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Office of the Attorney General

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May 6, 2024

Via email at [REDACTED]
Robert J. Borer

RE: *Public Records Matter Involving the Secretary of State*
Our File No. 20241070

Dear Mr. Borer:

This letter is in response to your correspondence¹ emailed to this office on April 19, 2024, in which you seek to appeal the denial of a public records request emailed to the Secretary of State's Office on March 31, 2024. We construed your correspondence to be a petition under the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43. Our findings in this matter are set forth below.

RELEVANT FACTS

On March 31, 2024, you emailed Ashlee McGill, Public Records Officer for the Secretary of State, requesting the following:

- a digital copy of Wayne Bena's calendar for the 30 period starting the day you answer this request.
- a digital copy of Bob Evnen's calendar for the 30 period starting the day you answer this request.

¹ As noted in previous correspondence to you, the Attorney General has a Public Records Petition Form on our Open Government webpage for use by individuals seeking our review pursuant to Neb. Rev. Stat. § 84-712.03(1)(b). See <https://ago.nebraska.gov/open-government>. The form includes an email address to use when returning the completed form. We would encourage your use of the form in the future.

After an exchange of email clarifying when the 30-day period should commence, Ms. McGill denied your request for the calendars. She indicated that “[f]uture calendar items are preliminary and draft in nature” and that her office is withholding the records under Neb. Rev. Stat. § 84-712.05(9). Ms. McGill also informed you that Chief Deputy Secretary of State Colleen Byelick made the decision to withhold the requested records, and advised you of your right to administrative or judicial review under Neb. Rev. Stat. § 84-712.03.

You are challenging Ms. Byelick’s decision. Your petition contains no information or argument as to why you believe the denial was inappropriate. In previous correspondence submitted to this office on this matter, you asked us to determine whether the denial amounted to “censorship” and indicated that “[a]ll [you] want to do is show up and give a five minute rebuttal to their public audience.”

According to Ms. Byelick, neither Secretary Evnen nor Mr. Bena publishes a “public calendar.” Meetings, appointments, etc. are noted in Microsoft Outlook. However, scheduling is not static, and calendar items are constantly changed as necessary.

DISCUSSION

In several disposition letters sent to you over the years, we informed you that while the NPRS provide broad access to public records, those statutes are not absolute. They also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). The exception in § 84-712.05(9), relied on by the Secretary of State’s Office, is one of twenty-six categories of public records that may be kept confidential from the public at the discretion of the agency involved.² This exception pertains to

[i]nformation solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, passwords, and user identification names; guard schedules; lock combinations; or public utility infrastructure specifications or design drawings the public disclosure of which would create a substantial likelihood of endangering public safety or property, unless otherwise provided by state or federal law

² The categories of public records in Neb. Rev. Stat. § 84-712.05 may be withheld “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” As noted above, there are no “public” calendars at issue here that would obviate the ability to withhold records under § 84-712.05.

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Neb. Rev. Stat. § 84-712.05(9), amended 2024 Neb. Laws LB 43, § 11.

Our research has disclosed no Nebraska Supreme Court case dealing directly with the security exception in § 84-712.05(9). However, there is case authority from other jurisdictions that generally supports withholding calendars of public officials when a security interest is implicated. See *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 813 P.2d 240 (1991); and *Executive Office of the Governor v. AHF MCO of Florida, Inc.*, 257 So. 3d 612 (Fla. 2018). It is for officials in the Secretary of State's Office in the first instance to determine whether publicly disclosing the requested information presents a security concern. In this respect, we acknowledge the presumption that public officials operate in good faith.³ We will not second-guess Ms. Byelick's decision. Based on the authority mentioned above, there is no clear basis to disagree with the Secretary of State's Office's reliance on the security exception to withhold the requested records.

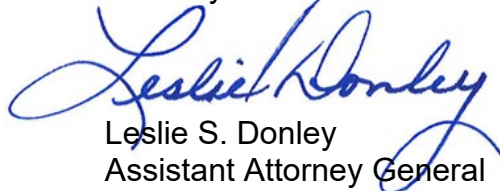
Finally, we note that under these circumstances, Outlook entries may well fall under the definition of "drafts." See Op. Att'y Gen. No. 91054 (June 17, 1991). However, since we conclude that the security exception applies, it is not necessary to consider this issue further.

CONCLUSION

Based on the foregoing review, we conclude that the Secretary of State's Office may withhold the requested records under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(9). Since no further review by this office is necessary, we are closing our file. Finally, if you disagree with our conclusion, you are free to consider the other remedies available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Colleen Byelick (via email only)

49-3534-31

³ See *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) ("In 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.").