



STATE OF NEBRASKA
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May 31, 2022

Via email at [REDACTED]
Robert J. Borer
6541 S. 59th Pl.
Lincoln, NE 68516

RE: *File No. 22-R-124; Lancaster County Election Commissioner; Robert J. Borer, Petitioner*

Dear Mr. Borer:

This letter is in response to your correspondence emailed to our office on May 14, 2022, and received by us on May 16, in which you requested our review of Lancaster County Election Commissioner David Shively's response to your May 12, 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). Our findings in this matter are set forth below.

RELEVANT FACTS

On May 12, 2022, you emailed Mr. Shively the following request:

Pursuant to Nebraska Public Records Law § 84-712 et seq., I am hereby requesting the following tabulator report from the Lancaster County May 10th, 2022 Primary:

A digital copy of the full CVR (cast vote records) report. This report is a standard ES&S report created by the scanner/tabulator.

Mr. Shively responded on May 13, indicating this his office had no such records. 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 assert that Mr. Shively's claims that he has no CVR report in his custody does not make it true. You state that "[t]he fact that he doesn't know how to search for and export the CVR Report from the scanner/tabulator doesn't mean the report doesn't exist."

ANALYSIS

Under § 84-712, Nebraska citizens and other interested persons have the right in Nebraska 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. Under § 84-712(3)(a), "copies may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes, and photocopies." Section 84-712(3)(e) does not "require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record."

In our disposition letter to you dated April 23, 2021, we concluded that you had not been denied access to public records based on representations from the Lincoln Lancaster County Health Department that it had no records responsive to your public records request. We discussed previous enforcement files where, based on the Attorney General opinions referenced above, we found that the public body involved was not required under § 84-712 to create records that did not otherwise exist.¹ We also pointed out to you that "absent 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)." Disposition Letter to *Consolidated File No. 21-R-109; Lincoln-Lancaster County Health Department; Robert J. Borer, Petitioner and City of Lincoln, Mayor Leirion Gaylor Baird; Robert J. Borer, Petitioner*, at 3-4.

Our conclusion with respect to this matter is no different. Mr. Shively represented to you that his office does not have the requested CVR report. Mr. Shively is not required to create a CVR report in response to a request made pursuant to § 84-712. Your insinuations that Mr. Shively does not have the knowledge to search for and export the report does not obviate the fact that § 84-712 does not require him to create a report his office otherwise does not have.

¹ *File No. 18-R-122; Nebraska State Patrol; Annita Lucchesi, Petitioner* (July 25, 2018); *File No. 19-R-117; Department of Health and Human Services; Alec Ferretti, Petitioner* (June 20, 2019).

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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)

49-2955-30