



STATE OF NEBRASKA
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DOUGLAS J. PETERSON
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July 1, 2022

Via email at [REDACTED]
S. Wayne Smith

RE: *File No. 22-R-130; Lancaster County Election Commissioner; S. Wayne Smith, Petitioner*

Dear Mr. Smith:

This letter is in response to your correspondence emailed to our office on June 20, 2022, and received by us on June 21, in which you requested our review of Lancaster County Election Commissioner David Shively's response to your June 15, 2022, public records request. We considered your request in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LBs 876 and 1246. Our findings in this matter are set forth below.

RELEVANT FACTS

On June 15, 2022, you requested from Mr. Shively the following records:

[A] copy of the Lancaster County Cast Vote Record (CVR) report, in a digital format, for all of the elections that were on the ballot for Nov. 3, 2020 General Election for delivery sometime before June 20, 4 days after send date June 16, 2022. Attached is the ES&S Manual for reference to produce the CVR data (page 42 onwards).

Mr. Shively responded to your request on June 16, indicating that his office had no records matching your request. In this respect, Mr. Shively stated that

[t]o the extent your email asks for the creation of records that do not exist, Neb. Rev. Stat. § 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions, or to create documents which do not otherwise exist. 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).

You disagree with Mr. Shively's denial. You assert that "[i]f the records do not exist in his office, they do exist on the computers of a third party (ES&S).¹

ANALYSIS

Under § 84-712, Nebraska citizens and other interested persons have the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. The purpose of § 84-712 is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). However, this office has consistently taken the position that § 84-712 does not require public officials to answer questions or to create documents which do not otherwise exist. See Op. Att'y Gen. No. 94035 (May 13, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).

Mr. Shively has represented to you that his office does not have the requested CVR report. Mr. Shively is not required to create a CVR report to fulfill your request nor is he required to ask ES&S to produce such a report. A response from a public official that there are no records responsive to a public records request does not equate to a denial of public records. Moreover, we presume that Mr. Shively's handling of your request fully complied with the NPRS. "[A]bsent 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). Finally, our determination here is consistent with our conclusion in *File No. 22-R-124; Lancaster County Election Commissioner; Robert J. Borer, Petitioner* (May 31, 2022),² in which the petitioner sought the digital CVR report from the Lancaster County Election Commissioner for the May 10, 2022 primary.

¹ We understand that ES&S is a private company currently under contract with the Secretary of State's Office to provide hardware, software and support services relating to the state's voting systems.

² Accessible at <https://ago.nebraska.gov/disposition-letters>.

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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: David Shively (via email only)
Eric Synowicki (via email only)

49-2976-30