



STATE OF NEBRASKA  
**Office of the Attorney General**

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

July 12, 2022

Via email at [REDACTED]  
Robert J. Borer

RE: *File No. 22-R-131; Lancaster County Election Commissioner; Robert J. Borer, Petitioner*

Dear Mr. Borer:

This letter is in response to the email you sent to this office, a number of state senators, and the Lancaster County Attorney and Sheriff on June 27, 2022. You have asked us to review Lancaster County Election Commissioner David Shively's response to your June 23, 2022, public records request. We construed your email 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), amended 2022 Neb. Laws LBs 876 and 1246. Our findings in this matter are set forth below.

**RELEVANT FACTS**

On June 23, 2022, you emailed Mr. Shively requesting records pertaining to the May 2022 primary election in Lancaster County, as follows:

- A digital copy of the *full audit log* printed by the *audit log printer* in the course of tabulating ballots
- A digital copy of *all reports* printed by the *election results printer* in the course of tabulating ballots

Mr. Shively denied your request on June 27, indicating that “your request . . . seeks information we are prohibited by law from disclosing pursuant to Neb. Rev. Stat. § 32-1032.” The text of the statute was set out in his letter. Mr. Shively further stated that “the records you seek constitute election materials that are prohibited by law from disclosure.”

The undersigned spoke with Mr. Shively about your records request on July 12. Mr. Shively confirmed that he had records responsive to the first item of your request only.

## DISCUSSION

Section 84-712 sets out the basic rule for access to public records in Nebraska. This provision generally states that “[e]xcept as otherwise expressly provided by statute,” all 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. Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “Public records” are defined as follows:

*Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.*

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record is confidential or may be withheld at the discretion of the records custodian under § 84-712.05,<sup>1</sup> there is no right of access.<sup>2</sup>

### Audit Log

“A statute qualifies as an ‘other statute’ under § 84-712(1) when the plain language of a statute makes it clear that a record, or portions thereof, is exempt from disclosure in response to a public records request.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305

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<sup>1</sup> Section 84-712.05 contains a number of categories of public records that may be withheld at the discretion of the records custodian so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .”

<sup>2</sup> In addition, § 84-712.08 allows the suspension of §§ 84-712, 84-712.01, 84-712.03 to 84-712.09, and 84-1413 when the application of those statutes would cause a state agency to be denied any federal funds, services, or essential information which would otherwise be available to the agency.

Neb. 780, 794, 943 N.W.2d 231, 243-44 (2020). As indicated by Mr. Shively in his June 27 response, § 32-1032 is the “other statute” which prohibits him from disclosing the requested audit log. This statute provides that

[u]pon the completion of the canvass by the county canvassing board, all books shall again be sealed, and the election commissioner or county clerk shall keep all election materials, including the ballots-cast containers from each precinct, the sealed envelopes containing the precinct list of registered voters, the precinct sign-in register, the official summary or summaries of votes cast, and the container for early voting materials, for not less than twenty-two months when statewide primary, general, or special elections involve federal offices, candidates, and issues and not less than fifty days for local elections not held in conjunction with a statewide primary, general, or special election. The election commissioner or county clerk shall keep on file one copy of each ballot face used in each precinct of the official partisan, nonpartisan, constitutional amendment, and initiative and referendum ballots, as used for voting, and all election notices used at each primary and general election for twenty-two months. The precinct sign-in register, the record of early voters, and the official summary of votes cast shall be subject to the inspection of any person who may wish to examine the same after the primary, general, or special election. The election commissioner or county clerk shall not allow any other election materials to be inspected, including ballots and provisional ballot envelopes, except when an election is contested or the materials become necessary to be used in evidence in the courts. The election commissioner or county clerk shall direct the destruction of such materials after such time, except that the election commissioner or county clerk may retain materials for the purposes of establishing voter histories.

Neb. Rev. Stat. § 32-1032 (2016). Since an audit log does not fall within the categories of records subject to inspection in § 32-1032—i.e., precinct sign-in register, the early voter record, official summary of votes cast—Mr. Shively is prohibited from disclosing it. We note that while § 32-1032 allows other “election materials” to be disclosed when there is an election contest or when necessary as evidence in a court case, those conditions do not exist here. Mr. Shively’s withholding of the audit log was mandatory under § 32-1032.

### Election Reports

In previous dispositions letter to you (File Nos. 21-R-109; 22-R-108; 22-R-124), we advised that public officials are not required to create records that do not otherwise exist in response to a request made under § 84-712. This file is no different. The undersigned has confirmed that Mr. Shively’s office has no records responsive to this particular item in your request. There is no requirement in the state’s public records law for public officials to create records. Consequently, you have not been denied any rights guaranteed to you under the NPRS with respect to item two.

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Since we have concluded that Mr. Shively did not unlawfully deny you access to public records, no further action by this office is necessary and we are closing this file.<sup>3</sup> If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

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

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<sup>3</sup> However, we will take this opportunity to remind Mr. Shively that in the event access to particular records is denied in the future, his written response to the requester must contain all of the components set out in Neb. Rev. Stat. § 84-712.04(1), including a description of the specific records withheld.