



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

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

April 23, 2021

Via email at [REDACTED]  
Robert J. Borer

RE: 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*

Dear Mr. Borer:

This letter is in response to your correspondence received by this office on April 8 and 16, 2021, in which you requested the assistance of the Attorney General in obtaining certain records from the Lincoln-Lancaster County Health Department (“LLCHD”) and the City of Lincoln’s mayor, Leirion Gaylor Baird. We have consolidated your correspondence for purposes of this response. On April 16, we discussed these matters with Assistant City Attorney Rick Tast. We construed your correspondence 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). Our findings with respect to these matters are set forth below.

### **RELEVANT FACTS**

Your petition involves three separate public records requests, summarized as follows:

I. On March 26, 2021, you emailed a public records request to Pat Lopez, director of the LLCHD, seeking the following records:

- the initial covid PCR test cycle threshold (CT) used for Lancaster County PCR covid test samples
- the current covid PCR test cycle threshold used for Lancaster County PCR covid test samples
- the date, or dates, at which the covid PCR test cycle threshold used for Lancaster County changed, if any change/s occurred
- please separate by lab, if labs used different covid PCR test cycle thresholds and changed them at different times

Robert J. Borer  
April 23, 2021  
Page 2

Mr. Tast timely responded to you on April 1, indicating that the LLCHD had no records responsive to your request.

II. On April 1, 2021, you submitted another request to Ms. Lopez, seeking

—a list of the lab sites used by the LLCHD and/or Lancaster County test sites to evaluate samples/specimens collected from individuals in the effort to screen for infection with SARS-CoV-2...**\*\*\*THAT USE the PCR test for that evaluation\*\*\***

Mr. Tast timely responded to this request on April 7, indicating again that the LLCHD had no responsive records. He further advised that opinions issued by the Attorney General have concluded that “[section] 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.”<sup>1</sup>

III. In a letter dated April 8, 2021, addressed to Mayor Gaylor Baird, you requested a “digital photo copy of [her] covid vaccination card.” Mr. Tast timely responded to you on April 13, indicating that “[v]accinations [sic] cards provided to individuals receiving COVID-19 vaccine by the Lincoln-Lancaster County Health Department do not constitute a public record. For this reason, the City of Lincoln has no documents responsive to your request.”

We note that you sent several follow-up emails to Mr. Tast generally arguing that the mayor’s vaccine card was a public record. In your petition to this office, you state, in pertinent part:

I served Lincoln's Mayor, Leirion Gaylor Baird, with a formal public records request for a digital copy of her covid vaccine card.

She presented herself, in her official public capacity, as an example for the public to follow with regard to getting the covid vaccine.

The event was staged for a photo op, and the photo was posted on her official Facebook page (see link below), which makes it "a public record and subject to the [sic] Nebraska's Open Government and Public Records laws." (See image #13 attached.)

<https://www.facebook.com/MayorLeirion/posts/918459598970913>

The public has a right to know whether this event (of her receiving a covid vaccination) was genuine or not . . . whether she actually received the vaccine or not.

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<sup>1</sup> We note that Mr. Tast also informed you that the LLCHD receives COVID-19 test results from all providers conducting tests within the county, and from providers when a resident is tested outside of Lancaster County.

The only way for the public to know this at this point . . . the only way for the public to know that her example is genuine, and therefore worthy of being followed, is to see her vaccination card/record. In the event that it becomes necessary to show proof of vaccination, no one can simply present a picture of themselves with a needle in their arm and pass that off as proof of vaccination. A vaccination card must be presented. The public deserves to know if she is being honest. Granted, she could forge the document, but that would not be wise, as it could come back to haunt her.

\* \* \*

My mission is simply to hold elected and appointed officials accountable to We the People they were elected to serve, and to keep them honest in all their dealings with their constituents.

## DISCUSSION

Neb. Rev. Stat. § 84-712.03 states, in pertinent part, that “[a]ny person denied any rights granted by sections 84-712 to 84-712.03 may . . . [p]etition the Attorney General to review the matter 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 . . . .” With respect to your March 26 and April 1 requests, the LLCHD represented to you that it had no responsive records. Mr. Tast has represented the same to the undersigned. You have not been denied any rights granted to you under §§ 84-712 to 84-712.03 because the LLCHD has no such records. There is no relief available to you. Moreover, “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). In this regard, you have presented no evidence that would support finding that records are being unlawfully withheld.

In his response to your second request, Mr. Tast correctly pointed to opinions of this office where we concluded that public bodies are not required to create records which do not otherwise exist in response to requests made under § 84-712 of the NPRS. For example, in our disposition letter to *File No. 18-R-122; Nebraska State Patrol, Annita Lucchesi, Petitioner* (July 25, 2018), we concluded that the Nebraska State Patrol was not required to compile data on criminal cases involving Alaska Native and American Indian women and girls since the data would have to be culled from individual files to create a new record. In addition, the information sought was not stored in a NSP database which could be retrieved, compiled and produced under Neb. Rev. Stat. § 84-712(3)(b)(iii). We reached a similar conclusion in our disposition letter in *File No. 19-R-117; Department of Health and Human Services; Alec Ferretti, Petitioner* (June 20, 2019), finding that the department was under no obligation to engage in a “verification” process to supplement the death records currently existing in its database.

Consequently, since there are no responsive records, and no obligation to create records or compile lists, the LLCHD's responses to your March 26 and April 1 public records requests were appropriate.

With respect to your request for the mayor's vaccine card, we agree with the city's position that the card is not a public record. "Public records" in Nebraska "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." Neb. Rev. Stat. § 84-712.01(1) (2014). Mayor Gaylor Baird's vaccine card is a *personal* immunization record; it is not a record "of or belonging to" the City of Lincoln.

In addition, we find your argument that a photo showing the mayor receiving a COVID vaccine shot somehow makes her vaccine card a public record is without merit. There is no dispute that the content posted on the mayor's official Facebook page is a public record. As you point out in your petition, the mayor's Facebook page expressly makes that disclaimer.<sup>2</sup> However, the mayor did not post a photo of her vaccine card on Facebook. And while Mayor Gaylor Baird may be a public official, that fact does not make her personal health records public.

### CONCLUSION

Based on the foregoing, we conclude that both the LLCHD and the City of Lincoln responded appropriately to your public records requests. 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: Rick Tast (via email only)

49-2686-29

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<sup>2</sup> "This is the official City of Lincoln account for Mayor Leirion Gaylor Baird. All information on this site is a public record and subject to the Nebraska's Open Government and Public Records laws."