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IN THE THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

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

DEFENDANT'S BRIEF IN OPPOSITION
TO PLAILNTIFF'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 response to Plaintiff's motion for summary judgment in the above captioned case.

INTRODUCTION

This case is ultimately about whether KORA requires the Secretary of State to continue to house within a database it manages, the Election Voter Information System ("ELVIS"), a function that the agency does not use or want. As the Secretary understands Plaintiff's argument, he believes KORA requires the Secretary to keep a database query function indefinitely because the Secretary used it previously to provide information to a third party. That argument is not supported by law and Plaintiff's entire theory collapses without this foundation. Plaintiff's motion for summary judgment should be denied.

RESPONSE TO PLAINTIFF'S UNCONTROVERTED FACTS

1. Uncontroverted.

2. Uncontroverted for purposes of this motion only.

3. Uncontroverted.

4. Uncontroverted.

5. Uncontroverted.

6. Uncontroverted.

7. Uncontroverted.

8. Uncontroverted.

9. Controverted. Part of paragraph 9 alleges a statement of law as opposed to stating an uncontroverted fact. Kan. Sup. Ct. R. 141(a)(2). Specifically, stating that a request was "pursuant to KORA" is an issue of law. However, Defendant does not believe this raises a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan.

App. 2d 999, 1005 (Kan. Ct. App. 2008) ("In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.").

10. Controverted to the extent Plaintiff is interpreting a court opinion rather than stating a fact. Kan. Sup. Ct. R. 141(a)(2). However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

11. Uncontroverted for purposes of this motion only.

12. Controverted. Part of paragraph 12 interprets a court opinion as opposed to stating an uncontroverted fact. Kan. Sup. Ct. R. 141(a)(2). Specifically, the statement that this Court "h[eld] that Mr. Hammet indeed had a right to the provisional ballot detail report he sought" is construing the holding of a court opinion as opposed to stating a fact. However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

13. Uncontroverted for purposes of this motion only. Additionally, Defendant notes that Plaintiff omitted part of the quotation.

14. Controverted. Part of paragraph 14 alleges a statement of law as opposed to stating an uncontroverted fact. Kan. Sup. Ct. R. 141(a)(2). Specifically, stating that a request was "pursuant to KORA" is an issue of law. However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

15. Uncontroverted.

16. Controverted. Part of paragraph 14 alleges a statement of law as opposed to stating an uncontroverted fact. Kan. Sup. Ct. R. 141(a)(2). Specifically, stating that his request

was "pursuant to KORA" is an issue of law. However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

17. Uncontroverted.

18. Uncontroverted.

19. Uncontroverted.

20. Uncontroverted for this motion only.

21. Uncontroverted.

22. Controverted. Part of paragraph 22 alleges a statement of law as opposed to stating an uncontroverted fact. Kan. Sup. Ct. R. 141(a)(2). Specifically, stating that his request was "pursuant to KORA" is an issue of law. However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

23. Uncontroverted.

24. Uncontroverted.

25. Uncontroverted.

26. Controverted. Plaintiff provides no citation that states the Secretary was asked to "guarantee that ES&S would be able to complete the data pull prior to the 2020 General Election in November 2020." *See* Case Mgmt. Order ¶ 5.q. The Secretary informed Mr. Hammet 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." Pl. Memo. at 28 (Ex. A). Furthermore, this email was sent on one week prior to election day. *Id.* However, this does not

raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

27. Uncontroverted.

28. Uncontroverted.

29. Uncontroverted.

30. The first sentence of paragraph 30 is uncontroverted. The second sentence of paragraph 30 is controverted. The emails that Plaintiff cites demonstrates that the Secretary responded to Mr. Hammet's emails. Pl. Memo. at 28 (Ex. A) ("They confirmed at state level we cannot pull the requested provisional ballot data.").

31. Controverted. Paragraph 31 is controverted to the extent Plaintiff is making a legal argument, and not a factual statement, that KORA would require the Secretary to create a record for him. *See* Kan. Sup. R. 141(a)(2) ("for each fact"). Defendant controverts the legal argument that KORA requires a state agency to "create" a record pursuant to KORA. Kan. Atty. Gen. Op. 86-43, 1 (Mar. 31, 1986). However, outside of any possible legal arguments Plaintiff suggests in paragraph 31, paragraph 31 is uncontroverted. Furthermore, this legal argument does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

32. Uncontroverted.

33. Controverted to the extent Plaintiff is making a legal argument. KORA is a records statute and the ELVIS files used to generate the information Mr. Hammet seeks are within ELVIS. They can be requested of either the Secretary or the county election officials. *See* Def. Ex. B (Hammet stating that the Secretary "must provide [him] with an estimate that is reasonable to pull every individual file to assess the provisional status."). However, this does not

raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

34. Part of the first sentence of paragraph 34 is controverted where Plaintiff claims "Defendant . . . would not order ES&S to run a pre-General Election manual data pull." The Secretary offered to have ES&S write a script to obtain the data Mr. Hammet sought. Pl. Memo. at 28, Ex. A (informing Mr. Hammet that a data pull could be done by ES&S for the information he sought); Case Mgmt. Order ¶¶ 5.p, q. However, this does not raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

35. Response to Paragraph 35

Controverted. As to the first two sentences, Plaintiff offers no citation to the record as required by Supreme Court Rule 141(a) and the court should not rely on them for purposes of summary judgment. KS Sup. Ct. Rule 141(a)(2).

To the extent the Court would consider these uncited statements, they are controverted. Defendant did not interfere with Mr. Hammet's attempts to gather provisional ballot information from individual counties and did not instruct counties to delay their responses to KORA. Caskey Aff. ¶ 9. Additionally, to the extent Plaintiff is making a legal argument—that Defendant has the authority to order counties not to comply with KORA—Defendant controverts that contention. Counties must follow KORA's requirements. *See* Kan. Att'y Gen. Op. 95-64, 3 ("A contract term cannot redefine what constitutes a public record nor can county home rule be used to change the KORA so as to close an otherwise open public record.").

As to the third sentence, it is uncontroverted that the Election Standards were not updated following this Court's prior decision. They are being updated since it was brought to the Secretary's attention. Caskey Aff. ¶ 8.

Additionally, as to the third sentence, Defendant objects to the extent Plaintiff is claiming that he was advising counties to not fulfill their KORA duties. Counties must adhere to KORA when responding to requests they receive. *See* Kan. Att'y Gen. Op. 95-64, 3. Plaintiff's own facts demonstrate that counties did respond to requests he made. Pl. SOF ¶ 34.

Finally, Defendant objects as to consideration or inclusion of Exhibit C as part of Summary Judgment and objects to any consideration of the email or the statements contained therein under KS Sup. R. 141(d). The email and the statement contained therein are hearsay. K.S.A. 60-464. The email and the statement contained therein are being offered to purportedly prove that Mr. Caskey made the statements contained within the email and Plaintiff has not presented them in sworn testimony for purposes of summary judgment. *See Stormont-Vail Healthcare, Inc. v. Cutrer*, 39 Kan. App.2d 1, 6 (Kan. Ct. App. 2007).

If the court considers this email or the statement contained in it, they are controverted. Mr. Caskey did not "advise[]" election officials "to put the request on hold until the Mandated State Requirements that are placed on the election officer has been completed." Pls. Memo. at 40, Ex. C. The Secretary of State's office does not give orders to counties to dis-regard or not respond to KORA requests. Caskey Aff. ¶ 9. Mr. Caskey did not tell the Montgomery County Clerk to put any KORA requests "on hold." Caskey Aff. ¶ 9. Furthermore, although Mr. Caskey does discuss KORA matters with county election officials, the discussion ends with a reminder that the election official should consult his or her county attorney and the open records custodian

in the county. Caskey Aff. ¶ 9. Neither Mr. Caskey, nor the Secretary of State's office, is the attorney for a county election official. Caskey Aff. ¶ 9.

Nevertheless, even though nearly every contention in Paragraph 35 is controverted or objected to, nothing in Paragraph 35 raises a raise a dispute of material fact that would preclude summary judgment. *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

36. Uncontroverted for purposes of this motion only.

DEFENDANT'S ADDITIONAL STATEMENTS OF UNCONTROVERTED FACTS

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

2. 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.

3. The Secretary of State first learned of the ELVIS pre-programmed Provisional Ballot Detail Report identified in Pl. SOF ¶ 6 in September 2019. Ex. A, Caskey Decl. ¶ 3. 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. *Id.*

4. 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.*

5. 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.

6. 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; Case Mgmt. Order ¶ 5.d. There is no standard date that counties update provisional ballot information within ELVIS. Caskey Aff. ¶ 5.

7. 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.

8. 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.

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

10. Regarding the report to which Mr. Hammet refers in Pl. SOF ¶ 6 and the function that was removed from the ELVIS database identified in Pl. SOF ¶ 18, on October 23, 2020, the Secretary explained 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. B (email of Clay Barker).

11 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.*

12. 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.*

13. 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.* $522 represented the cost that ES&S would charge the Secretary to retrieve the data. Case Mgmt Order ¶ 5.p.

14. 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 generally 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. A Former Database Query Function is Not a Public Record Under KORA and an Agency is Not Required to Continue to Maintain a Database Function to Respond to Possible Future KORA requests

Plaintiff's arguments center around whether this office "denied' or "constructively denied" a public record. But these theories miss the mark in this case. The primary question for

the court is whether what Plaintiff sought meets the statutory definition of a public record under KORA at all. It does not and therefore Defendant's actions complied with KORA.[1]

A "public record" under KORA is "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 officer or employee of a public agency. K.S.A. 45-217(g)(1). If a record requested by an individual of a state agency or employee does not meet this definition, it is not a public record. Kan. Att'y Gen. Op. 1998-51, *2 ("If a record is not yet in existence, it is not 'recorded information' as of the date of the request and so does not meet this definition and is not a public record."). A former database query function does not meet the definition of a "public record" for two reasons. First, a database query function is not "recorded information." It is a function that can pull recorded information from other records in a database, in this case voter registration records, and then populate that data into fields of another document. Until that function is used, there is no report and thus no "recorded information" for an agency to produce. Kan. Att'y Gen. Op. 2002-09, *2 (June 13, 2002) ("[R]ecords not yet in existence are not subject to the KORA nor does the KORA impose a duty to create a record in order to respond to a request for information.").

Second, even if a database function did constitute "recorded information" at one time, once that function is removed from the database, the function would no longer be "recorded information" or "in the possession of" a public agency, officer or employee and thus is not a "public record." K.S.A. 45-217(g)(1). While Plaintiff objects to this statutory definition because he believes removing a database function "purposefully obscure[s] access to public records," Pl.

[1] The Secretary did provide Mr. Hammet with the ability to obtain the information that he wanted. Additionally, Mr. Hammet continues to have the ability to request voter registration records under KORA which are public records. *See generally infra* at III.

Memo. at 19, KORA only applies to existing records in an agency's possession. Kan. Att'y Gen. Op. 2002-09, *2. When Mr. Hammet made his October 6, 2020 KORA request, Pl. SOF ¶ 22, that function had already been removed from the Secretary's ELVIS database access weeks earlier and thus was not in the Secretary's possession at the time of Plaintiff's request. Pl. SOF ¶ 19.

Even assuming that Plaintiff is correct that the database function should have been considered a public record at one time, it does not follow that the function must therefore be kept forever. For example, when an agency makes copies of records, those records are public records at that time, but "once [an agency] transmits copies of the records, those copies no longer qualify as public records as defined in KORA because they are no longer in the possession of a public agency." Kan. Att'y Gen. Op. 2009-14, *2 (July 8, 2009); *see also* Kan. Att'y Gen. Op. 2004-1, *2 (Jan. 15, 2004) (records "possessed" by KDHR were public records). A function that was removed from a database prior to a valid KORA request cannot meet the definition of a public record under KORA.

Despite these legal impediments, Plaintiff is requesting this Court to declare something entirely new under KORA. Plaintiff wants this Court to declare that the Secretary, and presumably every other state agency, has a duty under KORA to maintain a database function so that Plaintiff can obtain information he wants. Plaintiff goes so far as to claim that the Secretary must *never* alter a database so that the Secretary may accommodate Mr. Hammet's future requests:

> Once KSOS produced data using the provisional ballot detail report functionality in KORA, it had created a record, *and along with that an affirmative obligation to provide that record in response to future requests when it was known that future requests would be forthcoming*. SOF ¶¶ 10, 15.

Pls. Memo. at 12 (emphasis added).[2] Essentially, Plaintiff argues that once a state agency utilizes a database function to provide information, that agency is bound to continue housing and using that database function in the future. That is incorrect as a matter of law.

As discussed above, "records 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); Kan. Att'y Gen. Op. 2002-09, *2. Mr. Hammet's underlying theory—that the Secretary had an "affirmative obligation to provide that record in response to future requests"—is incorrect. KORA requires an agency to provide records in its existence at the time of a request. Kan. Att'y Gen. Op. 1998-51, *2. The Secretary has done this.

Second, KORA imposes no duty on the Secretary to create or maintain a database function to compile information for Mr. Hammet. Plaintiff makes essentially the same argument under his "constructive denial" theory. Pl. Memo. at 14-15 ("Removing the ELVIS functionality that allowed for easy production of the provisional ballot detail reports violated the letter and spirit of KORA, and amounts to a denial of MR. Hammet's request for a public record."). "KORA imposes no duty on a public agency to create a record to compile specific information

[2] Plaintiff also claims that this office was "twice ordered to produce" the provisional ballot detail report. That is incorrect. *Mah v. Shawnee County Com'n.*, 2012 WL 5584613 (D. Kan. Nov. 15, 2012) involved a KORA request made to Shawnee County, not this office. This office intervened in that action. That dispute was about whether the names of those who cast provisional ballots in the 54th District election could be disclosed. It did not address the provisional ballot detail report function in ELVIS at all. *Loud Light v. Schwab*, 2020-CV-000343 (Jul. 24, 2020) involved a request for the provisional ballot detail report which this office downloaded in response to that request. The office then argued that that document could not be produced, either in its entirety or without redacting certain fields. *Id.* at 3-4. That decision was not about whether this office could remove a functionality from a database it maintains.

requested by an individual." Kan. Atty. Gen. Op. 86-43, 1 (Mar. 31, 1986); *see also* Kan. Atty. Gen. Op. 87-137, 1 (same); Kan. Atty. Gen. Op. 02-29, at 2 (same). While Mr. Hammet may want the Secretary to retain a database function to compile information for him, KORA does not require the Secretary to do so. Mr. Hammet is entitled to records in the ELVIS database, subject to redactions and costs. KORA does not entitle him to require this office to maintain a database function to compile information he requests.

Third, even if the database function could be construed as a public record when it was accessible in the ELVIS database, Mr. Hammet is incorrect that KORA requires the Secretary to retain that database function. "Nothing 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). Absent a statute requiring the Secretary to maintain a database function, the Secretary is under no obligation to do so. In fact, the legislature knows how to direct what information must be maintained within the ELVIS database. K.S.A. 25-2304(b). The legislature has not required the provisional ballot detail report nor the function to create it to be part of the centralized voter registration database.

Finally, Mr. Hammet's theory that past use of a database function creates an obligation for future use and production under KORA must be rejected because it would lead to an absurd interpretation of KORA. *See Dillon Real Estate Co. Inc. v. City of Topeka*, 284 Kan. 662, 678 (2007) (a court's "interpretation of a statute should avoid absurd or unreasonable results"). The provisional ballot detail report does not become "recorded information" until it is generated. The function that creates that report is no longer part of Defendant's ELVIS access. If the function to create the document is not in the database, then the report itself cannot meet the KORA

definition of "recorded information . . . within the possession" of an agency. K.S.A. 45-217(g)(1).

Taking Mr. Hammet's theory to its ultimate conclusion, an agency could never update or modify its use of technology. Plaintiff's core theory is that once an agency uses technology to create a record that agency must always create that same record in the future. For example, if Mr. Hammet previously requested emails drafted by the Secretary and the Secretary had in fact drafted those emails, then according to Mr. Hammet, KORA would require the Secretary to continue using email in the future. The Secretary could not decide that he no longer wanted to use email and Mr. Hammet would have a cause of action under KORA to *force* the Secretary to continue using email. Mr. Hammet's KORA theory also would result in yet be drafted emails being public records under KORA. Mr. Hammet's KORA theory results is an absurd conclusion and is not what KORA addresses.

KORA addresses records in the possession of an agency at the time of a request. KORA is not about records that might be in the possession of an agency in the future. *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). A function that was removed from a database is not a public record, no matter how many times that function was used in the past. KORA does not require an agency to maintain a database function that serves no purpose for the agency.

II. A Database Function is Not a "Government Record"

Plaintiff raises a new issue in his motion that was not pled, that somehow a database function should constitute a "government record" and can therefore not be removed. Mr. Hammet does not have standing or a cause of action to claim that an agency violated the

government records statute. 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). 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). Whether a government record was removed is a generalized grievance, not an injury suffered by Mr. Hammet personally. *See e.g.* K.S.A. 45-403(a).

Additionally, Mr. Hammet does not have a cause of action to enforce the provisions of the government records act. *See Tudor v. Wheatland Nursing L.L.C.*, 42 Kan. App.2d 624, 633 ("To bring a cause of action for the violation of a statute or a regulation, the plaintiff must establish that the statute or regulation was designed to protect a specific group of people rather than the public at large, and that the legislature or regulatory agency intended to provide enforcement of the statute or regulation through private causes of action."). The legislature has not created a private right of action under the government records act. Instead, it tasked the state records and the state archivist as the authorities responsible for disposition of government records. *See* K.S.A. 45-403(b), 404(a), 405, 406. The matter before the Court is a KORA action, not an action based on the government records act. KORA gives this Court jurisdiction to enforce KORA. *See* K.S.A. 45-222.

If this court decides that it does have jurisdiction to make determinations as to what things constitute government records under K.S.A. 45-401 *et seq.*, Plaintiff's argument that a database function is a government record fails for multiple reasons. First, Plaintiff confuses the

government records statutes with KORA statutes. Relying on K.S.A. 45-403(a), Plaintiff incorrectly claims that "KORA explicitly prohibits agencies from destroying public records." Pls. Br. at 11.[3] That is false. K.S.A. 45-403 is part of the "government records preservation act," K.S.A. 45-413, it is not part of the Kansas open records act. *See* K.S.A. 45-215 ("K.S.A. 45-215 through 45-223 shall be known and may be cited as the open records act."). Plaintiff is relying on the wrong act to support this theory. In contrast to the government records act, "Nothing 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).

Second, a database function is not a government record. The term "government record" means:

> [A]ll volumes, documents, reports, maps, drawings, charts, indexes, plans, memoranda, sound recordings, microfilms, photographic records and other data, information or documentary material, regardless of physical form or characteristics, storage media or condition of use, made or received by an agency in pursuance of law or in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency. Published material acquired and preserved solely for reference purposes, extra copies of documents preserved only for convenience of reference and stocks of publications, blank forms and duplicated documents are not included within the definition of government records.

[3] Although not relevant for purposes of summary judgment, Plaintiff wrongly states that "Defendant even attempted to thwart Mr. Hammet's ability to gather the information . . . by instructing county clerks not to comply with Mr. Hammet's requests and not updating the state's election manual . . ." Pl. Memo. at 12. As to the State Elections Standards, Defendant is in the process of updating that page of the Elections Standards. Def Resp. to Pl. SOF ¶ 35. As to what Plaintiff claims Defendant said to the county clerks, this statement is based on inadmissible hearsay. K.S.A. 60-464. This office has *not* the Montgomery County clerk to put any KORA requests on hold. Def Resp. to Pl. SOF ¶ 35. And, even if Defendant attempted to do so, such instruction would be legally meaningless. Counties, like state agencies, are obligated to follow KORA and produce public records when requested within the statutory requirements. K.S.A. 45-217(f)(1) (definition for a public agency); *see also* Kan. Att'y Gen. Op. 95-64, 3 ("A contract term cannot redefine what constitutes a public record nor can county home rule be used to change the KORA so as to close an otherwise open public record."). Mr. Caskey reminds county election officials that they should rely on advice of their county counselors to comply with KORA. Def Resp. to Pl. SOF ¶ 35.

K.S.A. 45-402(d).

Mr. Hammet continues to conflate the actual records that are created and stored within ELVIS—the voter registration files—with a preprogrammed function that compiles information from those records. Pl. Memo. at 10. This office did *not* and does not delete or modify voter records in the ELVIS database. Def Add'l SOF ¶ 2.

Furthermore, part of the government records statutes involve transferring government records to the state archives. *See* K.S.A. 45-405(a). A database function cannot be transferred to the state archives. Plaintiff acknowledges this fact which further demonstrates why his government records theory is incorrect. "As a new election nears, counties remove the data to prepare for the new election, 'clearing' ELVIS before every election." Pls. Memo at 14. In other words, Plaintiff acknowledges that this database function is simply a tool that counties can use during an election cycle if a county so chooses.[4] A function is not a government record.

While this is not the issue in this case because the database function was removed prior to Mr. Hammet's request, perhaps one could argue that after a database is queried, the results of that query become something that is "made," and therefore could become a government record. For example, the Secretary could draft a letter in the future. The letter itself may become a

[4] By the time Mr. Hammet requested the provisional ballot detail report, the canvasses had been concluded for a month. Mr. Hammet requested the provisional ballot detail report on October 6, 2020. Pls. SOF ¶ 22. By law, the county canvassers certified the elections for the counties in mid-August of 2020 and the state board of canvassers had certified the election by early September. K.S.A. 25-3104 (time for canvass of elections by counties); K.S.A. 25-3205 (a) (state board of canvassers meet "no later than September 1 next following the election" absent certain exceptions). Mr. Hammet already possessed a copy of the provisional ballot detail report as it existed on September 9, 2020. Pl. SOF ¶ 16. It is unclear how lack of receiving the provisional ballot detail report a month later "made it impossible for Mr. Hammet to assist voters who did not have their votes counted in the Primary Election in correcting deficiencies in advance of the 2020 General Election" when he had the report nearly a month after the conclusion of the county canvasses. Pl. Memo. at 14.

government record after it is drafted, but it would be absurd to argue the letter was a government record before it was drafted. However, even if a query is used, the question becomes whether the results are "made or received by an agency in pursuance of law or in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency." K.S.A. 45-402(d). The counties input and modify ELVIS files, not the Secretary. K.S.A. 25-2304(c) ; Def. Add'l SOF ¶ 2. The counties research provisional ballot information and make recommendations to the county canvass regarding provisional ballots, not the Secretary. *See e.g.* K.S.A. 25-3106, 3107. If anything, if this query were ever used by the Secretary, it would be "solely for reference purposes" or "extra copies," because the counties retain the relevant information. Thus, even if a query were performed, which it was not in this case, the results would not be a government record.

A database function would also not be considered a "government record" at the county level where researching provisional ballots research occurs. As explained above, until the function is used, there is nothing that has been "made" by the county to keep. K.S.A. 45-402(d). And if the county utilized the function for some reason, at best, the result would be for the purposes of researching provisional ballots. The "government records" within the ELVIS database would continue to be the voter registration records of the 1.9 million Kansans.

The remainder of Plaintiff's argument as to why the Secretary cannot remove a database query function rests on one Kansas Attorney General's Opinion, Op. Att'y Gen. No. 95-64, Pl. Memo at 10-11, which does not support Plaintiff's theory. That opinion involves an on-line retrieval system Johnson County created ("JCIN") and involves KORA, not the government records statute. According to the cited Attorney General's Opinion, JCIN effectively created new public records through a search query by individual users. Presumably, Plaintiff is arguing

that the database function that is no longer active at the state level in ELVIS is similar to JCIN's function. But the issue in this case is not about whether a record that results from a performed query is a public record. The issue is whether a public agency is prohibited under KORA from removing a database query function so that the function cannot be used in the future. Under Plaintiff's theory, once Johnson County created the JCIN access system and one record was created from it, Johnson County was required to keep the JCIN system and keep the query function forever, regardless of whether Johnson County determined that the JCIN or the query function benefited the county. *See* Pls. Memo. at 12 (Once KSOS produced data using the provisional ballot detail report functionality in KORA . . . an affirmative obligation [attached] to provide that record in response to future requests . . ."). Nothing in the cited attorney general's opinion implies that a database function is a public record or a government record that an agency must keep forever.

In summary, neither KORA nor the government records statute requires requires the Secretary agency to keep a database function to respond to Mr. Hammet's possible future KORA requests.

III. Defendant's requested fees comply with KORA

Next, Plaintiff argues that the requested fee of $522 is not "reasonable" because the cost to produce the provisional ballot detail report is less than that amount. Pls. Memo. At 15-18. First, this claim was not pled in Plaintiff's Complaint. Second, even if it was, Plaintiff is incorrect because he misunderstands that KORA is not implicated by the $522 cost. Third, even if KORA is implicated, $522 was reasonable under KORA.

Plaintiff pled that charging any fee was "presumptively unreasonable" under KORA because Defendant had not previously charged him a fee. Pl. Cmpl. at 9, Count II, ¶¶ 49-50. Plaintiff admits this claim fails. "Of course, Defendant would be entitled to charge Mr. Hammet for actual costs incurred by running the provisional ballot detail report through ELVIS, even if he has not done so in the past." Pl. Memo. at 17. In certain instances, charging a fee even when one was not previously charged is part of Defendant's own KORA policy. Kansas Secretary of State | KORA Policy Statement (ks.gov). Because Plaintiff has admitted that Defendant is permitted to charge a fee under KORA even if he did not do so in the past, Plaintiff's motion for summary judgment as to Count II should be denied and Defendant should be entitled to Summary Judgment on that count.

If this court nevertheless permits Plaintiff to modify his claim at summary judgment as to the reasonableness of the fees under KORA, Defendant still prevails. KORA is not implicated by the $522 the Secretary sought from Mr. Hammet. The attorney general has long explained that KORA does not require an agency to "create a record" or "compile information" for an individual, but instead only requires production of records in the possession of the agency at the time of the request. Atty. Gen. Op. 93-126 (Sept. 22, 1993). Plaintiff's argument, that charging $522 to have ES&S write a script that would compile the information he seeks, wrongly assumes that KORA required the Secretary to ask ES&S to do that. This offer to Mr. Hammet was beyond any duty KORA required of the Secretary. The question of whether $522 would a "reasonable" fee under KORA is irrelevant to this case. KORA is not implicated by this offer.

Nevertheless, even if this court finds that the offer to contract with a non-government third-party did create a KORA obligation that raised an issue of the reasonableness of the fee charged, the Secretary's fee was reasonable. Plaintiff acknowledges that the Secretary is

permitted to charge the "actual cost" to produce a record under KORA. Pl. Memo. at 15 (quoting K.S.A. 45-219(c)). The Secretary requested that Mr. Hammet pay the actual cost the vendor would charge the Secretary to write a script that would pull the data that Mr. Hammet wanted. SOF ¶ 13. The Secretary did not request payment for office staff time or any possible redaction that may accompany such production, costs that are recoverable under KORA. K.S.A. 45-219(c)(1), (2); Kan. Atty. Gen. Op. 93-126, at 1; *Data Tree, LLC v. Meek*, 279 Kan. 445, 465 (2005). $522 was below the costs that Defendant could have charged Mr. Hammet under KORA.

Plaintiff also argues that the fee was not reasonable because the Secretary has produced the information at a lower rate in the past and that charging a higher rate would discourage KORA requests. *See* Pl. Memo. at 16. But his argument fails because, again, it assumes that the Secretary is required to always maintain a database function to respond to Mr. Hammet's requests. That database function was removed. The record Mr. Hammet sought did not exist when he submitted his KORA request. And while Plaintiff cites the timing that the function was removed to insinuate that the Secretary was avoiding KORA responsibilities, Pl. Memo. at 15-16, Mr. Caskey explains the reasoning for removing the function. The office of the Secretary of State had never heard of the provisional ballot detail report prior to Mr. Hammet's request. Def. Add'l SOF ¶¶ 3-4. After reviewing its contents, it was determined the office could not verify the accuracy of it. Def. Add'l SOF ¶ 7. Furthermore, the Secretary has located no Kansas law that the function to be kept. Def. Add'l SOF ¶ 4. The Secretary had no reason to remove a query function from a database until after he knew it even existed and determined that no statute required him to keep it.

Finally, the court should find the $522 fee was more than reasonable given the actual cost to produce the records Mr. Hammet sought—namely certain voter records within ELVIS. *See* Def. Add'l SOF ¶¶ 11-12. Production of the records would have cost hundreds of thousands of dollars. *Id.* Requesting $522 to compile the information for Mr. Hammet rather than producing the ELVIS voter records was not an unreasonable fee under KORA.

IV. The Provisional Ballot Detail Report is not an election abstract

Plaintiff wrongly claims that the Provisional Ballot Detail Report is an abstract of a voting record. Before addressing why a provisional ballot detail report is not an abstract of a voting record, two preliminary issues must be addressed.

A. Plaintiff lacks standing and a cause of action to raise the issue of whether Defendant violated K.S.A. 25-2709 before this Court

Plaintiff lacks standing and a cause of action to challenge the destruction of election records, even if a database query function or its results constituted an abstract of a voting record under K.S.A. 25-2709. Standing requires a "sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." *Gannon*, 298 Kan. at 1123 (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). 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). Whether voting record abstracts are not retained pursuant to K.S.A. 25-2709 is, at best, a generalized grievance suffered by all Kansans. He lacks standing to raise this claim.

Even if Mr. Hammet had standing to raise this claim , he lacks a cause of action to enforce the provisions of K.S.A. 25-2709. *See Tudor v. Wheatland Nursing L.L.C.*, 42 Kan. App.2d 624, 633 ("To bring a cause of action for the violation of a statute or a regulation, the plaintiff must establish that the statute or regulation was designed to protect a specific group of people rather than the public at large, and that the legislature or regulatory agency intended to provide enforcement of the statute or regulation through private causes of action."). Plaintiff can identify nothing in K.S.A. 25-2709 that indicates a desire of the legislature to create a private right of action. The Kansas Supreme Court has already ruled that "[t]here is no statutory sanction for election materials' being destroyed before the period specified in 25-2709 has passed." *Cure v. Board of County Com'rs of Hodgeman County, Kan.*, 283 Kan. 779, 798 (1998). The matter before this Court is a KORA action. K.S.A. 45-222. Jurisdiction is limited to enforcing KORA, not K.S.A. 25-2709. Plaintiff cannot shoehorn in through KORA a cause of action to enforce a statute not under that act, whatever that enforcement would entail. Under KORA, a record that is "no longer in the possession of a public agency" no longer "qualif[ies] as a public record[.]" Kan. Att'y Gen. Op. 2009-14, *2. Count III should be dismissed.

B. An Extra-statutory and Unneeded Database Query Function is Not an Abstract of a Voting Record

If this court determines that Plaintiff has standing and a cause of action to enforce the provisions of K.S.A. 25-2709(5), the same foundational problem with Plaintiff's argument regarding public records and government records is applicable here—a database query function is not an abstract of a voting record. Plaintiff continues to focus on the results of a database function, as opposed to the database function itself. The Secretary has no duty to maintain this function and the function was removed. K.S.A. 25-2709 only becomes relevant when a voting

abstract "has been on file" for a period of time. If the Secretary has not used the query function to create something—or in this case if the function has been removed without creating something—then nothing is "on file" and K.S.A. 25-2709 is not implicated.

C. The Provisional Ballot Detail Report is Not an Abstract of a Voting Record

Finally, even if this court moves beyond these first hurdles, an un-generated, non-statutory report is not an "abstract of a voting record" within the meaning of K.S.A. 25-2709(5).

The provisional ballot detail report is not mentioned in Kansas law and the contents of it do not meet the criteria of an "abstract" as the term has been continuously used throughout the election code. *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). Kansas election statutes identifying "abstracts" have a common theme—they are a tabulation of the vote totals along the election process. *See e.g.* K.S.A. 25-3006, 3106, 3109, 3204. In contrast, the provisional ballot detail report that Mr. Hammet envisions identifies specific voter names, not candidates or vote totals, the reason a provisional ballot was cast and whether it was counted. *See* Mem. Decision and Order at 2, *Loud Light v. Schwab*, 2020-CV-000343 (July 24, 2020) ("Hammet said he wanted the report to include the 'Registration ID, Name, Address, and Status Reason such that it is clear which individuals' ballots were not counted and the reason their respective ballots were not counted."). These criteria are not similar to what the legislature repeatedly referred to as "abstracts" in the election code. Furthermore, these fields are part of a preprogrammed report. Presumably these fields could be deleted to

produce something else than what Mr. Hammet is seeking, further showing that this is not an "abstract of [a] voting record[]" under K.S.A. 25-2709(5).

Plaintiff identifies no statute which defines the provisional ballot detail report as an "abstract of a voting record." Pl. Memo at 19-20. Instead, Plaintiff argues that this court should utilize a dictionary-based definition to declare a database function that the Secretary of State's office did not know existed until approximately one year ago constitutes an "abstract of a voting record." Pl. Memo at 20. Under Plaintiff's theory and definition, the Secretary would be required by law to retain for 20 years something that (1) he is not statutorily required to receive or create, (2) the contents of which are not statutorily defined, (3) the data included within the report changes in real-time as counties input data into the ELVIS database, and (4) is only available for a limited time during an election cycle. Pl. Memo. at 20. The court should not accept Plaintiff's request to modify decades of election administration in Kansas without statutory instruction by the legislature.

If this court adopted Plaintiff's reasoning, that results of non-statutory database query function became "abstracts of voting records," it would create record retention and election administration confusion across Kansas. *See* Def Add'l SOF ¶ 14 (This office has never considered provisional ballot information contained in the provisional ballot detail report to be a voting records abstract). Under Plaintiff's theory, presumably the creation of *any* document by an election official which "summarizes or concentrates the essentials of a larger thing or several things" into one place now becomes a voting records abstract subject to the 20-year destruction rule. Pl. Memo. at 20. No statute even requires counties to utilize the ELVIS database in performing its provisional ballot duties. *See* Def' Add'l SOF ¶ 6. If merely using a database could transform something into a "voting record abstract," the Secretary would need to review

what functions are pre-programmed in the ELVIS database, determine whether any of those functions are statutorily required, and possibly remove them statewide to help protect election administrators from inadvertently violating K.S.A. 25-2709(5).

Fortunately, this is not required. Even if this Court were to accept the Plaintiff's newly created definition of an abstract of a voting record, the Court need not make the leap to requiring agencies to create and retain extra-statutory database functions for 20 years based on a law enacted in 1974. *See Fisher v. DeCarvalho*, 298 Kan. 482, 498 (a court "is not free to completely rewrite the statute").

While the Secretary acknowledges that K.S.A. 25-2709(5) is not entirely clear as to what records must be retained, if the court is inclined to interpret the meaning of K.S.A. 25-2709(5), the court should acknowledge that this statute has been in existence since 1974, the term "provisional ballot" has been used in Kansas since 1996, and the voter registration database has been mandated by statute since 2001. *See* Kan. Sess. Laws 1974, ch. 106, § 8, Kan. Sess. Laws 1996, ch. 187 § 1, Kan. Sess. Laws 2001, ch. 128, § 11. The Secretary has never understood K.S.A. 25-2709(5) to an extra-statutory abstract based on a database function. *See* Def. Add'l SOF ¶ 14. If the legislature intended the provisional ballot detail report or the function that creates it to constitute an "abstract of a voting record" to be retained for 20 years, it would have given a clear statement or even acknowledged these as records within a statute somewhere.

The court should also consider the "whole act" statutory cannon and consider the election statutes as a "whole" as opposed to looking at K.S.A. 25-2709(5) in isolation. *See State v. Heronimus*, 262 Kan. 796, 801 (1997) "We must consider the whole act and not read one statute in isolation from the other.") (citations omitted). Throughout the election code, the Legislature

identifies abstracts and records that must be created. Plaintiff would have this court create new non-statutory "abstract[] of voting records" based on an isolated subsection in K.S.A. 25-2709.

Finally, the Court should consider the entity with responsibilities to create abstracts and records under chapter 27 when determining what constitutes abstracts under K.S.A. 25-2709(5). *See Woessner v. Labor Max Staffing*, 312 Kan. 36, 56-57 ("[A] word is known by the company it keeps such that . . . the meaning of a word may be clarified by reference to the words or phrases with which it is associated."). Chapter 27 of the Kansas statutes, where K.S.A. 25-2709 is located, involves "voting places and materials thereof." It primarily involves the county election obard. Outside of being permitted to adopt rules and regulations, the Secretary does not have express duties in Chapter 27 and neither creates nor receives abstracts.

Taking into consideration these canons of construction, the Secretary has identified possible "abstracts of voting records" to which K.S.A. 25-2709(5) may apply. The most logical "abstract" would be abstracts identified in in K.S.A. 25-3007. Assuming these include abstracts beyond the certified abstracts in K.S.A. 25-3006, there appears to be set retention schedule in statute. As this involves abstracts of the election boards, these abstracts logically fit within the requirements of K.S.A. 25-2709.

Another logical abstract is found in K.S.A. 25-3106. Under that statute, the county election official uses the abstracts identified in 3006 and 3007 to create a "preliminary abstract" for the county board of canvassers. K.S.A. 25-3106. That abstract does not have specific a statutory retention schedule and is closely associated with the timing in chapter 27.

Finally, to the extent the court wishes to utilize Plaintiff's definition, articles 27 and 28 identify records and receipts that summarize items used by election officials. K.S.A. 25-2707 (requiring a "record" to be made for election supplies when delivered to or received from a

supervising judge); K.S.A. 25-2812 ("members of the special election board shall certify the receipt and return of . . .voting records . . ."). Defendant also believes that K.S.A. 25-2812 is the only statute in Chapter 25 that the term "voting records" is used besides K.S.A. 25-2709(5).

To be clear, this court does not need to identify which, if any, of these provisions constitute an "abstract of a voting record" under K.S.A. 25-2709(5). Even assuming Plaintiff has standing raise this claim and a cause of action to enforce K.S.A. 25-2709(5), this Court can deny summary judgment on Count III by finding that a non-statutory, un-generated, pre-programmed report in a database is not an "abstract of a voting record" under K.S.A. 25-2709(5).

CONLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment should be DENIED.

Date: June 11, 2014

Respectfully submitted,

/s/ Garrett Roe
GARRETT ROE
General Counsel for Secretary of State Scott Schwab
KS Bar #26867
120 SW 10th Ave, Memorial Hall, First Floor
Topeka KS 66612
Ph. 785-296-8473
Fax: 785-368-8032
Email: garrett.roe@ks.gov

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 11th day of June, 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

EXHIBIT A

THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

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

(Pursuant to chapter 60)

DECLARATION OF BRYAN CASKEY

I, Bryan A. Caskey, pursuant to K.S.A. 53-601, hereby declare as follows:

1. I am the Deputy Assistant Secretary of State for the State of Kansas. I was appointed to this position by Secretary of State Scott Schwab on January 13, 2019. I have served in this position since 2015, served as the Assistant Elections Director several years prior, and have worked in the Elections Division of the Kansas Secretary of State since 1998.

2. The Electronic Voter Information System [ELVIS] is the state voter registration database. The database is maintained by the Secretary of State. The ELVIS database currently contains over 1.9 million records of legally registered voters. No one within the office of the

Secretary of State inputs, modifies, or deletes records or information. These tasks are performed by county election offices.

3. Until September 2019, the Kansas Secretary of State did not know of the existence of the pre-programmed report within the ELVIS database titled "Provisional Ballot Detail Report." Until that time, the Secretary of State had not generated that report. Since that time, the office has only generated that report in response to requests by parties outside of the office of the secretary of state. This office does not use this report and knows of no statutory obligation to generate or maintain this report pursuant to any of its election duties. The last time this office generated a copy of the Provisional Ballot Detail Report was on September 9, 2020 in response to a request from Mr. Davis Hammet.

4. The Kansas Secretary of State also does not receive provisional ballot information 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. The Secretary does not instruct county election officials on whether to utilize ELVIS to track information related to provisional ballots for purposes of their election duties. The Secretary does not know of any statutory requirement that would require counties to use ELVIS specifically to perform their duties related to researching provisional ballots, tracking provisional ballots, and making recommendations to the county board of canvassers.

5. To my knowledge, ELVIS contains a functionality to temporarily store provisional ballot information within the ELVIS database during an election if a county election official enters that information into ELVIS. Some counties may use ELVIS for this purpose and some counties may not. After the county board of canvassers have determined which ballots to accept and reject,

voter registration records are updated to prepare for the next election. Because the Secretary has no statutory obligation with regards to provisional ballots, each county election official may track provisional ballots and update provisional ballot information at different times and in different manners, and the Secretary is aware of no statute that requires counties to track provisional ballots in a specific manner. Furthermore, the Secretary is not able to confirm the accuracy of information contained in the Provisional Ballot Detail Report. For instance, the number of provisional ballots identified on the Provisional Ballot Detail Report does not come close to aligning to the number of voters who actually cast provisional ballots in the election.

6. After Mr. Hammet's October 2020 records requests, I investigated how to produce the documents Mr. Hammet requested. To respond to Mr. Hammet's records request for information about provisional ballots from the ELVIS database, this office would need to manually review each individual record and try to ascertain whether an individual voter cast a provisional ballot. The two options for doing this would be to either (1) review each of the over 1.9 million records individually and only pull records which contained provisional ballot data, or (2) print out all 1.9 million record files within the ELVIS database, review and redact each record manually, and then provide all of those records to Mr. Hammet for him to do the search himself. Either option would have been extraordinarily time intensive, would have taken months, if not years, to complete, would have also cost hundreds of thousands of dollars in staff time. I then requested the vendor for the ELVIS database to determine whether it could pull the required data in a different manner. The vender, Election Systems & Software [ES&S] determined that it could pull the requested data for Mr. Hammet, but that it would cost $522 to write a "script" to do so.

7. With respect to election abstracts, this office has never understood a Provisional Ballot Detail Report or the provisional ballot data entered into ELVIS to be an abstract subject to

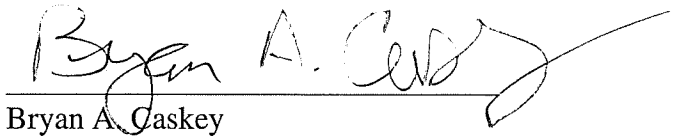
K.S.A. 25-2709. The Secretary of State receives abstracts of elections from county election officials pursuant to statute which include a certified vote total of the number of ballots cast for each office on the ballot and questions submitted on the ballot.

8. I have read Paragraph 35 of Plaintiff's Memorandum in Support of Summary Judgment and it contains a number of errors. The election standards found on the Secretary of State's website are not updated in real time. A revision date is posted on each chapter to alert the public when the last revision date took place. County election officers receive instruction, both written, and oral from the Secretary of State's office that supplements the Kansas Election Standards. The last time that they were updated was prior to this Court's prior decision, but after the *Hammet v. Metsker* decision, a citation to which is included on the page Plaintiff's memorandum cites. This office has begun the process of updating that page to reflect this Court's prior opinion.

9. Also, in response to Paragraph 35, the Secretary of State's office does not give orders to counties to dis-regard or not respond to KORA requests. Occasionally discussions are held with county election officials concerning KORA requests. I did not tell the Montgomery County Clerk to put any KORA requests on hold. The discussion always ends with a reminder from myself to the county election official that the official should consult with his or her county counselor and the open records custodian in the county. Neither I, nor the Secretary of State's office, is the attorney for a county election official.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 2021



Bryan A. Caskey
Deputy Assistant Secretary of State

EXHIBIT B

Roe, Garrett [KSOS]

From: Davis Hammet <davishammet@gmail.com>
Sent: Friday, October 23, 2020 12:52 PM
To: Barker, Clay [KSOS]
Subject: Re: Provisional KORA Denial

EXTERNAL: This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Clay,

This is obviously frustrating for me after 2 years of litigation on this specific issue just to have new excuses made to prevent access.

Again, to clarify, my request is not limited to the "Provisional Ballot Detailed Report." My request is for provisional data related to the 2020 primary election. You have indicated your office can "pull up individual voter records to determine provisional ballot information" meaning that your office does in fact have the provisional "recorded information... which is made, maintained or kept by" the KSOS. K.S.A. 45-217(g)(1).

KSOS has many options to provide this data. KSOS has and can make custom reports (as it did to fulfill my request the "email" field be included in the voter file). KSOS could create a custom report including the exact same fields as the former Provisional Ballot Detail Report.

I would be happy to provide a step-by-step guide to creating the exact export I want had my outstanding KORA for the ELVIS Manual been fulfilled (includes sections: 2.14 "Voter Registration Reports," the entire Chapter 5: Public Service Requests (or just 5.6 "PSR Report Formats: Available Fields for Each PSR Type" if they won't share the entire chapter), 10.14 "Advance & Early Voting Reports," 11.7 "Provisional Voting Reports," 12.11 "NVRA Reports," and Appendix D: "Exporting Files.").

If KSOS determines it's impossible to create such a report or otherwise access the data in an easier manner then it must provide me with an estimate that is reasonable to pull every individual file to assess the provisional status.

If none of this information has motivated the KSOS to act to fulfill this KORA, please explicitly state it is denied so I may begin assessing legal actions.

Thank you,
Davis Hammet

On Fri, Oct 23, 2020 at 11:33 AM Barker, Clay [KSOS] <Clay.Barker2@ks.gov> wrote:

> Davis,
>
> You submitted a KORA request for a provisional ballot detail report generated from ELVIS.

The problem is, after the September 2020 upgrade to the ELVIS system, which was a major overhaul requiring the system to be off-line for three days, the KSOS office can no longer see the accumulated data or generate that Report.

The Report is no longer "recorded information . . . which is made, maintained or kept by or [] in the possession of" the KSOS. K.S.A. 45-217(g)(1).

All 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.

Clay

Clayton Barker

Deputy General Counsel, Secretary of State

Clay.barker2@ks.gov

785-296-3483

From: Davis Hammet <davishammet@gmail.com>
Sent: Wednesday, October 21, 2020 1:00 PM
To: Barker, Clay [KSOS] <Clay.Barker2@ks.gov>
Subject: Provisional KORA Denial

EXTERNAL: This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Mr. Barker,

On 10/06/2020 I made a Kansas Open Records Request (KORA) for 2020 primary provisional data as I had done regularly in previous weeks. On 10/14/2020, I was informed that a contractor (ESS) had allegedly changed your record keeping system to remove a specific titled report; however, you stated the records are still being stored in the system your office administers, and that counties still had access to the specific titled report.

KSA 45-220(b)'s requires that "no request shall be... denied because of any technicality," and several Attorney General Opinions have discussed how agencies cannot skirt around KORA. The recent case Loud Light, Davis Hammet v. Scott Schwab ruled that your office had illegally denied me access to provisional data, and that such records were clearly covered by KORA.

Given all this, I reassert my request for the provisional data. If this request is being denied then pursuant to 45-218(d) I request a written explanation of the denial including the specific provisions of law allowing such denial.

Thank you,
Davis Hammet