



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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February 22, 2022

Via email at [REDACTED]
Robert J. Borer

[REDACTED]

RE: *File No. 22-R-108; Lancaster County Records Administrator; Robert J. Borer, Petitioner*

Dear Mr. Borer:

This letter is in response to your correspondence emailed to our office on February 7, 2022, in which you requested our opinion with respect to a public records request you submitted to David A. Derbin, Lancaster County Records Administrator, on February 3, 2022. We construed your request for an opinion to be a petition under § 84-712.03(1)(b) of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Upon receipt of your petition, we forwarded it to Mr. Derbin and requested a response. On February 14, we received a written response from Lancaster County Attorney Patrick Condon, which contained an affidavit of David J. Shively, Lancaster County Election Commissioner. We have now considered your petition and the county's response under the provisions of the NPRS, and our findings in this matter are set forth below.

RELEVANT FACTS

At issue is the third item in a public records request you submitted to Mr. Derbin on February 3. You specifically sought "a digital copy of the document that reports the number of ballots that were completed by ES&S ExpressVote machines for the Nov 2020 election, broken down by precinct, if possible." Mr. Derbin responded to your request by letter dated February 4, indicating that his "[o]ffice does not have in its custody records responsive to Item 3 of your request."

You state in your petition that neither Mr. Shively nor Mr. Derbin were able to provide you with the requested records. You assert that “[t]hese numbers must exist” Consequently, you have asked this office to address the following:

Does the simple fact that these numbers were never pulled from the machines mean that they were not now available to (requestable by) the public?? Is that right/legal? Is that in keeping with the spirit of the law here? Or does this mean our Public Records Request statute must be updated to include information on digital / electronic devices, beyond that of email accounts?

According to Mr. Condon, both Mr. Derbin and Mr. Shively responded to your records request, indicating that Lancaster County would provide you all responsive records in the county’s custody. He indicates that you were provided, free of charge, records responsive to the first two items in your request. Mr. Condon further indicates that no records were withheld under § 84-712.05.

With respect to the third item, you were apprised that there were no existing records. Mr. Condon indicates that the “[c]ounty conducted a good faith and thorough search of its own records” The search involved asking Mr. Shively about the machines generally and whether any reports existed. In this respect, Mr. Shively’s affidavit provides us the following background:

The Express Vote Machines are used to assist voters, primarily disabled ones, with voting without marking a paper ballot. When using one of these machines, the voter makes his/her selections on the machine, which then prints a physical ballot when the voter is done. This printed ballot is collected and processed just like any other ballot. These ballots printed by the Express Vote Machines contain a bar code at the top (along with a printed list of which offices/candidates the voter selected), which ordinary paper ballots do not contain, but all ballots are processed by the tabulation machines in the same way and are not kept separate or distinguished in any way by our office.

Because these ballots are processed like all other ballots, the tabulation machines do not generate a report distinguishing between ballots printed by Express Vote Machines and other ballots. I have never generated such a report from the tabulation machines and I do not know how, or if it is even possible, to do so.

These Express Vote Machines themselves do not tabulate votes. They simply assist voters by printing filled-in ballots for them based on their selections. I am not aware of any way to print any type of report listing the number of ballots cast on such machine or if it is even possible.

Finally, Mr. Condon states that even if it were possible to create a report from these machines, there is no requirement for the county to do so, citing in support Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).

ANALYSIS

In our disposition letter to you dated April 23, 2021, we concluded that you had not been denied access to public records based on representations from the Lincoln Lancaster County Health Department that it had no records responsive to your public records request. We discussed previous enforcement files where, based on the opinions referenced above, we found that the public body involved was not required under § 84-712 to create records that did not otherwise exist.¹ We also pointed out to you that “absent contrary evidence, public officers are presumed to faithfully perform their official duties.’ *Thomas v. Peterson*, 307 Neb. 89, 98, 948 N.W.2d 698, 706 (2020).” Disposition Letter to *Consolidated File No. 21-R-109; Lincoln-Lancaster County Health Department; Robert J. Borer, Petitioner and City of Lincoln, Mayor Leirion Gaylor Baird; Robert J. Borer, Petitioner*, at 3-4.

We reach the same conclusion here. Mr. Shively unequivocally states that the Express Vote Machines do not tabulate votes, and that the Express Vote Machine ballots are tabulated like all other ballots. Because of this, there is no report distinguishing Express Vote Machine ballots from other ballots. Mr. Shively states that he is “not aware of any way to print any type of report listing the number of ballots cast on such machine or if it is even possible.” Moreover, you have presented no evidence to support or suggest that the county has the requested tallies, and is unlawfully withholding them. Your insistence that “numbers must exist” is insufficient and does not refute Mr. Shively’s sworn testimony to the contrary. Consequently, since there are no responsive records, no ability to generate such a report and, ultimately, no obligation to create a report, the county’s response to this item in your request was appropriate.

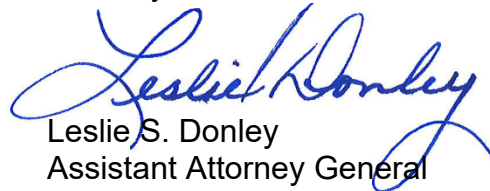
¹ *File No. 18-R-122; Nebraska State Patrol; Annita Lucchesi, Petitioner* (July 25, 2018); *File No. 19-R-117; Department of Health and Human Services; Alec Ferretti, Petitioner* (June 20, 2019).

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Since no further action by this office is necessary, we are closing our file. If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Patrick Condon (via email only)

49-2881-30