

**IN THE THIRD JUDICIAL DISTRICT  
SHAWNEE COUNTY DISTRICT COURT  
CIVIL DEPARTMENT**

DAVIS HAMMET,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 20-cv-638
	)	Div. No. 3
	)	
SCOTT SCHWAB,	)	
	)	
Kansas Secretary of State, in his official	)	
capacity,	)	
	)	
Defendant.	)	

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION  
FOR SUMMARY JUDGMENT**

Defendant Secretary of State Scott Schwab, in his official capacity, by and through his undersigned counsel, submits this memorandum in support of his motion for summary judgment in the above captioned case.

## **NATURE OF THE CASE**

This case involves the Kansas Open Records Act (“KORA”) and presents primarily three issues for the Court.

- (1) Whether KORA requires an agency to create documents for a requester.
- (2) Whether an agency is permitted to require payment of the actual cost a vendor would charge the agency to retrieve information from a database.
- (3) Whether a Provisional Ballot Detail Report is an election abstract under the meaning of Article 25.

## **STATEMENT OF UNCONTROVERTED FACTS CONTENTIONS OF FACTS**

Pursuant to Kan. Sup. Ct. R. 141(a), Defendant presents the following uncontroverted contentions of fact.

### **STIPULATED FACTS**

1. In the 2018 General election and the 2020 Primary election, Mr. Hammet requested, through KORA, that the KSOS provide him with the provisional ballot detail report. Case Mgt. Order ¶ 5.a
2. The provisional ballot detail report is a report that can be generated from the Election Voter Information System (“ELVIS”). Case Mgt. Order ¶ 5.b.
3. ELVIS is the statewide voter registration database for the state of Kansas and is maintained by the Secretary of State. Case Mgt. Order ¶ 5.c.
4. County election officials input information into the ELVIS system for their respective counties. Case Mgmt. Order ¶ 5.d.

5. In June 2020, Mr. Hammet filed a lawsuit against the KSOS requesting access to the provisional ballot detail report under KORA. In this lawsuit, Mr. Hammet noted that he would seek the same information for the 2020 primary and general elections. Case Mgt. Order ¶ 5.e.

6. In July 2020, Mr. Hammet prevailed in that lawsuit against the KSOS, and this Court ordered KSOS to produce the 2018 general election ELVIS provisional ballot detail report to Mr. Hammet with the data requested by Mr. Hammet. Case Mgt. Order ¶ 5.f.

7. On August 4, 2020 and August 11, 2020, Mr. Hammet requested and subsequently received from KSOS two updated copies of the provisional ballot detail report for the 2020 primary election. Case Mgt. Order ¶ 5.g.

8. On August 13, 2020, the office of Kansas Secretary of State requested ES&S to remove KSOS access to the provisional ballot detail report function. Case Mgt. Order ¶ 5.h.

9. On September 9, 2020, Mr. Hammet sent an email to KSOS that, among other things stated: “[He] plan[ned] to KORA the Provisional Detail Report for the primary once it’s (relatively) fully updated. Do you have a status on that? Should I go ahead and officially request it?” KSOS responded that afternoon by providing a copy of the provisional ballot detail report. Case Mgt. Order ¶ 5.i.

10. On September 13, 2020, ES&S made changes to the ELVIS system and removed the provisional ballot detail report functionality. Case Mgt. Order ¶ 5.j.

11. Prior to removing the functionality, KSOS had not charged Mr. Hammet to query and produce the provisional ballot detail report or otherwise informed Mr. Hammet that running that report would cause KSOS to incur a cost. Case Mgt. Order ¶ 5.k.

12. On October 6, 2020, Mr. Hammet once again requested through KORA the provisional ballot detail report for the 2020 primary election. Case Mgt. Order ¶ 5.l.

13. Between October 6 and October 14, 2020, Mr. Hammet sent KSOS several emails asking for updates regarding his October 6, 2020 request. KSOS responded to these requests, at first KSOS informed Mr. Hammet that it was sent to the elections division to run the report. However, on October 14, Mr. Hammet was informed that after the September changes to ELVIS, KSOS no longer had the ability to run that report. Case Mgt. Order ¶ 5.m.

14. On October 14, 2020, KSOS informed Mr. Hammet that the office no longer could run the provisional ballot detail report. Case Mgt. Order ¶ 5.n.

15. KSOS could request that ES&S restore the ability for KSOS to run the provisional ballot detail report function. Case Mgt. Order ¶ 5.o.

16. On October 27, 2020, KSOS informed Mr. Hammet that it would request ES&S to pull the data Mr. Hammet requested on October 6, 2020 and ES&S reported such data pull would cost \$522. Case Mgt. Order ¶ 5.p.

17. KSOS informed Mr. Hammet via email on October 27, 2020, that ES&S would not begin work to pull the data until after Mr. Hammet paid the \$522, but that “ES&S could not confirm when the data specialist could begin the work order after being told to start, since the election is creating unpredictable work flow.” Case Mgt. Order ¶ 5.q.

18. KSOS will charge Mr. Hammet for any future requests from KSOS for this data based on the cost for ES&S to pull this data after each request. Case Mgt. Order ¶ 5.r.

19. KSOS does not know how much a future request for provisional ballot voter data would cost to produce as it will vary dependent on the time it takes to respond to such requests. Case Mgt. Order ¶ 5.s.

### ADDITIONAL UNCONTROVERTED FACTS

20. On October 17, 2020, after being informed that the ELVIS pre-programmed Provisional Ballot Detail Report had been removed from state-level ELVIS user access, Mr. Hammet stated his position that, “It appears the simplest solution is for your office to contact ESS and ask them to turn back on your provisional report functionality.” Ex. B.

21. In the same email, Mr. Hammet does not claim that Kansas is required to create or maintain the Provisional Ballot Detail Report. *Id.*

22. On October 23, 2020, the Secretary explained through an email to Mr. Hammet that the report was not “recorded information . . . which is made, maintained or kept by or [] in the possession of” the KSOS. K.S.A. 45-217(g)(1).” The Secretary also explained that “[a]ll the office can do now is pull up individual voter records to determine provisional ballot information, but it cannot consolidate the information into a report.” Ex. C.

23. On October 23, 2020, Mr. Hammet “clarif[ied]” that his “request [was] not limited to the ‘Provisional Ballot Detail Report.’ [His] request is for provisional ballot data related to the 2020 primarily election.” Mr. Hammet also stated that the Secretary “must provide [him] with an estimate that is reasonable to pull every individual file to assess the provisional status” if “it’s impossible to create such a report or otherwise access the data in an easier manner.” *Id.*

24. The ELVIS database contains over 1.9 million records of legally registered voters. Ex A, Caskey Decl. ¶ 2.

25. No one within the office of the Kansas secretary of state inputs, modifies, or deletes records or information within the ELVIS database. Ex. A, Caskey Decl. ¶ 2.

26. The Secretary of State first learned of the ELVIS pre-programmed Provisional Ballot Detail Report in September 2019. The office of the Secretary of State has never generated the Provisional Ballot Detail Report except for purposes of responding to requests for a copy of that report by third parties. Ex. A, Caskey Decl. ¶ 3.

27. The Secretary of State does not use the Provisional Ballot Detail Report and knows of no requirement that it create or maintain this pre-programmed report function in the ELVIS database. Ex. A, Caskey Decl. ¶ 3. The last time the Secretary generated this report was on September 9, 2020. *Id.*

28. The Secretary of State does not receive information from counties regarding specific individuals who cast provisional ballots or why those ballots were cast provisionally, outside of information entered into the individual voters' records within the ELVIS database by county election officials. Ex. A, Caskey Decl. ¶ 4.

29. The Secretary of State does not instruct county election officials on whether to utilize ELVIS to track information related to provisional ballots for purposes of their election administration duties and knows of no statutory requirement that counties do so. Ex. A, Caskey Decl. ¶¶ 4-5. Counties track provisional ballots and update them in different times and in different manners. *Id.* at ¶ 5. There is no standard date that counties update provisional ballot information within ELVIS. *Id.*

30. The Secretary of State is not able to confirm the accuracy of information contained in the pre-programmed Provisional Ballot Detail Report of the ELVIS system. Ex. A, Caskey Decl. ¶ 5.

31. The only provisional ballot data that the Secretary of State is required to collect from counties is the aggregate numbers that reflect the total numbers of provisional ballots cast and whether they are counted. Ex. A, Caskey Decl. ¶ 5.

32. The Secretary of State provides these aggregate totals of provisional ballot information to Congress pursuant to law. Ex. A, Caskey Decl. ¶ 6.

33. To produce records that reflect the provisional ballot information Mr. Hammet sought, the Secretary of State would have been required to spend months, if not years, searching and reviewing individual records within the ELVIS database. Ex. A, Caskey Decl. ¶ 7. This would have cost hundreds of thousands of staff hours. *Id.*

34. The Secretary of State requested its ELVIS vendor to inform the office how much it would cost for the vendor to retrieve the information Mr. Hammet sought. *Id.* The Secretary informed Mr. Hammet that cost would be \$522. *Id.*

35. The Secretary has never understood a Provisional Ballot Detail Report or the provisional ballot data entered into ELVIS to be an abstract of an election record. Ex. A, Caskey Decl. ¶ 8. The Secretary understands abstracts of elections to be vote totals from county election officials that include the total number of ballots cast for each office on the ballot and for questions submitted on the ballot. *Id.*

## **ARGUMENT AND AUTHORITIES**

### **I. THE SECRETARY DID NOT DENY MR. HAMMET'S KORA REQUEST**

The Secretary is entitled to Summary Judgment on Count I because the Secretary did not deny Mr. Hammet's KORA request as to the Provisional Ballot Detail Report. SOF ¶ 9. Nor did

the Secretary deny any request for records containing provisional ballot data that is temporarily entered into the ELVIS database by county election officials. SOF ¶ 16, 33-34.

A. *The “Provisional Ballot Detail Report” did not exist at the time of the Request and is thus not a document maintained or possessed by the Secretary*

“[R]ecords not yet in existence are not subject to the KORA” and KORA does not “impose a duty to create a record in order to respond to a request for information.” Kan. Atty. Gen. Op. 02-29, 2 (June 13, 2002). “KORA imposes no duty on a public agency to create a record or to compile specific information requested by an individual.” Kan. Atty. Gen. Op. 93-126, 1 (Sept. 22, 1993) (citation omitted). KORA only requires the Secretary to produce records that exist at the time of the KORA request. Kan. Atty. Gen. Op. No. 02-29, at 2. A public record is defined as “any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of” a “public agency” or an officer or employee of a public agency pursuant to his official duties and related to functions, activities, programs or operations of the agency. K.S.A. 45-217(g)(1). If a requested document does not meet this term, it is not a “record” under KORA.

In the past at the state level, the Provisional Ballot Detail Report was available to the Secretary as a pre-programmed report within ELVIS that compiled data from fields within ELVIS database records. SOF ¶ 2. The Secretary does not enter this data into nor delete this data from ELVIS. *See* SOF ¶¶ 4, 25. The Secretary also has never used the Provisional Ballot Detail Report. SOF ¶ 27. The Provisional Ballot Detail Report serves no functional purpose to the Secretary. *Id.* at 27-30. No statute requires the Secretary to generate or maintain this Report.

The Secretary first learned of this database function in September 2019, when a KORA request was filed. SOF ¶ 26. The Secretary has only generated this Report in response to requests from individuals outside of this office since that time. *Id.* The last time the Secretary



produced this Report was on September 9, 2020, following an email from Mr. Hammet requesting it. SOF ¶¶ 9, 27.

The Provisional Ballot Detail Report is available to counties. Counties are responsible for researching the reasons that provisional ballots are cast and for making recommendations on whether they should be accepted or rejected at the county canvass. *See* 25-3107(a) (county election officials “shall hear any questions from the county board of canvassers”); *see also* Kansas Election Standards, Chapter III. Canvassing, Chart for *Counting Provisional Ballots*, p. III-9, available at [IV \(ks.gov\)](http://IV.ks.gov) (last visited May 14, 2021); *see also* SOF ¶ 29. These are not Secretary of State functions.

No statute defines how county election officials track information related to provisional ballots. While some counties may find ELVIS and the Provisional Ballot Detail Report useful for these duties, others may track provisional ballots in a different manner outside of ELVIS. SOF ¶ 29. For counties that utilize the ELVIS system for provisional ballot tracking, each county may also do it differently. *See id.* Additionally, each county may update information about provisional ballots at different times. *See id.* Thus, the Report itself is, at best, an incomplete and inaccurate snapshot in time that pulls data provisional ballot data that some of the 105 counties inconsistently input into ELVIS. Due to the non-statutory and non-uniform methods counties use related to provisional ballot tracking, the Secretary cannot ascertain the accuracy of a Provisional Ballot Detail Report when it’s generated at the state level. SOF ¶ 30. Each county would have a better understanding of what information is accurate within any report the county produces.

Furthermore, the Secretary of State is not statutorily required and does not otherwise collect information about individual provisional ballots from the county election officials—the

kind of information the Provisional Ballot Detail Report would generate. SOF ¶ 28. The only information the Secretary affirmatively receives about provisional ballots in an election is from a county survey which provides, in aggregate form, the total numbers of provisional ballots cast by category. SOF ¶ 31. This report is part of a statutorily required report provided to Congress by June 30 of each year following a federal election. *See* 52 U.S.C. § 20981(b)(4) (report involving election administration includes “[M]ethods of conducting provisional voting”); SOF ¶ 32. A copy of the 2020 General Election Post Election Report completed by Barber County is attached as Exhibit 1 to Bryan Caskey’s Declaration for the Court’s reference. In summary, the Secretary has never used the Provisional Ballot Detail Report and does not collect the individual voter information contained in the Report.

After learning of this report in September 2019, confirming that the Secretary is not required by law to generate or maintain the report, and determining that any report would be inaccurate, the Secretary requested that the functionality be removed from ELVIS. SOF ¶¶ 8, 30. It is not sound policy for the Secretary of State to retain and disseminate inaccurate information. *See Colorado v. DeJoy*, 487 F. Supp.3d 1061, 1065-66 (D. Colo. Sept. 12, 2020 (providing inaccurate information from the government may “sow confusion amongst voters”). As of September 13, 2020, the Secretary has lacked the ability to generate the Provisional Ballot Detail Report. SOF ¶ 10. It cannot, therefore, be argued that the Provisional Ballot Detail Report requested on October 6, 2020, was a record within the possession of the Secretary of State.

Hammet’s primary theory seems to be that the Secretary is denying his KORA request merely because the office no longer has access to a database function he wants the office to use. SOF ¶ 20. But that is not a KORA matter and, in that same email, Mr. Hammet tellingly does not claim that Kansas law requires this report to be maintained by the Secretary. *Id.* “KORA

imposes no duty on a public agency to create a record to compile specific information requested by an individual.” Kan. Atty. Gen. Op. 86-43; 1 (Mar. 31, 19686); *see also* Kan. Atty. Gen. Op. 87-137, 1 (same); Kan. Atty. Gen. Op. 02-29, at 2 (same). Furthermore, “[n]othing in [KORA] shall be construed to require the retention of a public record nor to authorize the discard of a public record.” K.S.A. 45-216(b). Even if the ability to create a non-statutorily required database report could be considered a public record, KORA clarifies that this office is not required to retain that ability, absent some other statute mandating the office do so. This office has no obligation to maintain this database function in perpetuity.

Finally, to the extent that Mr. Hammet is claiming he was denied a KORA request because he told the Secretary that he may be requesting a Provisional Ballot Report in the future, SOF ¶9, Mr. Hammet’s claim is incorrect as a matter of law. KORA requests are requests for existing records, not future ones. “[R]ecords not yet in existence are not subject to the Act. A prospective or standing request for ‘records as they become available’ is not enforceable” under KORA. *Kansas sunshine Law: How Bright Does It Shine Now? The Kansas Open Meetings and Open Records Act*, 72-May J. Kan. B.A. 28, 29 (May, 2003) (citing Kan. Atty. Gen. Op. 98-51). Mr. Barker produced the Provisional Ballot Detail Report when Mr. Hammet submitted that request on September 9, 2020. *See* SOF ¶ 9. The process of removing that functionality from ELVIS was already pending at that point. SOF ¶¶ 8. Mr. Hammet cannot bind the Secretary to future records that have not been created and prevent the Secretary from modifying the database he manages.

*B. The Secretary Did Not Deny Access to Provisional Ballot Data Mr. Hammet Sought, Despite the Secretary Going Beyond What KORA Requires to Assist Mr. Hammet*

The second issue in this case involves the records within the ELVIS database which contain provisional ballot data. On October 23, 2020, Mr. Hammet clarified that his request was “not limited to the ‘Provisional Ballot Detail Report.’ [His] request [was] for provisional ballot data related to the 2020 primary election.” SOF ¶ 23. The Secretary provided Mr. Hammet with the ability to obtain this information by requesting a vendor to create a record to compile this information for him. This action by the Secretary is beyond what KORA would have required.

ELVIS contains voter registration data for over 1.9 million registered voters. SOF ¶ 24. During any election cycle, a small number of those records contain information about provisional ballots entered by county election officials. *See id.* ¶¶ 28-29. The Secretary has access to the ELVIS database although he does not input any data. *Id.* ¶¶ 4, 25. Records in a government database, including the ELVIS database, are subject to KORA. Atty. Gen. Op. 2017-10, 1 (July 11, 2017).

As discussed earlier, “KORA imposes no duty on a public agency to create a record or to compile specific information requested by an individual.” Kan. Atty. Gen. Op. 93-126 (Sept. 22, 1993) (citation omitted). “[A] public agency is only required to make available to the public those records which it makes, maintains, keeps or possesses.” Kan. Atty. Gen. Op. 86-43, 1 (Mar. 31, 1986). When no statute requires an agency “to record or compile certain information in a particular form,” the KORA does not require the agency to do so. *Id.* Furthermore, KORA “does not require a public agency which maintains records on computer facilities to write a computer program to produce requested information in a certain form if the information is available in existing records.” Kan. Atty. Gen. Op. 87-137, 2 (Sept. 15, 1987). Thus, KORA only requires the Secretary to produce actual records that contain the information Mr. Hammet requested. K.S.A. 45-217(g)(1).

To respond to Mr. Hammet's records request under KORA, the Secretary had two options: (1) staff could manually click through each of the 1.9 million individual voters' ELVIS records to determine which voters cast provisional ballots and produce, with redactions, only the records that met his request, or (2) staff could attempt to produce a copy of every record entered into the ELVIS database, redact private information, and allow Mr. Hammet to search for the data he wanted himself. SOF ¶ 33. Neither manner of production would be possible, especially during an election. Responding in either of the above scenarios would have required months or years of staff time and would have been justifiably denied as being overly burdensome. *Id.*; *see also* K.S.A. 45-218(e) (a request may be rejected if it places an unreasonable production burden). Additionally, the cost would have been extraordinarily high assuming the Secretary could comply with that request. SOF ¶ 33.

Realizing these limitations, the Secretary opted for another avenue that, although not required by KORA, would allow Mr. Hammet to receive the data he sought. This alternative method of production would not require the Secretary to create inaccurate reports that serve no office functions. The Secretary offered to contract with the ELVIS vendor so that the vendor could write a script which would pull the information Mr. Hammet sought. However, to obtain the data, Mr. Hammet would be required to pay the actual cost of that process. The Kansas Supreme Court has previously held similar costs to be permissible. *See State ex rel. Stephan v. Harder*, 230 Kan. 573, 589 (1982) (permitting recovery of the cost of a computer program to obtain sought after information). Additionally, it should be noted that Mr. Hammet retained the ability to obtain the information he sought from county election officials if he did not want to pay that fee.

Because the Secretary never denied Mr. Hammet's KORA request, the Court should enter Summary Judgment in favor of the Secretary as to Count I.

## II. THE FEE WAS REASONABLE

The Secretary is entitled to Summary Judgment as to Count II of the Petition because the fee the Secretary sought was reasonable under KORA.

KORA permits an agency to recover the costs an agency incurs to produce records. K.S.A. 45-219(c). Fees for copies of records cannot exceed the actual cost of furnishing the copies, including cost of staff time required to make the information available. K.S.A. 45-219(c)(1). As for fees for providing access to records maintained on computer facilities, the fees shall include only the cost of any computer services, including staff time required. *Id.* at (2); Kan. Atty. Gen. Op. 93-126, at 1. The Secretary met this requirement.

As discussed above, to comply with KORA, KSOS only was required to provide the underlying records in its possession. Those records were part of a subset of the 1.9 million individual voter records within the ELVIS database and production would have required spending hundreds of thousands of dollars of staff time to fulfill the request. SOF ¶ 33. Instead, the Secretary required Mr. Hammet to pay the much lower actual cost the vendor would charge the Secretary to pull the information he sought. SOF ¶ 16. Not only was this fee reasonable under KORA, it was a lower fee than what KORA would have permitted. The Secretary did not request Mr. Hammet to pay for office staff time to review the vendor's production or to pay for any needed redactions, both of which are impossible fees under KORA. K.S.A. 45-219(c)(1), (2); *Data Tree, LLC v. Meek*, 279 Kan. 445, 465 (2005) (agency redaction costs are recoverable). The fees requested of Mr. Hammet were reasonable.

Hammett's argument seems to be that the fee was not "reasonable" for two reasons. First, in his Petition, Hammett alleges that the Secretary is not permitted to charge a fee at all because the Secretary previously did not charge a fee. Pet. Count II. Defendant has found no case law that supports this theory. KORA only gives Mr. Hammett "the right to obtain copies of public records . . . no[t the] right to obtain the records in the least expensive manner." Kan. Atty. Gen. Op. at 2. Mr. Hammett's theory is inconsistent with statute and with the Secretary's policy.

KORA provides that an agency "may" charge a fee, not that it must. K.S.A. 45-219(c). KORA only imposes the fee limitation that an agency may not charge more than the actual cost to produce the records requested. *Id.* The fact that the Secretary did not charge a fee in the past does not forever bar imposition of a fee. The Secretary's KORA fee policy permits the Secretary to charge for subsequent records even when the Secretary previously did not charge a fee.

[Kansas Secretary of State | KORA Policy Statement \(ks.gov\)](#). Mr. Hammett's theory that an agency is *per se* prohibited from charging a production fee because the agency did not charge one in the past is unsupported.

Second, for purposes of the facts of this case, Mr. Hammett's argument is incorrect. In the past, Mr. Hammett requested and received a report from the ELVIS database that the Secretary could create for Mr. Hammett at that time. That function was removed from the system. Whether the change to a database function occurs by the request of an agency or due to changes in the database itself, the requestor is not entitled to the agency nevertheless being obligated to provide him with the prior service forever. The Secretary informed Mr. Hammett of the cost to obtain the information he sought under the capabilities of the ELVIS database when he submitted his request. Rather than pay the reasonable fee, Mr. Hammett asks this Court to require the Secretary to create an inaccurate record that serves no use to the office simply

because the Secretary did so in the past. KORA does not require this. The Secretary's fee is reasonable.

### III. THE SECRETARY DID NOT VIOLATE THE ELECTION RECORDS RETENTION STATUTES

The Secretary is entitled to Summary Judgment on Count III because a Provisional Ballot Detail Report is not an “[a]bstract[] of voting records” under K.S.A. 25-2709.

A. *Mr. Hammet Does not have Standing to Challenge Whether a Provisional Ballot Detail Report is an “Abstract of an Election Record”*

Mr. Hammet lacks standing to assert that K.S.A. 25-2709 was violated. Standing requires a “sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy.” *Gannon v. State*, 298 Kan. 1107, 1123 (2014) (citations omitted). “Under the traditional test for standing in Kansas, ‘a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.’” *Id.* (citations omitted). Importantly for this case, Mr. Hammet’s injury “cannot be a ‘generalized grievance’ and must be more than ‘merely a general interest common to all members of the public.’” *Id.* (citations omitted).

Count III of the Petition merely alleges that K.S.A. 25-2709 was violated. Whether an election records destruction statute is violated is not injury personally suffered by Mr. Hammet. Mr. Hammet lacks standing to bring Count III.

B. *Even if Mr. Hammet Does Have Standing to Allege a Violation of K.S.A. 25-2709, the Provisional Ballot Detail Report is not an Abstract of a Voting Record*

Even assuming, arguendo, Mr. Hammet had standing to bring Count III, the Secretary is entitled to summary judgment because the Provisional Ballot Detail Report, nor the temporary



provisional ballot data contained in ELVIS, are abstracts of voting records within the meaning of Article 25.

K.S.A. 25-2709 establishes a record destruction timeline for certain election records. At issue here is subsection five, “abstracts of voting records” which the statute requires to be maintained for 20 years. While this statute does not itself define what an “abstract of a voting record” is, other statutes clarify that abstracts are the certified vote totals of elections at the various stages of the vote-counting process. *State v. Kleypas*, 305 Kan. 224, 262 (2016) (“[I]dentical words or terms used in different statutes on a specific subject are [ordinarily] interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended.”) (citations omitted).

K.S.A. 25-3006 identifies the abstract of the original canvass of the election board:

(a) When the election board completes its canvass, it shall make three abstracts of the vote cast for all candidates whose names are printed on the ballot, all write-in votes cast and all votes cast on questions submitted. Such abstracts shall be made under the direction of the supervising judge upon forms provided by the county election officer. Each of such three abstracts shall bear a certificate of the validity thereof and each certificate shall be signed by all of the clerks and judges at the voting place.

(b) In voting places where voting machines equipped with printed election returns mechanisms are used, the counter compartment shall not be opened and the original and duplicate originals of the printed return sheets of the votes cast on questions submitted and for candidates whose names are printed on the official ballot labels, together with the tabulation and inclusion of any write-in votes appearing on the paper roll shall constitute the official abstract for the votes cast on that machine, when coupled with the other originals and duplicate originals of other machines in the voting place and certified as abstracts of the vote cast at such voting place, upon forms and in the manner prescribed by the county election officer.

*Id.* (emphasis added). Notably, the definitions of abstracts in these statutes do not mention provisional ballot cast or whether provisional ballots were accepted or rejected, as acceptance and rejection does not occur until the county canvass. *See* K.S.A. 25-414(e).

Next, each county election officer creates a “preliminary final abstract” or “preliminary intermediate abstract,” depending on the type of election at issue:

When returns of any election are received by the county election officer, he shall make a preliminary inspection of the abstracts and other records returned. The county election officer shall prepare a combined tabulation of the vote totals for each candidate and question submitted showing therein the votes at each voting place. Such tabulation shall be known as the preliminary final abstract of election returns, in the case of all elections for which the county board of canvassers make the final canvass. Such tabulation shall be called the preliminary intermediate abstract of election returns, in the case of all elections for which the county board of canvassers make an intermediate canvass.

K.S.A. 25-3106 (emphasis added). Again, the abstract concerns vote totals and makes no mention of provisional ballots, a Provisional Ballot Detail Report, or information about individuals casting provisional ballots.

Next, the county election official takes the preliminary abstracts and certain other ballots and records to the county board of canvassers. *See* K.S.A. 25-3107(a). The county board of canvassers then “finalize[s] the preliminary abstract of election returns by making any needed changes and certifying its authenticity and accuracy.” *Id.* Kansas statute defines what is contained in an “abstract of the election returns” that the county canvassing board certifies. K.S.A. 25-3109(a). If the election is one in which the county board of canvassers is the final canvass, *see* K.S.A. 25-3103(a), a final abstract is “certified by the county board of canvassers” and, depending upon the type of election, specifies (1) “the persons nominated for each office as a result of such primary,” (2) “the persons elected to each office as a result of such general election,” and (3) “the result on each question submitted.” *Id.* at (b)-(c). In elections in which the county board of canvassers are the intermediate canvass and the state board of canvassers is the final canvass, *see* K.S.A. 25-3103(b), the secretary of state receives the “abstract of the votes in national and state primary and general elections . . . tabulate[s] the vote by counties . . . and . . . carefully preserve[s] in his or her office said abstracts.” K.S.A. 25-3204. The state board of

canvassers utilize these abstracts to make final canvass and certify the total votes received for persons seeking office and for questions submitted. K.S.A. 25-3205 (primary elections follow the rules for canvass for general elections), 25-3206 (canvass for general election). For the court's convenience, attached to Mr. Caskey's Declaration as Exhibit 2 are copies of the intermediate abstract from Allen and Anderson Counties for reference. These are examples of abstracts of voting records K.S.A. 25-2709 requires the Secretary of State to keep for at least 20 years and that K.S.A. 25-2708(c)(1) requires counties "retain as a permanent record in the office of the county election officer." Again, none of these statutes mention provisional ballot information, or a Provisional Ballot Detail Report, as being included as an "abstract" of a voting record.

K.S.A. 25-3107(a) further demonstrates that provisional ballot information and the Provisional Ballot Detail Report are not election "abstracts." That statute requires the county election officer to "present to the county board of canvassers the preliminary abstracts of elections returns, together with the ballots and records returned by the election boards . . ." (emphasis added). K.S.A. 25-409 requires the county board of canvassers to receive and review "provisional ballots, together with objected to and void ballots packaged in accordance with K.S.A. 25-3008." If the Legislature intended the Provisional Ballot Detail Report or provisional ballot data in ELVIS to be considered an election "abstract," it would have so stated and it would not have included provisional ballots apart from election abstracts in the county canvassing statute.

Furthermore, the Provisional Ballot Detail Report does not resemble what the legislature has statutorily defined as abstracts of elections. The report is a tracking worksheet that lists individuals by name, identifying the reason for casting a provisional ballot. The information is

constantly changing as records are updated, as demonstrated by Mr. Hammet's repeated requests for new reports. In contrast, statutory election abstracts are certified by election bodies that provide a total number of votes cast in an election by office or question submitted. *See supra*; *see also* KAR 7-25-1 (providing the required certification for the "abstracts of votes cast at each voting place for every election."). An abstract under Article 25 is not a compilation of the names of every person casting a ballot. Mr. Hammet would have this court create a new election record out of whole cloth that does not resemble what has been known by election officials since at least 1968 to be "election abstracts." *See* Kan. Sess. Laws 1968, ch. 406, § 45. The term "provisional ballot" was not even added to Kansas statute until 1996. *See* Kan. Sess. Laws 1996, ch. 187 § 1. If Mr. Hammet were correct, all 105 counties have been violating this statute for 25+ years. Simply, the Provisional Ballot Detail Report and the provisional ballot data Mr. Hammet seeks are not election abstracts.

*C. The Secretary Does Not Add, Modify, nor Delete Information from ELVIS*

Finally, the Secretary is entitled to summary judgment as to Count III because he has not destroyed any election records. The Provisional Ballot Detail Report, when requested in October of 2020, had not been created and it was not destroyed. *See supra*. Additionally, the Secretary does not modify or remove data from ELVIS. *See supra*. Even if it could be plausibly argued that the Provisional Ballot Detail Report was an election abstract, the Secretary did not destroy it because it was not created in the first place.

## CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment should be GRANTED.

Date: May 14, 2014

Respectfully submitted,

/s Garrett Roe

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on the 14<sup>th</sup> day of May, 2021, I caused a copy of the foregoing to be filed on the Court's electronic filing system and further that I caused a copy to be served on opposing counsel via e-mail.

/s/ Garrett Roe

Garrett Roe, Kansas No. 26867

*Attorney for Defendant*