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December 4, 2024

Via email at [REDACTED]
Robert J. Borer

RE: *Public Records Matter Involving the Lancaster County Election
Commissioner*
Our File No. 20241219

Dear Mr. Borer:

This letter is in response to your email received by this office on November 19, 2024. You have requested our review of the denial you received from Todd Wiltgen, Lancaster County Election Commissioner, relating to your November 9, 2024, records request. We forwarded your email to Deputy Lancaster County Attorney Jennifer Chrystal-Clark upon receipt, and discussed the matter with Ms. Chrystal-Clark and Deputy County Attorney Andrew Barness on November 21. 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 to 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43 and LB 1204. Our findings in this matter are set forth below.

RELEVANT FACTS

On November 9, you emailed Mr. Wiltgen the following request:

Pursuant to Nebraska Public Records Law § 84-712 et seq., I am hereby requesting a digital copy of the video surveillance footage of the Eiseley Library ballot drop box from November 2nd. More specifically, I am requesting footage of the 4:00 pm to 4:30 pm time frame, with the original resolution.

You asserted that the “footage should be readily available, since you say you have conducted an investigation.”

Mr. Wiltgen denied your request on November 18, citing Neb. Rev. Stat. § 84-712.05(9) as the statutory basis for withholding the requested footage. Mr. Wiltgen further informed you that “[d]ue to the location of the surveillance, your request falls within the perimeters [sic] of this exception”

According to your petition, you submitted your public records request in response to an incident in which certain citizens were “monitoring drop boxes for ballot stuffing” and identified an individual that appeared to be acting “out of character for someone simply dropping off a ballot (or ballots).” You indicate that “[t]he incident was reported” and that “Todd Wiltgen claimed he conducted an investigation, but provided no evidence that he did.”¹ You assert that “[l]ooking at a video tape of someone dropping a ballot into a drop box is no different than watching someone at a polling place hand their sleeved ballot back to an election worker. Or no different than watching an election office worker accept an enveloped ballot from a citizen.”

Mr. Barnes confirmed to the undersigned that Mr. Wiltgen withheld video footage from the camera installed on the Eiseley Library’s premises to monitor the drop box.

DISCUSSION

As you know from multiple disposition letters we have sent you over the years, access to public records is not absolute. Sections 84-712(1) and 84-712.01(1) provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section 84-712.05(9), cited by Mr. Wiltgen as the basis to withhold the video footage, sets out one category of public records that may be kept confidential 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

¹ As a general rule, this office does not consider the reason for a records request when making our determination under Neb. Rev. Stat. § 84-712.03(1)(b). *BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) (“The public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’”).

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”

likelihood of endangering public safety or property, unless otherwise provided by state or federal law[.]

You argue that video footage showing an individual drop a ballot into a drop box is no different than handing a completed ballot to an election worker. We disagree. While there is no question the video footage you requested is a public record, there is also no question the county installed the camera for the express purpose of monitoring the drop box.³ Thus, it seems to us that any video footage would constitute “[i]nformation solely pertaining to protection of the security of public property.” Moreover, based on the circumstances presented here, the video footage also implicates a security concern for the individual appearing at the drop box location.

Since § 84-712.05 merely permits, and does not mandate, record custodians to withhold records, it is for Mr. Wiltgen to determine whether publicly disclosing the requested video footage presents a security concern. In this respect, we acknowledge the presumption that public officials operate in good faith.⁴ There is also no clear basis to disagree with Mr. Wiltgen’s reliance on the security exception to withhold the requested video footage and find the withholding under § 84-712.05(9) appropriate.

³ See § 4.1 to Amendment No. 1 to Interlocal Agreement for Election Drop Boxes at Library Branches, accessible at <https://www.lancaster.ne.gov/DocumentCenter/View/24877/C-24-0677-PDF?bidId=>.

⁴ 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.”).


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CONCLUSION

For the reasons discussed above, we do not believe that you were improperly denied access to public records and we plan no further action regarding this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jennifer Chrystal-Clark (via email only)
Andrew Barness (via email only)

49-3684-31