

Memo

To: Secretary Pate, COS Ross, Director Burhans, Ms. Widen
From: Eric Gookin
Date: August 25, 2020
Subject: Final - Application of Iowa's Data Breach Law (ch. 715C) to pre-filled ABRs

Question:

If a county commissioner of elections includes the confidential Voter Verification Number ("VVN") on a county-wide mailing of Absentee Ballot Request Applications ("ABRs"), does that constitute a "breach of security" under Iowa Code ch. 715C?

Introduction:

Iowa Code ch. 715C ("Personal Information Security Breach Protection") is the law governing data breaches that occur in Iowa. While we generally associate the causes of security and data breaches as either malicious or accidental, chapter 715C requires only that personal information be acquired for an illegitimate purpose. Iowa Code § 715.1(1).

In this instance, Linn County Commissioner of Elections, Joel Miller, acquired the confidential voter verification numbers ("VVN") of all Linn County registered voters from the statewide voter registration database (I-Voters), and provided them to a third-party vendor without a lawful purpose under Iowa's election statutes.

Contrary to the typical is outwardly celebrating his decision to acquire and send confidential personal information to a third-party without a legitimate purpose. He claims this was done in aspiration of helping Iowa voters request absentee ballots before the General Election. However, regardless of the lofty goal he states, he openly disregarded the state commissioner of elections' formal directive, an Emergency Election Order as approved by the Legislative Council, and the passage of HF2643 which was signed into law on June 30, 2020. As an elected official, Commissioner Miller is obliged to uphold the laws of the state, not to unilaterally disregard them as he sees fit.

Facts:

On July 6, 2020, SOS Director of Elections, Heidi Burhans, learned that at least two county commissioners were planning to send ABRs with most of the required fields prefilled. Director Burhans sent an email later that day to all county commissioners that SOS staff had concluded that inclusion of voter information on ABR forms was prohibited by law.¹

On July 11, 2020, Commissioner Miller notified this office via email to state his intent to distribute ABRs to "... each **ACTIVE registered voter in Linn County...**"² (Emphasis in the original). Furthermore, the email continues, "In each instance, an **ACTIVE registered voter's PIN** will be prefilled onto the form along with the voter's personal information." (Emphasis in the original.)

¹ The initial interim analysis by SOS staff was limited to the "Confidential Records" portion of the Iowa Open Records Law, but did not preclude further analysis by SOS.

² Email was addressed to SOS Legal Counsel, Molly Widen, but included Secretary Pate and Director of Elections Heidi Burhans. Further discussions will refer to this as the "July 11 email".

In proclaiming his authority to do so, Commissioner Miller did not cite to any specific state or federal law, opting instead to refer to some mistaken, implied power to override the legal interpretation of the State Election Commissioner, the Emergency Election Order, and the Legislature's will:^{3,4}

I, as the County Auditor of Linn County, duly authorized as the County Commissioner of Elections, and as a custodian of voter records, including Voter Identification Numbers and Four-digit PINs (personal identification numbers), DO NOT AGREE with the Director's statement.⁵ (Emphasis in original.)

On July 17, 2020, the Legislative Council approved a request from Secretary Pate to send blank ABRs to all registered voters statewide.

On July 20- 28, 2020, Commissioner Miller delivered about 100,000 ABRs to the USPS to send to Linn county voters.^{6,7}

On July 27, 2020, the staff from the Office of Secretary of State sent a demand for documents and information pursuant to Iowa Code § 47.1(6). Relevant documents were to be delivered within 10 days. The response from Commissioner Miller was received after 12 days, on August 8, 2020.

Relevant law:

Iowa Code ch. 715C governs the treatment of data security in Iowa.

A security breach "means unauthorized acquisition of personal information maintained in computerized form by a person that compromises the security, confidentiality, or integrity of the personal information." Iowa Code § 715C.1(1).

"Personal information" is further defined as:

An individual's first name or first initial and last name *in combination* with any one or more of the following data elements that relate to the individual if any of the data elements are not encrypted, redacted,⁸ or otherwise altered by any method or technology in such a manner that the name or data elements are unreadable... Iowa Code § 715C.1(11). (Emphasis added.)

The relevant "following data elements" referenced above include driver's license numbers or "other unique identification number *created or collected by a government body.*" (Emphasis added.)

³ "The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections." (Iowa Code 47.1(1)).

⁴ The election-related duties of county commissioners is listed out at 47.2 with little discretion in how to execute them.

⁵ July 11 email from Miller to Widen.

⁶ Kathy Obradovic. *Linn auditor completes mailing of absentee ballot request forms despite RNC objections.* <https://iowacapitaldispatch.com/2020/07/28/linn-auditor-completes-mailing-of-absentee-ballot-request-forms-despite-rnc-objections/?eType=EmailBlastContent&eld=cd23cbb8-52be-4285-a8cc-9f5be9606d24>

⁷ There were subsequent bulk mailings in the week after the July 20 mailing.

⁸ Redacted is also defined under 715C.1(2): "Redacted" means altered or truncated so that no more than five digits of a social security number or the last four digits of other numbers designated in section 715A.8, subsection 1, paragraph "a", are accessible as part of the data.

There is an important exemption for some data that might otherwise be captured as “personal information” but that “[are] lawfully obtained from publicly available sources, or from federal, state, or local government records lawfully made available to the general public.” Iowa Code § 715C.1(11)(b).

Importantly, the statute exempts from the definition:

Good faith acquisition of personal information by a person or that person’s employee or agent for a legitimate purpose of that person is not a breach of security, *provided that the personal information is not used in violation of applicable law* or in a manner that harms or poses an actual threat to the security, confidentiality, or integrity of the personal information. Iowa Code § 715C.1(1). (Emphasis added.)

Analysis:

There are four questions that flow from applying the statute to the facts that are addressed in turn below:

- 1) Is the information contained on the pre-filled ABRs “personal information” as defined by chapter 715C?
- 2) Was the information acquired publicly available?
- 3) Was the acquisition of the information done in good faith for a legitimate purpose?
- 4) Was the data redacted sufficiently to qualify for the exemption mentioned above?

Is the information contained on the pre-filled ABRs “personal information” as defined by chapter 715C?

For purposes of ch. 715C, “personal information” includes “[a]n individual’s first name or first initial and last name *in combination* with any one or more of the following data elements”. Iowa Code § 715C.1(11)(a). As mentioned above, there is an enumerated list of data elements included. Relevant to this discussion is “Driver’s license number or other unique identification number created or collected by a government body.” Iowa Code § 715C.1(11)(a)(2).

For an ABR to be accepted by a county commissioner, there are several required fields that must be completed. Iowa Code § 53.2(4). Among them are the voter’s first and last names, and a “Voter ID” which is defined further under § 53.2(4) as an Iowa driver’s license or the voter verification number (“VVN”) created by the Secretary of State and issued to voters pursuant to Iowa Code § 48A.10A(1).⁹

Furthermore, the Legislature recognized the importance of limiting access to this information by making it a confidential record under Iowa’s Open Records statute. This limitation appears in both Iowa Code secs. 22.7(36) & (66) for driver’s licenses and non-operator IDs, and Iowa Code §§ 22.7(72) & (73) for the VVNs created by § 48A.10A and required in § 53.2(4).

Because Iowa Code § 48A.10A commands the SOS to create and assign the numbers, it necessarily must qualify as an “other unique identification number *created* or collected by a government body” for purposes of Iowa Code ch. 715C. (Emphasis added.)

⁹ The “Voter ID” required for ABRs is described alternatively as a Voter Verification Number in chapters 22 and 53, but as “an additional four-digit personal identification number assigned by the state commissioner” under Iowa Code § 48A.10A. For clarity purposes, “Voter Verification Number” or “VVN” will be used here.

Even if there is any doubt that the VVN qualifies as an element of personal information, the driver's license is specifically designated such by Iowa Code § 715C.1(11)(a)(2). This alone would account for between 130,000-145,000 voters who had their personal information released.

We know from his own statement that Commissioner Miller's intent was to include these elements in his mailing, and more importantly, with a third-party vendor. "Linn County's voters are expecting my office to mail them prefilled ABRFs including their Four-digit PIN [VVN] so that they might proceed promptly in requesting absentee ballots."¹⁰

In short, the combination of name and voter ID number meet the definition of security breach protection as "personal information" under chapter 715C.

Was the information acquired publicly available?

Even though we know, as discussed above, that the information that Commissioner Miller pre-filled on the ABRs qualifies as "personal information," Iowa Code ch. 715C exempts "personal information" from its breach protections, if that information is available as a public record.

As described above, the elements that make this personal information (e.g. driver's license, voter verification number), are also considered confidential records under Iowa's public records statute, Iowa Code ch. 22. Under that law, confidential records "*shall be kept confidential*, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information Iowa Code." Iowa Code § 22.7. (Emphasis added.)

Importantly, voter information requests are not governed under chapter 22, but are fulfilled subject to the request procedure outlined under Iowa Code § 48A.38, subject to certain limitations. Specifically, § 48A.38(f) requires:

The county commissioner of registration and the state registrar of voters shall remove a voter's whole or partial social security number, as applicable, *voter identification number assigned by the state commissioner [VVN], Iowa driver's license number, or Iowa nonoperator's identification card number* from a voter registration list prepared pursuant to this section. (Emphasis added.)

Similarly, there are restrictions on releasing information related to voter registration submitted to the secretary of state or county commissioners under the National Voter Registration Act. Iowa Code § 48A.34. The same is true of certain information received by SOS by participants in the Safe at Home program. Iowa Code § 9E.6.

In essence, some elements of a voter registration record are public, if the proper procedures under Iowa Code ch. 48A are followed, but many elements are intentionally withheld from the public. The VVNs are protected under both the voter registration chapter and the open records chapter. Most voter information is subject to public review, but Iowa has clearly adopted policy preferences to limit specific voter data via legislative action.¹¹

¹⁰ July 11 email from Miller to Widen.

¹¹ There are further restrictions on *how* that information can be used under § 48A.39, but that is less relevant to this question.

Was the acquisition of the information done in good faith for a legitimate purpose?

Having satisfied the first two questions above, it is necessary to determine whether Commissioner Miller's acquisition of the personal information was done in "good faith . . . for a legitimate purpose. . . provided that the personal information is not used in violation of applicable law." Iowa Code § 715C.1(1).

Commissioner Miller's actions were clearly not in "good faith" because his actions were intentionally committed in defiance of three lawfully issued directives and legislation by which he is bound.

The first occurred when he defied the directive from Director Burhans prohibiting counties from including the VVN on any ABR mailings. The Secretary of State is the state commissioner of elections, tasked with "supervis[ing] the activities of the county commissioners of elections." Iowa Code § 47.1(1). The section permits the Secretary to appoint a person to lead the elections division and carry out those duties on his behalf. Director Burhans is that appointed person, and as such has the authority to exercise those powers. Specifically, "[t]he state commissioner of elections shall prescribe uniform election practices and procedures, shall prescribe the necessary forms required for the conduct of elections. . ." Iowa Code 47.1(1). That directive was issued to all counties to ensure that there was a uniform application of the policy throughout the state.

The second occurred when he defied the emergency order put in place by Secretary Pate, as approved by the unanimous, bipartisan vote of the Legislative Council on July 17, 2020, prior to Commissioner Miller's mailing. In relevant part, the Emergency Election Directive, § 2 reads: "To ensure uniformity and to provide voters with consistent guidance on the absentee ballot application process, County Auditors shall distribute *only the blank* Official State of Iowa Absentee Ballot Request Form..." (Emphasis added.) Again, the Secretary advanced the necessity of a uniform, statewide policy, confirmed by the lawfully designated body of the legislature.

The third occurred when he defied a newly-enacted HF2643 which was signed into law on June 30, 2020. In §§ 123-125 of that bill, the legislature clarified that a county commissioner cannot unilaterally acquire and use the VVN on their own, but that a "registered voter shall provide [the VVN]" HF 2643 § 123. And that "[a] commissioner shall not use the voter registration system to obtain [missing] necessary information." HF2643 § 125. Since he cannot acquire the VVN from I-Voters to merely complete a deficient absentee ballot, he certainly cannot acquire it to lower the security threshold. As an elected official, Commissioner Miller has sworn to uphold the laws of the state, not to unilaterally disregard them as he sees fit.

All of the above constitute "bad faith," but Commissioner Miller is absolutely using the personal information "in violation of applicable law" in the third instance. Since it is settled that he is not acting in good faith, it is not necessary to analyze whether Commissioner Miller has a "legitimate purpose" in pre-filling absentee ballots with personal information. However, it is desirable to do so, since it will help reveal how far his actions contravene Iowa law.

There are four places in Iowa law that describe the circumstances under which a VVN number may be acquired from I-Voters by election officials and used in a mailing. Because these circumstances are enumerated under Iowa law, they are the only circumstances which can be considered legitimate purposes for an elections official to acquire or release the VVN.

The first legitimate purpose was when the SOS originally created the ID number pursuant to Iowa Code § 48A.10A(1):

The state registrar shall compare lists of persons who are registered to vote with the department of transportation's driver's license and nonoperator's identification card files and shall, on an initial basis, issue a voter identification card to each active, registered voter whose name does not appear in the department of transportation's files. The voter identification card shall include the name of the registered voter, a signature line above which the registered voter shall sign the voter identification card, the registered voter's identification number assigned to the voter pursuant to section 47.7, subsection 2, and an additional four-digit personal identification number [VVN] assigned by the state commissioner.

The second legitimate purpose is when a county commissioner issues voter ID cards on an ongoing basis to newly registered voters, or to voters who moved jurisdictions pursuant to Iowa Code § 48A.10A(2).

The commissioner shall issue voter identification cards on an ongoing basis as prescribed by the state registrar. The commissioner shall, as a part of the voter acknowledgment process required under sections 48A.26 and 48A.26A, issue a voter identification card to a registered voter under this subsection at the time of registration or update to registration if the registered voter's name does not appear in the department of transportation's driver's license or nonoperator's identification card files.

The third legitimate purpose is when a voter requests a card to replace a lost or damaged card, pursuant to IAC § 721-21.52, subject to certain requirements. Importantly, this is a materially different request than the two above because it requires affirmative action in the form of a request by the voter.

The fourth and final legitimate purpose comes as a result of an ABR received in the commissioner's office. The commissioner's staff must use the number to validate the identity of the voter prior to issuing an absentee ballot (though it's arguable whether this constitutes "acquisition" or just "validation" of the VVN). Again, if the VVN is incorrect or blank, the commissioner must contact the voter to obtain the information. HF2643 § 125.

Those are necessarily the only circumstances under Iowa law that can be considered "legitimate purposes" for acquiring the VVN from I-Voters. Nowhere in either the voter registration or the absentee voting statutes do county commissioners have discretion to send voter acknowledgement or voter ID cards on their own accord.

The acquisition of the personal information therefore does not qualify for a "good faith" exemption under chapter 715C.

Was the data encrypted or redacted sufficiently to protect the information?

The final leg of analysis that needs to be completed is whether the personal information included on the pre-filled ABRs was encrypted or redacted:

"Personal information" . . . if any of the data elements are not encrypted, redacted, or otherwise altered by any method or technology in such a manner that the name or data elements are unreadable or are encrypted, redacted, or otherwise altered by any method or technology but the keys to unencrypt, unredact, or otherwise read the data elements have been obtained through the breach of security. Iowa Code § 715C.11(a).

Redacted

Helping in the analysis is the definition of “redacted” from § 715C.1(12): “altered or truncated so that no more than five digits of a social security number or the last four digits of other numbers... are accessible as part of the data.”¹²

Unreadable

I start with the obvious question: Does a mailing which includes a VVN concealed within an envelope qualify as “otherwise altered to be unreadable”?

While a heavy-enough envelope is likely to conceal the personal information, that is not enough under the plain language of the statute that requires such information be, “encrypted, redacted, or otherwise altered” to be unreadable. Concealment is not the same as alteration, which requires the data “to be made different.”¹³

Encrypted

Question 11 from the Secretary’s demand for documents asks about the method of data transfer. Commissioner Miller responds that he put it on a flash drive. Since he does not specifically say it’s an encrypted flash drive, it is reasonable to assume it was not.

Furthermore, Question 12 asks, “If the data was encrypted, what encryption standard or protocol was used?” His response to that question: “**Not applicable.**” (Emphasis in original.)

The data on the flash drive was never encrypted once it left I-Voters. Since it was never encrypted, it cannot qualify for this exemption and the analysis must stop here.¹⁴

Conclusion

For the purposes listed above, the pre-filling of a voter’s name and voter ID onto an ABR for any reasons other than those previously mentioned constitutes a security breach because it was an unauthorized acquisition of personal information. Under chapter 715C, breach of security does not require nefarious intent. It only requires that the acquisition of the data was illegitimate:

‘Breach of security’ also means unauthorized acquisition of personal information maintained by a person in any medium, including on paper, that was transferred by the person to that medium from computerized form and that compromises the security, confidentiality, or integrity of the personal information. Iowa Code § 715C.1(1).

Because Commissioner Miller had no legitimate purpose to acquire the personal information, it only follows that the vendor could not have obtained a “legitimate purpose” from an illegitimate one. This, of course, is not the vendor’s fault; it is the fault of Commissioner Miller.

¹² The chapter of Iowa Code referenced here is 715A which deals with FORGERY AND RELATED FRAUDULENT CRIMINAL ACTS, and provides a list different from that which is in 715C. However, reading 715C.1(12) so narrowly would seem to preclude the list from earlier in this section, making the section internally inconsistent. Whenever possible Iowa law is to be construed in a manner assuming consistency. Thus, applying only the list of personal information from 715A is undesirable.

¹³ <https://www.dictionary.com/browse/alter?s=t>

¹⁴ Obviously, merely encrypting personal information that is otherwise subject to a breach of security under chapter 715C cannot be a sufficient defense if the party receiving it has received decryption keys and the ultimate use of the personal information is unlawful.

Commissioner Miller has compromised the confidentiality of personal information that is explicitly protected under Iowa law under chapters 22, 48A, and 52. What's more, he did so after the legislature passed HF2643, the Secretary of State demanded that he not send it, and the Secretary of State and Legislative Council together clearly expressed his actions were in violation of Iowa law and public policy.

Regardless of whatever personal mission Commissioner Miller believes he is carrying out, his decisions and actions have caused personal information to be acquired by a third party for an illegitimate purpose "that compromises the security, confidentiality, or integrity of the personal information[]" which is the definition of "Breach of Security" under Iowa Code ch. 715C.