



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

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**MIKE HILGERS**  
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December 22, 2023

S. Wayne Smith  
[REDACTED]

RE: *Public Record Matter Involving the Secretary of State's Office*  
Our File No. 20231193

Dear Mr. Smith:

This letter is in response to your petition dated December 7, 2023, and received by our office on December 11, in which you requested our review of the purported denial of your public records request by the Secretary of State's Office (SOS). We considered your petition under the provisions of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022). Our conclusion in this matter is set out below.

### **BACKGROUND**

On November 13, 2023, you submitted a request to the SOS seeking "a copy of the 'provisions governing the manual counting of ballots' referenced in 32-1012." SOS staff subsequently informed you that the office had no responsive records. You followed up with an email to Chief Deputy Colleen Byelick stating:

I understand that "provisions governing the manual counting of ballots" in 32-1012 indicates that there are rules or an explanation of the manual counting procedures in case it is impractical to count all or part of the ballots with optical scanners. If this is not the case, what does this phrase mean?

You indicate that Ms. Byelick had not responded as of December 6.

You state that you “disagree” with the response you received from the SOS that it has no records responsive to your request. You indicate that you are petitioning us to review your request “since [you] believe [the] denial is in violation of the Public Records Statutes.” A copy of § 32-1012 was enclosed with your petition.

## DISCUSSION

Section 84-712 of the NPRS generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. “Public records” are defined as “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.” Neb. Rev. Stat. § 84-712.01(1). This office has concluded that § 84-712 does not require public officials to answer questions, to interpret or explain records, or to create records which do not otherwise exist. See 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).

Section 84-712.03(1)(b) of the NPRS requires us “to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections, including whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712.” Upon review, there is nothing in your petition to support a finding that you were denied access to public records or that the SOS failed to comply with the NPRS. The fact that a public official represents that the public body has no responsive records does not equate to a denial of public records. Moreover, absent any direct evidence to the contrary, we must presume that public officials act in good faith and that they are speaking truthfully if they indicate that they do not have records responsive to a particular records request.<sup>1</sup> Also, as indicated above, public bodies are not required to create records that do not otherwise exist, answer questions, or interpret or explain records.

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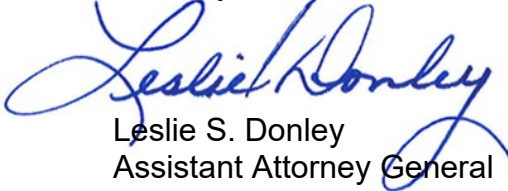
<sup>1</sup> See *Wolf v. Grubbs*, 17 Neb. App. 292, 314, 759 N.W.2d 499, 520 (Neb. Ct. App. 2009) (“[I]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.”).

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Since we conclude that you have not been denied access to public records, no further action by this office is warranted and we are closing our file. If you disagree with this conclusion, you may wish to consult with your private attorney to determine if any other remedies may be available to you under the NPRS.

Sincerely,

MIKE HILGERS  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Colleen Byelick (via email only)

49-3413-30