inc., an international non-profit 501(c)(3). NEDC aims to promote secure, reliable, and transparent elections. NEDC educates elected officials and the public about threats to elections, unsecure ballot machines, and legislation. As part of those efforts, NEDC makes use of public records to understand public officials' policies and discussions of election issues.

5. Defendant Lawson is the current Indiana Secretary of State, who is sued only in her official capacity.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to Ind. Code (I.C.) § 5-14-3-9(e).

7. Venue is appropriate in Marion County pursuant to Ind. Trial Rule 75(A)(5) because it is the county in which Defendant Lawson's principal office is located.

STATUTORY BACKGROUND

8. APRA establishes that "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.” I.C. § 5-14-3-1.

9. APRA requires public agencies to release requested records to the public unless specific statutory exemptions apply. In enacting APRA, the legislature declared that it “shall be liberally construed to implement this policy [of full and complete information regarding the affairs of government] and place the burden of proof for the nondisclosure of a public record on the public agency.” I.C. § 5-14-3-1.

10. When a person requests a public record, the agency must provide the records within a “reasonable time.” I.C. § 5-14-3-3(b).

11. If an agency denies all or part of a record request submitted in writing, it must provide a “a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record.” I.C. § 5-14-3-9(d)(2).

12. The PAC educates Indiana officials on public access matters and issues advisory opinions interpreting public access laws. I.C. § 5-14-4-10. Either an agency or a requesting party may request a non-binding advisory opinion from the Public Access Counselor. I.C. §§ 5-14-4-10, 5-14-3-9.5(e).

13. If an agency denies a record request, the requesting person may file an action in the circuit or superior county court of the county in which the denial occurred. I.C. §§ 5-14-3-4.4(a)(1), 5-14-3-9.

FACTUAL AND PROCEDURAL BACKGROUND

14. Secretary Lawson served as the president of NASS from July 2017 to July 2018 and now serves as its past president and co-chair of the NASS Cybersecurity Committee.

15. On September 13, 2018, Susan Greenhalgh, NEDC's Policy Director, emailed a records request to the Secretary's office. The request sought copies of (1) "every correspondence . . . sent from anyone at the Secretary of State's office . . . to anyone at the National Association of Secretaries of State" or (2) "sent to anyone at the Secretary of State's office . . . from anyone at the National Association of Secretaries of State," from May 1, 2017 through the date of the request. A copy of said email is attached as Exhibit A.

Defendant's First Explanation

16. On December 13, 2018, Jerold A. Bonnet, General Counsel to the Office of the Indiana Secretary of State, wrote a letter to NEDC and enclosed a CD-R disc containing publicly available agency records, such

as pamphlets or public announcements. A copy of said letter is attached as Exhibit B. The CD-R disc did not include correspondence between the Secretary and NASS. Mr. Bonnet added that an unspecified number of requested materials in possession of or known to the agency were “not available for public inspection” because they were “advisory or deliberative materials, trade secrets, investigatory records, administrative or technical information that would jeopardize security of public safety, diaries, journal or personal notes etc.” Mr. Bonnet did not provide a log of the records that the Secretary alleged were not available for public inspection.

17. On December 18, 2018, NEDC received the letter and the enclosed CD-R disc. That day, after receiving the disc, Ms. Greenhalgh responded by email to Mr. Bonnet, acknowledging receipt of the disc and documents, advising Mr. Bonnet that the documents provided were non-responsive to the requests for correspondence between the Secretary and NASS, and asking the Secretary to expedite the public records request given how long the request had been outstanding.

18. By email on December 18, 2018, the Secretary’s office explicitly denied the request, stating:

[I]t is our considered view that the National Association of Secretaries of State (NASS) is not a public agency (per Indiana Code 5-14-3-2 (a)) and that agency correspondence received from, or sent to NASS, is not available for public inspection pursuant to: a) federal and state authority; b) the discretion of the agency and; c) directives from NASS, which considers itself to be a private member organization and its correspondence private and confidential.

A copy of said communication is attached as Exhibit C.

19. By email on December 19, 2018, Ms. Greenhalgh wrote to Mr. Bonnet that “NASS’s status is wholly and completely irrelevant to this request” because “[t]his request is directed to the office of the secretary of state, which is a public agency.”

Defendant’s Second Explanation

20. By email on December 20, 2018, Mr. Bonnet responded to Ms. Greenhalgh, stating: “The agency remains of the view that its communications with the National Association of Secretaries of State (NASS) are (generally) not available for public inspection - relying on the authorities cited in our letter dated December 18, 2018.” Mr. Bonnet also added a new explanation not stated in his previous letters:

The agency is not foreclosing on the possibility that certain communications to and from NASS exist which are available for public inspection and copying (possibly subject to redaction). However, for reason of the request’s range of communication

types, time span, and lack of specificity or particularity, the agency does not believe the access requested is reasonable, practical or required.

21. By email on December 21, 2018, Ms. Greenhalgh clarified and narrowed NEDC's request by limiting it to email communications that were (1) sent to or from two specific email domains (@nass.org or @sso.org), (2) were not sent to or from staff who held security clearances, and (3) were not classified.

22. As of January 10, 2019, the Secretary's office still had not responded to Ms. Greenhalgh's December 21, 2018 email.

23. On January 10, 2019, NEDC filed a formal complaint with the PAC. A copy of said complaint is attached as Exhibit D.

24. On January 11, 2019, the PAC, Luke Britt, responded by email that "it does not appear that this matter is yet at an impasse" and placed the complaint "on hold" pending further discussions between NEDC and the Secretary.

Defendant's Third Explanation

25. On January 14, 2019, Mr. Bonnet emailed NEDC's undersigned counsel William Groth, stating for the first time that staff were in fact working on NEDC's request, and that "I expect we will

have an initial batch of 400 – 500 specifically identified records to discuss with you in about a week.” A copy of said email is attached as Exhibit E.

26. On January 15, 2019, Mr. Groth wrote to Mr. Bonnet, summarizing the Secretary’s arguments for denial or delay over the preceding four months, responding to those arguments, and requesting a final production and exemption log by the end of that week. A copy of said communication is attached as Exhibit F.

27. On January 18, 2019, Mr. Bonnet emailed Mr. Groth, stating that if NEDC would explicitly narrow its request to agency communications addressing only “election integrity and cybersecurity,” then this “would considerably shorten the retrieval and evaluation time involved.” Mr. Bonnet also stated that the Secretary would provide an exemption log for an initial sample of documents to NEDC “within the next 5 – 10 working days.” A copy of said communication is attached as Exhibit G.

28. On January 22, 2019, Mr. Groth wrote to Mr. Bonnet and, in response to Mr. Bonnet’s proposal to expedite the request, explicitly narrowed the records request, as suggested by Mr. Bonnet, to only those

communications containing the terms “election,” “elections,” “voting,” “executive board,” “cybersecurity,” or any abbreviations of those terms used by the Secretary or her staff. A copy of said email is attached as Exhibit H.

Defendant’s Fourth Explanation

29. By email on February 1, 2019, Mr. Bonnet wrote to Mr. Groth stating why the office would not or could not respond promptly to NEDC’s request: that the request was not sufficiently specific and particular (despite NEDC’s agreement twice to narrow the request); that all emails from NASS involved issues of trade secret and copyright because of boilerplate language stating “confidential” and “copying is prohibited”; that some materials required further review to determine whether to assert the deliberative materials exception, that consideration to “be completed in 2 – 3 weeks’ time”; and that the Secretary had initiated consultation with the Indiana Counterterrorism and Security Council to decide whether the public safety exception applied, and that “[b]ased on that consultation the agency anticipates responding to NEDC’s request with respect to both specific documents and unspecified, but generally described documents, for which these

exceptions are believed to apply, within the next 6 to 8 weeks.” A copy of said communication is attached as Exhibit I.

30. On February 7, 2019, NEDC asked the PAC to revive NEDC’s initial complaint and to amend it to include additional supporting documents. In its amended complaint, NEDC wrote that it sought to revive and amend the complaint “based on the Secretary of State’s continued refusal to provide any responsive documents, the Secretary of State’s ever lengthening estimation of the time necessary to compile the records, and a clear pattern of delay and mischaracterization of the fact and the law.” A copy of said amended complaint is attached as Exhibit J.

31. On February 12, 2019, Mr. Bonnet emailed Mr. Groth an exemption log for an initial set of documents, and mailed to Mr. Groth an initial production, purportedly in partial fulfillment of NEDC’s request.

32. On February 27, 2019, Mr. Groth emailed Mr. Bonnet acknowledging receipt of the February 12 materials but noting that these documents (many of which appeared to be identical to documents previously disclosed in December) included no communications

whatsoever responsive to Request 1 (correspondence from the Secretary's office to NASS) and only incomplete disclosure in response to Request 2 (correspondence from NASS to the Secretary's office). A copy of said communication is attached as Exhibit K.

33. On February 28, 2019, Mr. Bonnet wrote to the PAC responding to NEDC's complaint. He asserted five reasons for the Secretary's failure to respond to NEDC's request: "(A) reasonable time for production of records; (B) delay or denial on account of reasonable specificity; (C) denials based on IC 5-14-3-4 (a)(3) and (a)(4) -National Association of Secretaries of State (NASS) copyright or trade secret rights; (D) denials based on IC 5-14-3-4 (b)(6) -deliberative materials and; (E) delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19) - security and public safety." A copy of said communication is attached as Exhibit L.

34. With respect to "(A) reasonable time for production of records" and "(B) delay or denial on account of reasonable specificity," Mr. Bonnet asserted that the request involved a large volume of records and would take time to process. However, Mr. Bonnet provided no

estimated date of completion, or proposed schedule for rolling partial disclosures.

35. With respect to “(C) denials based on IC 5-14-3-4 (a)(3) and (a)(4) -National Association of Secretaries of State (NASS) copyright or trade secret rights,” Mr. Bonnet relied on standard boilerplate at the end of every email sent from NASS to the Secretary’s office:

Every email from NASS the Agency retrieved and reviewed contains the following statement:

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.

Mr. Bonnet further stated that NASS had “advised the [Secretary] of its position” that including this boilerplate at the bottom of every email message sent to a public agency “invokes [NASS’s] commercial proprietary rights including copyright protection under federal law.”

36. With respect to “(D) denials based on IC 5-14-3-4 (b)(6) - deliberative materials,” Mr. Bonnet stated that emails received from or sent to NASS—an outside entity that is not an agency of the Indiana

state government—nonetheless qualified as intra-agency or inter-agency “deliberative materials.”

37. With respect to “delay or denials based on IC 5-14-3-4 (b)(10) and (b)(19) -security and public safety,” Mr. Bonnet stated:

[T]he Agency has initiated the process of seeking review and guidance from the Indiana Counterterrorism and Security Council (CTASC) pursuant to IC 5-14-3-4.4 (b). NEDC’s public record request and the particular materials the Agency believes should be excepted from public access based on security and public safety, have been placed on CTASC’s executive session and public meeting agendas for their March 13, 2019 meeting. While the Agency anticipates that CTASC will take up its requests for review and guidance at that time, it’s unknown if such guidance will be provided on that date, or at a later date.

38. The Secretary has not provided NEDC with any further information regarding the security and public safety exception, despite the passage of both March 13, 2019 (the date of the planned CTASC meeting) and March 29, 2019 (the date that is eight weeks after February 1, 2019).

PAC’s Advisory Opinion and Defendant’s Continued Failure to Respond

39. On April 11, 2019, the PAC emailed an undated advisory opinion (No. 19-FC-16) to Mr. Groth. A copy of said opinion is attached

as Exhibit M. The PAC “decline[d] to issue a definitive declaration on the issue of the timeliness in this case,” opining that “five months is normally much too long to produce documents pursuant to a request” but suggesting that the initial request was broad. The PAC further speculated that some of the exemptions urged by the Secretary’s office might well apply, but emphasized that “without *in camera* review, this determination is solely on the merits of its legal arguments but not necessarily on any unknown underlying facts.”

40. As of the date of this complaint, over 65 days have elapsed since the PAC transmitted his advisory opinion.

41. As of the date of this complaint, over 275 days have elapsed since NEDC submitted its request.

42. Secretary Lawson has not produced any further documents or exemption logs since February 12, 2019.

LEGAL ALLEGATIONS

43. Defendant is a “public agency” as defined at I.C. § 5-14-3-2(q).

44. NASS is not a “public agency” as defined at I.C. § 5-14-3-2(q).

45. Each communication sought in NEDC's September 13, 2018 APRA request is a "public record" under I.C. § 5-14-3-2(r).

CAUSES OF ACTION

COUNT I:

APRA - DENIAL OF RIGHT TO INSPECT RECORDS

46. Plaintiff realleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

47. Defendant's refusal to provide records constitutes an unlawful denial of disclosure and/or interference with the right to inspect and copy public records, in violation of I.C. § 5-14-3-3(b).

COUNT II:

APRA - UNREASONABLE DELAY

48. Plaintiff realleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

49. Defendant has not responded to the request by providing the requested copies, allowing NEDC to make copies, or providing a final denial of disclosure under I.C. § 5-14-3-9(d) within a reasonable time after the request was received by the agency, in violation of I.C. § 5-14-3-3(b).

REQUESTED RELIEF

Wherefore, NEDC respectfully requests that the Court grant the following relief:

- a) Expedite the hearing on this action under I.C. § 5-14-3-9(l);
- b) Declare that Secretary Lawson has unlawfully denied and/or interfered with Plaintiff's right to inspect or copy public records, and/or failed to respond to within a reasonable time after the request;
- c) Order Secretary Lawson to conform with this declaration by producing all responsive and non-exempt documents, as well as an exemption log for all documents being withheld or redacted, forthwith;
- d) After Secretary Lawson has provided a proper privilege log and in the event she continues to withhold information from NEDC as being allegedly exempt from disclosure by a specific provision of APRA, perform an *in camera* review of the contract and invoices in question pursuant to the authority granted it by I.C. § 5-14-3-9(h) to determine whether any part of those documents have been properly withheld and whether each and

every one of the redactions of the contract is permitted by
APRA;

- e) Award attorney's fees, court costs, and other reasonable expenses of litigation occurred by NEDC in accordance with I.C. § 5-14-3-9(i); and
- f) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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