OPINION OF THE PUBLIC ACCESS COUNSELOR

NAT'L ELECTION DEF. COAL.; FREE SPEECH FOR THE PEOPLE,
Complainant,

v.

OFFICE OF THE SECRETARY OF STATE,
Respondent.

Formal Complaint No.
19-FC-16

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Secretary of the Secretary of State violated the Access to Public Records Act.[1] Chief legal counsel Jerry Bonnet filed an answer to the complaint on behalf of the Secretary. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint

[1] Ind. Code §§ 5-14-3-1 to -10

received by the Office of the Public Access Counselor on February 12, 2019.

BACKGROUND

This complaint concerns materials disseminated by the National Association of Secretaries of State ("NASS") by and through the Indiana Secretary of State ("SOS") who served as the former president of that Association.

On or about September 3, 2018, the National Election Defense Coalition ("NEDC") submitted a public records request to the Indiana Secretary of State for NASS materials. The request sought all communication between Secretary Lawson's office and NASS from May 1, 2017 to date. As of the date of the filing of NEDC's complaint on February 7, NEDC argues no responsive materials have been made available; the documents provided were, in NEDC assessment, unresponsive to the request.

That is not to say the Indiana Secretary of State's Office has unresponsive in terms of updates. On the contrary, it has kept NEDC updated to the progress of the search. NEDC simply takes exception to this progress as an unreasonable delay in production of public records. The SOS gave an estimated production timeline of 6-8 weeks for the production.

Timeliness aside, there are also questions of reasonable particularity of the request as well as scrutiny regarding the SOS' potential withholding of certain documents from NASS as being copyrighted material, deliberative and/or technical security records.

It should also be noted that the SOS did provide an initial batch of responsive materials on February 12, 2019 with an attachment privilege log.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act ("APRA") states that "(p)roviding persons with 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." Ind. Code § 5-14-3-1. The Office of the Secretary of State is a public agency for the purposes of the APRA; and thus, subject to the Act's requirements. Ind. Code § 5-14-3-2(n).

As a result, any person has the right to inspect and copy the SOS's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

This case has a number of moving parts and the parties have expressed their arguments in a cogent and concise way. The issues will be discussed in the order in which they were presented.

2. Reasonable Particularity

A critical element of a sound public records request is that a requester set forth the parameters of a search with a certain degree of specificity. Ind. Code § 5-14-3-3(a)(1). The rationale behind reasonable particularity is simple: the more

succinct and detailed a records request is, the more efficient and timely a response should be.

In regard to email requests, this office has gone to great lengths to clarify what a reasonable particular email search should look like. If a search request is presented with an individual sender, and individual recipient, some search terms or a subject matter, and a reasonably condensed timeframe, a public agency should have no problem locating those records. Failing to set reasonable standards leads to legislation implementing search fees, or even worse, considering emails not to be a public record.[2]

Interestingly enough, a Marion County trial court recently considered this very issue and expanded those parameters a bit to include groups of senders and recipients.[3] While this office approaches that holding with some caution, respectfully, the court does appear to hesitate at a too-technocratic application of those parameters. In that regard, we agree with that wisdom.

That stated, the request in the current case does not approach even a loose interpretation of reasonable particularity as set forth by this office. The SOS chose to accept it anyway with the caveat that a subject matter be identified. After NEDC provided some search terms, the search yielded well over 3000 pages of documents initially.

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[2] H.B. 1629 (2019)

[3] *Citizens Action Coalition of Indiana v. Office of the Governor of the State of Indiana*, 49D01-1706-PL-025778 (2019).

As a result, the complainant should not feel terribly affronted that the timeline has stretched to a greater degree than if the request was more specific.

Nevertheless, this office cautions public agencies against taking on a public records request that, on its face, would yield an impractical number of emails or records to sort, review, and produce. That is why an agency should ask the requester to narrow a search at the outset and come to a reasonable middle ground before a search begins.

3. Reasonable Timeliness

Reasonably particular or not, a requester should expect to receive some emails within a reasonable time if an agency accepts a request. Ind. Code § 5-14-3-3(b). This could entail a partial or complete fulfillment of the request, depending on the circumstances.

Neither "reasonable time" nor "reasonable particularity" are defined by statute. But it stands to reason that if specificity has been established as a predicate, reasonable timeliness is simply defined by this office as practical efficiency.

In those cases where an agency accepts a cumbersome or voluminous request, a sensible approach to the search and production is to disseminate the materials in a piecemeal manner as they become available. This certainly alleviates anxiety on the part of requester that they may have been ignored.

Unfortunately, this had not been done until after the submission of the updated formal complaint. Five months is indeed a long time to wait for documents in any circumstance. While this office is sympathetic toward the practical constraints and limitations of the SOS' office (relatively small

staff; election season duties; etc.), requests that go stale and languish often invite the ire of the requester, and rightfully so.

Therefore while it can be said that the production of documents was not reasonably timely, there is some contributory culpability on the part of the complainant for submitting a deficient request.

4. Exemptions to Disclosure

Once a portion of the records were compiled, a significant portion were omitted from the eventual disclosure based upon several exemptions to disclosure codified under APRA. The SOS compiled a table or privilege log enumerating each document and why it was withheld under the statute.

The first exemption is based upon copyright and trade secret which would fall under Indiana Code section 5-14-3-4(a)(3) (referring to the Federal Copyright Act) and section 5-14-3-4(a)(4) in regard to trade secrets.

As for the copyright portion of its argument, the SOS asserts that NASS tags all of its material as confidential and prohibits forwarding of the material. The SOS asserts that NASS has the ability to restrict dissemination of its materials as its own intellectual property.

Authorities are fairly mixed as to whether this argument by a public agency is credible and there is no authority which would directly affect Indiana. It is not clear whether courts would consider the fair use doctrine when a third party requests copyrighted material from a public agency for non-commercial purposes, but other states have not held public

agencies liable for releasing third-party materials pursuant to a public records request.

Along those same lines, there must be a commercial element to trade secrets as well. The material, if disseminated, must place the creator of the material at an economic disadvantage in its marketplace. The materials must also be closely held. *See* Ind. Code § 24-2-3-2.

It is unclear what economic value the materials from NASS contain. It is unknown what competitors exist or in which commercial marketplace NASS participates. Moreover, NASS publishes a great deal of material on its website that appears to be intellectual property.[4]

Because the materials are freely mass-distributed to public agencies, and possibly exclusively so, NASS should ostensibly have the foresight that the materials received by public agencies become public record.

The SOS also claims that some of the material is deliberative under Indiana Code section 5-14-3-4(b)(6), which exempts inter- or intra-agency deliberative materials communicated for the purposes of decision making. This exemption also applies to contractors.

Again, it is unclear what, if any, contractual relationship exists between the SOS and NASS, however, if one does exist, the materials could possibly qualify under this section. The exemption also qualifies if the communication is between other states' public agencies as well. Therefore it is quite possible much of the material cited as being deliberative is legitimately deliberative in nature and can be withheld from

[4] https://www.nass.org

disclosure. Without reviewing the unredacted materials, however, this office cannot make a final determination.

Finally, the SOS cites a security and public safety argument for disclosing some of the materials.[5] Again, without the benefit of a review, it is impossible to say for sure, however, it stands to reason that election security documents may contain sensitive materials these exemptions were designed to protect.

[5] Ind. Code §§ 5-14-3-4(b)(10), -(19).

CONCLUSION

Based on the foregoing, this office declines to issue a definitive declaration on the issue of timeliness 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.

The SOS has, however, carried its burden to this office 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.

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