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CASE NUMBER: 2020-CV-000638

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Mr. Hammet requested provisional ballot detail reports under KORA in 2019. When Defendant refused to turn them over, Mr. Hammet sued and won. On July 24, 2020, this Court found provisional ballot detail reports subject to KORA and ordered Defendant to produce them. The same day, Defendant openly criticized the Court, accusing the "Kansas Judiciary [of], once again, [paying] disrespect to the intent of policy." Pl. Statement of Facts, ¶ 13 (uncontroverted by Defendant).

Although this history is conspicuously absent from Defendant's arguments, it is relevant to understanding the issues in the present case. Not long after this Court's ruling, on August 4 and August 11, 2020, Mr. Hammet requested and subsequently received additional provisional ballot detail reports. Then, on August 13, 2020—two days after Mr. Hammet's last request and a mere three weeks after the Secretary's loss in Court—Defendant ordered his technology provider to end access to the provisional ballot detail reports.

While doing so did not destroy the underlying data in the reports, it did end Defendant's access to those reports and effectively ended his access to the data itself. Because of Defendant's

actions, "the Secretary of State would have been required to spend months, if not years, searching and reviewing individual records within the ELVIS database" to respond to Mr. Hammet's request. Def. Statement of Additional Facts, ¶ 12.

By ordering his technology provider to end access to the provisional ballot detail report, Defendant essentially threw away the key to a warehouse full of documents subject to KORA. Worse, Defendant did so in order to frustrate Mr. Hammet's access to the records and in an obvious ploy to circumvent his Court-ordered obligations under KORA. The Court should not tolerate the Secretary's gamesmanship. The provisional ballot detail report is a record, it is subject to disclosure under KORA, and Defendant Schwab actually and constructively denied Mr. Hammet access to that record. Defendant made it impossible to get the records Mr. Hammet sought and attempted to charge Mr. Hammet an unreasonable fee to access the underlying data. Summary judgment in favor of Mr. Hammet is therefore appropriate.

PLAINTIFF'S REPLY TO DEFENDANT'S ADDITIONAL STATEMENT OF UNCONTROVERTED FACTS

1. Uncontroverted.
2. Uncontroverted.
3. Uncontroverted.
4. Objection. Whether the Secretary has an obligation to create or maintain the provisional ballot detail reporting function is a question of law.
5. Uncontroverted.
6. Objection. Whether counties have an obligation to track information related to provisional ballots is a question of law.
7. Uncontroverted.

8. Objection. Whether the Secretary of State is required to collect certain information from county election officials is a question of law.

9. Objection. Whether the Secretary provides aggregate totals of provisional ballot information to Congress pursuant to law is a question of law.

10. Uncontroverted that Exhibit B—Clay Barker's email—contains the representations Defendant asserts. To the extent Defendant claims 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),'" Plaintiff objects. Defendant's statement is a conclusion of law not fact.

11. Uncontroverted.

12. Controverted. Defendant could have produced the records had he not intentionally ended his access to the provisional ballot detail report.

13. Uncontroverted.

14. Objection. Whether the provisional ballot detail report is an abstract of an election record is a question of law not fact.

ARGUMENT

I. The Provisional Ballot Detail Report is a public record under KORA and Defendant cannot end access to records in order to frustrate KORA requests.

Defendant argues that the provisional ballot detail reporting function is not a record under KORA and that Defendant has therefore not violated KORA by failing to provide the report to Mr. Hammet. This contorts Defendant's obligations under KORA, and is an attempt by Defendant to avoid liability by incorrectly classifying Mr. Hammet's requests.

Contrary to Defendant's assertions—which are raised for the first time in his opposition brief, rather than his own brief in support of summary judgment—Mr. Hammet did not request a

"database query function" pursuant to KORA. Def. Memo. at 10-15. He requested the report that the database query function produced. Defendant argues that he was not legally obligated to produce report because the database query function he intentionally deleted is not a record. But there is no question that the report itself is a record—this Court previously found it was.

Even placing that aside, Defendant proffers two reasons who he is not obligated to produce this record: (1) it is not "recorded information" and (2) even if it is, once the database functionality was deleted, it was *no longer* recorded information. Defendant's argument ignores this Court's previous ruling and his own voluntary responses to Mr. Hammet's KORA request. He also advances a shocking premise: once an agency receives and fulfills a valid KORA request, the State is free to disregard subsequent KORA requests, so long as it destroys any documents that might be subject to disclosure before the subsequent request for those documents comes in.

A. The Court ruled that provisional ballot detail reports were records under KORA and Defendant provided the reports voluntarily in response to subsequent KORA requests.

The parties already litigated whether provisional ballot detail reports are subject to KORA. In *Loud Light and Davis Hammet v. Scott Schwab, Kansas Secretary of State*, 2020-CV-343, "[t]he parties [did] not dispute that the information in the Report meets the definition of a public record under KORA," and the Court concluded "that Defendant's disclosure of the ELVIS provisional ballot detail report for the 2018 general election sought by Hammet is required under KORA." Mem. Decision and Order at 5, 14. While that litigation concerned a different election, Defendant offers no explanation for why the Court's ruling should be any different this time.

Defendant also fails to acknowledge that it voluntarily responded to Mr. Hammet's August 4 and 11, 2020 KORA requests for provisional ballot detail reports. In doing so, Defendant acknowledged that the provisional ballot detail reports were records under KORA.

Finally, Mr. Hammet does not argue that the database query function, which creates a provisional ballot detail report, is a record under KORA. Instead, it is the reports themselves and the information they contain that are records.

Defendant's argument that the provisional ballot detail report is merely a "database query" and not "recorded information" should therefore fail.

B. When Defendant relinquished the ability to run provisional ballot detail reports, he effectively ended his access to the information contained in the reports and intentionally frustrated access to the records.

Defendant instructed his technology provider to end his ability to run the provisional ballot detail report. When he did so, Defendant effectively ended his access to the information contained in the report, and intentionally made it all but impossible for members of the public to access that information through the Secretary of State's office. Now, as Defendant emphasizes, in order "[t]o 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." Def. Statement of Additional Facts, ¶ 12. But Defendant intentionally created this problem.

By relinquishing his ability to run the "database query" he now claims is not subject to KORA, Defendant ensured he could not respond to requests for the information contained in the provisional ballot detail reports. An analogous federal Freedom of Information Act case is instructive. In *Scudder v. CIA*, 25 F. Supp. 3d 19, (D.C. Dist. 2014), the Plaintiff sought electronic copies of articles the CIA published. The CIA countered that it did not have the ability

to electronically produce the records, instead offering to produce 19,000 pages of paper printouts. *Scudder*, 25 F. Supp. at *21-*23. As here, the agency claimed that it could not feasibly respond to the plaintiff's request in the format he selected—electronic PDF documents. In analyzing whether the CIA would have to produce the PDF documents if they already existed, the Court wrote, "A FOIA request for records in an existing format should not be frustrated due to the agency's decision to adopt a production process that nonetheless renders release in that format highly burdensome." *Id.* at *43.

Here, the Defendant has done just that. By intentionally ending access to the provisional ballot detail report function, Defendant chose to make release of the provisional ballot data all but impossible. Rather than retain a simple means of producing the data Mr. Hammet seeks, Defendant elected to make his KORA response only possible with "months, if not years, [of] searching and reviewing individual records within the ELVIS database." Def. Statement of Additional Facts, ¶ 12. Defendant should not be able to avoid his obligations under KORA so easily.

> "Once [a government agency] has chosen to input public records into a computerized form, from which software can more quickly find a record or even produce a new record, it has created, maintained and is in possession of a record (albeit perhaps a new and improved record), which thus becomes subject to the KORA."

Op. Att'y Gen. No. 95-64, 1995 Kan. AG LEXIS 71 at *15.

Defendant argues that the Attorney General's Opinion No. 95-64 is inapplicable. But, as the quoted portion of the opinion makes clear, information which a government agency puts into a computerized form is subject to KORA. And if the new software functionality allows quicker, more efficient, access to records, than the new and improved record is still subject to KORA. Here, Defendant has records subject to KORA in a computerized form. He had the ability to

quickly access that information but *intentionally* degraded the quality of those computerized records by purposefully discarding his ability to run database reports.

C. Defendant cannot destroy records, or make their access impossible in order to avoid KORA requests.

Defendant's next argument is more straightforward, but striking in its implications. He argues that "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." Def. Memo. at 11. Defendant then insists that "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." *Id.* at 12. Defendant exaggerates Mr. Hammet's argument in order to misdirect, and in doing so, ignores the logical extension of his own argument. Under Defendant's theory, agencies are free to avoid their KORA obligations simply by destroying their ability to access or retain records, even if those records were previously litigated and even if the agency knew future KORA requests were imminent.

Plaintiff does not argue that all agencies must maintain all database functions in perpetuity. Instead, agencies should not be able to intentionally relinquish records or database functions to purposely avoid KORA obligations. Especially so here. *This* Defendant should not be allowed to undermine KORA and the Court's prior ruling by purposely ending access to records *that were already* the subject of litigation and which he knew that Mr. Hammet intended to continue requesting. Pl. Statement of Facts, ¶ 11 (uncontroverted by Defendant).

In making his point, Defendant analogizes to email. According to Defendant:

> "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."

Def. Memo. at 15. But Defendant's hypothetical misses the point. A better analogy would have the Secretary refuse to produce certain emails, be ordered to do so by a Court, and next—still in possession of the emails—order his email search function disabled so he would never again be able to efficiently comply with a request that required him to produce emails. Then, when responding to KORA requests for those emails, he would claim that production would require thousands of hours and review of every one of the Secretary's emails. Defendant should not be allowed to undermine his KORA obligations so easily.

"The purpose of KORA is 'to ensure public confidence in government by increasing the access of the public to government and its decision-making processes.'" Mem. Decision and Order at 9 (citing *Data Tree v. Meek*, 279 Kan. 445, 454 (2005)). Here, Defendant litigated to prevent access to the reports. Then, after losing in Court and publicly criticizing the ruling, Defendant attempted another tactic: he purposely destroyed his ability to access a record and erected insurmountable obstacles to retrieving the underlying data.

Plaintiff does not argue that all agencies must maintain their database functions forever. Plaintiff simply argues that Defendant should not be able to circumvent the Court's ruling by ending access to the records he clearly does not want to provide under KORA.

II. The $522 fee is unreasonable because it is only necessary due to Defendant's actions.

Defendant argues that (1) Plaintiff did not plead the fee is unreasonable, (2) that KORA is not implicated, and (3) the fee is reasonable. Defendant is incorrect.

Kansas requires notice pleading, and Mr. Hammet did so. Count II of his Petition asserts a violation of KORA's prohibition on unreasonable fees. Mr. Hammet pleaded that the $522 "Defendant is requiring is presumptively unreasonable as the records have previously been

produced for free." Petition, ¶ 49. He also pleaded, "By imposing unreasonable fees for access to public records related to provisional ballots, Defendant violated KORA." Petition, ¶ 50. Defendant suggests this somehow limits Plaintiff's arguments, but it does not. Mr. Hammet clearly alleged the fee was unreasonable, the same argument he makes now. His pleading is not as limited as Defendant suggests. Even so, "[u]nder notice pleading, the petition is not intended to govern the entire course of the case. Rather, the pretrial order is the ultimate determinant as to the legal issues and theories on which the case will be decided." *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1191 (Kan. 2009).

Defendant next argues he was not charging the $522 fee under KORA to produce the provisional ballot detail report. The position strains credulity. Defendant litigated over producing the report. After losing, he then twice provided the report under KORA voluntarily. Then, after ending his ability to run the report and in negotiations with Mr. Hammet over providing the information, Defendant offered to have its technology provider obtain the underlying data for a fee. Pl. Statement of Facts, ¶ 26, *see generally* Pl. Statement of Facts ¶¶ 22-31. Put another way, he offered to fulfill Mr. Hammet's KORA request, but only if Mr. Hammet paid $522. It stretches the facts to now argue that the $522, which Defendant told Mr. Hammet was necessary to respond to his KORA request, was not really a fee under KORA.

Finally, Defendant argues the $522 was reasonable because it was the actual cost that the technology provider was going to charge. The argument, like many Defendant raises, ignores context. Defendant's technology provider only needed to charge the money in the first place because Defendant voluntarily ended access to the provisional ballot detail report. Had Defendant not intentionally frustrated Mr. Hammet's requests, the $522 would be unnecessary.

III. Defendant admits he ended access to the provisional ballot detail report to impede KORA requests.

Defendant's Declarant, Deputy Assistant Secretary of State Bryan Caskey, writes that since learning of the existence of provisional ballot detail reports, Defendant "has only generated that report in response to requests by parties outside of the office of the secretary of state. . . . 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. Hammet." Def. Ex. A, ¶ 3.

Defendant thus admits he used the provisional ballot detail report function to respond to KORA requests. By ending his access, he therefore intentionally ended his ability to respond to otherwise lawful KORA requests. The Court should not allow Defendant to circumvent his obligations under KORA so easily.

IV. Plaintiff has standing under K.S.A. 25-2709 and provisional ballot detail reports are abstracts.

Defendant argues Plaintiff lacks standing to assert a violation of K.S.A. 25-2709 and that ending his ability to run provisional ballot detail reports did not destroy any records. But Defendant's actions caused Mr. Hammet a particularized injury, giving him a sufficient personal stake in the outcome here to establish standing. In addition, when Defendant ended his ability to run provision ballot detail reports, he made access to the records in those reports all but impossible. Thus, ending the reporting ability destroyed the records.

A. Because Defendant violated K.S.A. 25-2709, plaintiff lost access to records he would have otherwise had; he thus has standing.

To establish standing, Plaintiff must demonstrate a "sufficient personal stake in the outcome of the controversy to invoke jurisdiction and to justify the court exercising its remedial powers." *Ternes v. Galichia*, 297 Kan. 918, 921 (Kan. 2013). "The determination of whether a sufficient interest exists to establish standing is highly fact-specific . . . Courts have pointedly

avoided making definitive rules governing sufficiency of the interest." *Id.* at 922 (internal citations omitted). Kansas courts occasionally look to the Federal standing requirements and require parties to "present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Id.* at 921, citing *Horne v. Flores*, 557 U.S. 433, 445 (2009).

If the Court determines K.S.A. 25-2709 applies, then Defendant's violation of the statute injured plaintiff. By destroying the provisional ballot detail reports, Defendant denied Mr. Hammet access to the records to which he was otherwise entitled. Worse, a factfinder could infer that not only did Defendant violate K.S.A. 25-2709 and that doing so injured Mr. Hammet, but also that Defendant destroyed the records specifically because Mr. Hammet had requested them in the past. Defendant claims it has only provided provisional ballot detail reports to third parties, but he identifies no third party other than Mr. Hammet. *See* Def. SOF, ¶ 26. Plaintiff's injury is thus "concrete, particularized, and actual." *Ternes*, 297 Kan. at 922.

B. By ending his ability to run provisional ballot detail reports, Defendant effectively destroyed the records themselves.

Defendant next argues that the provisional ballot detail report is just a database query function and thus not an abstract. He accuses Mr. Hammet of continuing "to focus on the results of a database function, as opposed to the database function itself." Def. Memo. at 24. But by ending his access to the provisional ballot detail reports, Defendant effectively ended access to the data. As with his KORA argument, Defendant simultaneously argues he merely removed a database function, not records themselves, but also argues that retrieving the records was impossible because it would have required "months, if not years, searching and reviewing individual records within the ELVIS database."

Defendant cannot have it both ways. Either the information is easily accessible, and therefore not destroyed, or the information can no longer be accessed by the Secretary of State's office, meaning the underlying information was effectively destroyed. Thus, ending the reporting function destroyed an abstract record.

CONCLUSION

The Court ruled that Defendant had to provide provisional voter information by producing provisional ballot detail reports. Weeks after his failure in Court, Defendant ordered his technology provider to end his access to the function. Doing so effectively ended access to the information itself—information which the Court already ruled was discoverable under KORA. Defendant should not be allowed to avoid his statutory obligations with such gamesmanship.

For these reasons, and the reasons stated in Plaintiff's Memorandum in Support of Summary Judgment, Mr. Hammet asks the Court to enter Summary Judgment in his favor and for all other relief as asserted in Mr. Hammet's motion, and all other relief the Court deems just.

Dated: June 25, 2021

Respectfully submitted,

/s/ Sharon Brett

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2021, I electronically filed the foregoing with the Clerk of the District Court's electronic filing system which will serve all registered participants and a copy was also served by email to counsel for the Kansas Secretary of State, Garrett Roe (garrett.roe@ks.gov) and Clay Barker (clay.barker2@ks.gov).

/s/ Sharon Brett
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