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CASE NUMBER: 2020-CV-000638

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

REPLY IN SUPPORT OF DEFENDANT
SECRETARY OF STATE'S MOTION FOR SUMMARY JUDGMENT

I. Plaintiff's Responses to the Secretary's Statement of Uncontroverted Contentions Demonstrates this Case is Ripe for Entry of Summary Judgment

Supreme Court Rule 141(b) requires a party to respond to the uncontroverted contentions in a motion for summary judgment with statements that the contentions are either uncontroverted, uncontroverted for purposes of this motion only, or controverted, and if controverted, "(i) concisely summarize the conflicting testimony or evidence and any additional genuine issues of material fact that preclude summary judgment; and (ii) provide precise references as required in subsection (a)(2)." However, "[i]n order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.". *See Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1005 (Kan. Ct. App. 2008).

Plaintiff identifies three paragraphs as being controverted without stating that the dispute is not material for purposes of summary judgment. Pl. Resp. at 3-4 (¶¶ 25, 27, 33). However, any dispute regarding these three facts is not material to the conclusive issues in this case and do not preclude summary judgment.

Paragraph 25 of the Secretary's Memorandum for Summary Judgment states that "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." Memorandum in Support of the Secretary's Motion for Summary Judgment ("Def. Mtn. for Summ. J.") at 6. Plaintiff responds that contention is controverted because no discovery has taken place to allow him to confirm or deny the fact. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Pl. Resp. Br.") at 3. Whether the Secretary inputs, modifies, or deletes records or information within the ELVIS database is not material to preclude summary judgment on the issues in this case, namely: (1) whether what Plaintiff sought is a record under KORA; (2) whether the Secretary's requested fee was subject to KORA or was reasonable under KORA; or

(3) whether an extra-statutory database query function is an abstract of a voting record and, if it is, whether plaintiff has standing and a cause of action to privately enforce K.S.A. 25-2709(5).

Paragraph 27 of the Secretary's Memorandum for Summary Judgment states that "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.*" Plaintiff again responds that it is controverted without discovery to confirm or deny this fact. Pl. Resp. Br. at 3.

As to the first sentence, Plaintiff did not identify conflicting testimony or present evidence to controvert this contention as required by Rule 141(b). Plaintiff also did not identify how disputing this contention raises a genuine issue of material fact that would preclude summary judgment. Plaintiff could have cited a statute that required the Secretary to create, use or maintain this pre-programmed report function. He did not because none exists. It should be deemed admitted. However, even if it is not deemed admitted, the lack of a statutory requirement is a legal issue, not a factual one, and would not preclude summary judgment. *See Osterhaus*, 39 Kan. App. 2d at 1005 ("facts subject to the dispute"). If the Secretary is not statutorily required to create, maintain, or use the provisional ballot detail report, discovery would not alter the lack of a statutory requirement.

As to second sentence regarding the last date that the report was generated, it is not material for purposes of summary judgment. This is a KORA case. The parties stipulated that (1) the Secretary requested ES&S to remove access to the provisional ballot detail report function on August 13, 2020, Def. Mtn. for Summ. J. SOF ¶ 8; (2) the Secretary produced the provisional ballot detail report to Plaintiff on September 9, 2020; (3) that the function to create

future provisional ballot detail reports was removed on September 13, 2020; and that (4) Plaintiff last requested a provisional ballot detail report on October 6, 2020. Def. Mtn. for Summ. J. SOF ¶ 8-10, 12. Those are the material facts for purpose of summary judgment.

Paragraph 33 of the Secretary's Memorandum for Summary Judgment states:

> 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.*

Def. Mtn. for Summ. J. at 7.

Plaintiff's Response:

> Controverted. There is nothing in the record showing that Defendant was unable to turn the provisional ballot detail report functionality back on at the statewide level within ELVIS and produce the report without incurring staff time "searching and reviewing individual records within the ELVIS database." See Def. Mem. at 13-14

Pl. Resp. Br. at 3.

Plaintiff has not disputed the uncontroverted contention as required by Supreme Court Rule 141(b). The contention identifies the cost to produce the records that were within the Secretary's possession at the time of Mr. Hammet's request. The contention does not state that the Secretary lacked the ability to request the vendor to turn the database query function back on. Even if the contention did involve the Secretary's ability to turn a computer function back on, it is not a material dispute that would preclude summary judgment in this KORA matter. KORA does not require the Secretary to maintain or enable database functions to respond to possible future KORA requests. *See infra* at 24-28.

II. Plaintiff either Misunderstands that What he Seeks is not a Public Record under KORA or is Trying to Create new KORA Requirements

A. Plaintiff did not request a public record within the meaning of KORA

Throughout his brief, Plaintiff wants to discuss anything other than the issue before the Court which is whether what he sought constitutes a public record under KORA. Plaintiff even claims that "[t]here can be no dispute that the statewide provisional ballot detail report is a record under KORA." Pl. Br. at 6. But there is a dispute in this case over whether what Plaintiff requested constitutes a public record under KORA.

The primary issue in this case is whether what Mr. Hammet requested constitutes "recorded information, regardless of form or characteristics . . . made, maintained, or kept by or [] in the possession of any public agency[?]" K.S.A. 45-217(g)(1). Whether something he requested in the past was a public record is not relevant to this court's analysis. The question before the court is solely whether at the time Mr. Hammet submitted his request, did the item he requested meet the definition of a public record under KORA. "[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); *see also* Kan. Att'y Gen. Op. 94-104, *1 (Aug. 17, 1994) (While an agency must provide records available in a database in a requested format, "[T]he agency is not required to acquire or design a special program to produce information in a desired form, but has discretion to allow an individual who requests information to design or provide a computer program to obtain the information in the desired form."); Kan. Op. Att'y. Gen. 89-106, *4 ("agree[ing] with and adopt[ing]" the "rule" that "computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records" and "[a]ccess by the use of a specially designed program prepared by or at the expense of the applicant may obviously be permitted in the discretion of the public official[.]"); *Id.* ("Computerized public information must be provided in the form requested if the public agency has the capability of producing that form" but the

"agency is not required to acquire or design a special program to produce information in a desired form.").

Two uncontroverted facts answer this question and require granting summary judgment for the Secretary:

1. On September 13, 2020, state level access to the database function used to create the provisional ballot detail report function was removed from the ELVIS database.

2. On October 6, 2020, Plaintiff submitted a request for the provisional ballot report from the ELVIS system.

Def. Mtn. for Summ. J. ¶¶ 10, 12

The requested provisional ballot detail report Mr. Hammet requested was not created at the time Mr. Hammet made his request and the function used to create the report had already been removed from the agency's ELVIS access. The office had requested removal of the report functionality a month before Mr. Hammet's request at issue in this case. Def. Mtn. for Summ. J. SOF ¶ 8. The function was removed when a third-party vendor, ES&S, made changes to the ELVIS system. *Id.* at ¶10. This timeline is not in dispute.

Plaintiff avoids this simple analysis and argues that he was "constructively denied" his KORA request and that the Secretary's actions violate the "letter and spirit of KORA." Pl. Memo. at 6. But that is not accurate. Plaintiff's argument ignores KORA and instead asks the Court to hold that because he wants the report, KORA gives him the right to dictate to the Secretary which technology functions the agency will use. That is not how KORA works. KORA is a records production statute and is limited to records that meet the statutory definition of KORA. Kan. Atty. Gen. Op. 86-43, 1

The Attorney General addressed a similar issue involving email of state employees. In 2015, Senator Hensley asked the Attorney General "[w]hether an email sent by a state employee

from his or her private e-mail account related to functions, activities, programs or operations funded by public funds or records is within the meaning of 'public record' under K.S.A. 45-217(g)(1)." Kan. Att'y Gen. Op. 2015-10, *1 (Apr. 28, 2015). The Attorney General explained that emails generally are public records under KORA, *id.* at *2, but found that emails from a state employee's private account did not meet the statutory definition of KORA because a state employee's private email, even one that related to office functions, was not possessed by an "agency." *Id.* at *2. If the email were sent from an agency email address, the email would have been subject to KORA. *Id.* at *2, n.5 ("[A]n email generated from, for example, an email account registered to a state agency . . . would be 'made, maintained or kept' or 'in the possession of' that agency . . ."). The Attorney General did not engage in hypotheticals about using private email to "constructively deny" a KORA request or theorize that using private email violated the "spirit" of KORA. The Attorney General did a straightforward statutory analysis. The legislature ultimately amended KORA after this opinion so that certain private emails are now subject to KORA. *See* 2016 Kans. Sess. Laws Ch. 82, § 10 (amending K.S.A. 45-217); *see also* Kansas Governor Signs Bill Opening Public Officials' Private Emails (govtech.com). If the Legislature wishes to modify KORA and redefine a public record in the way Mr. Hammet wants this Court to do, that is a decision for the Legislature to make.

The Attorney General's current KORA advice also confirms the Secretary's reading of the statute. According to the Attorney General, while computerized data constitutes a public record, "The KORA applies to public records possessed by a public agency at the time the request is made. It does not require that a public agency do research for you, create a record it does not already possess, or write out their response to your questions." KORA FAQ - Kansas Attorney General Derek Schmidt. Furthermore, "Records not yet in existence are not subject to

KORA; a prospective or standing request for 'records as they become available' is not enforceable. If you want to see public records that may be created in the future, you need to make your request after the records have been created or exist." *Id.* This is consistent with the attorney general's longstanding interpretation of KORA.

The alleged "record" Plaintiff seeks is less of a record than the private emails discussed in Kansas Attorney General Opinion 2015-10. Those emails had at least been drafted—they were "recorded information" that had been "made." Here, Plaintiff asks the Court to declare something to be a public record that was not recorded information and was not "made, maintained or kept by or [] in the possession of" the Secretary when the request was made. Plaintiff wants this Court to declare something to be a public record that the Secretary *could* create if the Secretary alters the ELVIS database. If Plaintiff's theory were correct, then KORA would give requesters the right to demand agencies to enable technology features solely to create records not yet in existence. Plaintiff is wrong that this was a report that "already existed, that Defendant had access to, and that Defendant could easily produce[.]" Pl. Memo. at 4. During the prior litigation, the Secretary had access to this database function to create that report. When the request at issue was made, the function had been removed and thus was not recorded information made, maintained, kept or in the possession of the Secretary. The Secretary is not required to create a record. Kan. Atty. Gen. Op. 93-126 (Sept. 22, 1993) (citation omitted).

B. Why a database function was removed and historical use of a database function are irrelevant to the definition of a KORA public record

Plaintiff claims that this Court should take a "negative inference" of the Secretary's actions and "assume that he did not *want* KSOS to retain the functionality and be forced to turn over the reports into the future." Pl. Reply Memo. at 5. Plaintiff also cites to the timeline in

which the function was removed, apparently for similar reasons. *Id.* But questions about why a database function was removed are not relevant to whether the provisional ballot detail report was a public record at the time Plaintiff submitted his request. *See* Kan. Att'y Gen. Op. 95-64, *3 (June 20, 1995) ("A contract term cannot redefine what constitutes a public record[.]"). As to the timeline, if the function were removed in December of 2021, rather than September of 2021, and Mr. Hammet submitted a KORA request in 2022, the legal issue would remain the same. Plaintiff's arguments demonstrate his incorrect understanding that KORA dictates how the Secretary maintains the ELVIS database. It does not. KORA gives Plaintiff the right to obtain records the Secretary possesses at the time the request is made. Under Plaintiff's reading of KORA, it is unclear whether an agency could ever remove a database function if it could possibly be used to produce a report that a requestor may want in the future. The Secretary identified this flaw in Plaintiff's theory multiple times, *see e.g.* Def. Mtn. Sum. J. Br. at 11, 15, yet Plaintiff does not seem to explain when it *would* be permissible for an agency to remove a database function.

While the Secretary explained in his brief that the function was ultimately removed due to inaccuracy and because it served no office purpose, the reason it was removed does not matter for purposes of summary judgment. The issue before the court is that what Plaintiff requested was not recorded information that was made, maintained, kept, or possessed by the Secretary at the time of the request.[1]

[1] The Secretary did not know the database function existed until September of 2019. SOF ¶ 26. The Secretary was involved in litigation which arguably involved that function in 2020 and was ordered to print and maintain a copy of the provisional ballot detail report for the 2018 general election. *Loud Light*, Memo. Order at 4-5. It is unclear whether the Secretary could have deleted that function until after that litigation ended. *See* K.S.A. 60-237(e).

Plaintiff also incorrectly argues that prior history can change the definition of a public record or an agency's obligations under KORA. Pl. Resp. Br. at 4-5. While KORA requires an agency to produce records that meet the statutory definition of public records, it does not preclude an agency from responding to requests for information if it so chooses, even if those requests may technically not be KORA requests. *See* Kan. Att'y Gen. Op. 02-29, *2 (KORA does not impose a duty on an agency to create a record to respond to a request for information); *see* Kan. Att'y Gen. Op. 94-104, *1 (KORA does not require agency to create a computer program to respond to a request but has discretion to allow one to be created or used). An agency's decision to provide information that KORA does not statutorily require does not modify the definition of a public record to then bind an agency to forever respond to similar requests. And, although a former database function is not a public record under KORA, even if it were, KORA certainly does not prohibit an agency from modifying, upgrading, replacing, or disabling a database or function simply because either was used in the past. *See e.g.* K.S.A. 45-216(b) ("Nothing in this act shall be construed to require the retention of a public record[.]").

Finally, searching for a way to argue that a former database function should constitute a public record, Plaintiff wrongly cites to this Court's prior opinion by claiming that it held the "statewide provisional ballot detail report is a record under KORA." Pl. Memo. at 6. The instant case is in a different posture than the prior one. In *Loud Light*, the parties did not dispute that the information in the report met the definition of a public record under KORA and this Court ultimately found that "disclosure of the ELVIS provisional ballot detail report for the 2018 general election sought by Hammet [was] required under KORA." *Loud Light, et al. v. Schwab*, 2020-CV-000343, 5, 14 (Jul. 24, 2020). But that case involved a report that could be generated from a pre-existing function in the ELVIS database at the time the KORA request was made.

Under that set of facts, the Secretary did not argue that the provisional ballot detail report was not in the agency's possession at the time of the request. Here, the function was removed prior to Plaintiff's request and that fact changes the court's inquiry. The prior case did *not* hold that the Secretary would forever be required to maintain a database function he did not want or use.

Something that is *not* recorded information and is *not* made, maintained, or possessed by an agency at the time of a KORA request does not constitute a public record under KORA. Absent modifying the ELVIS database to turn the function back on, the Secretary lacks the ability to generate the provisional ballot detail report. Despite Plaintiff's attempts to confuse the issues, the analysis is no different than an email or other electronically created document. The Secretary would likely not argue that an email sent from a government email address, assuming the email existed at the time of the request, was not a public record under KORA. Kan. Att'y Gen. Op. 2015-10, at *2. But the Secretary would argue that if the government email account were deactivated, KORA would not require him to reactivate and use that email to create future correspondence. Yet, that is exactly Plaintiff's argument. He argues that even though the Secretary does not want access to a database function, a KORA requestor can force the Secretary to enable that function anyway. The Secretary has not located a case or an Attorney General opinion, and Plaintiff has not cited one, which requires a state agency to maintain a database function to respond to possible future KORA requests. KORA does not require agencies to respond to future requests at all. Kan. Att'y Gen. Op. 98-51, *2 (KORA does not cover "records not yet in existence.").

When Plaintiff requested the provisional ballot detail report, neither the function nor the report was "recorded information" that was "made, maintained, or [] in the possession of" the

Secretary of State. What Plaintiff is seeking is not a public record under the definition of KORA and the Secretary is entitled to Summary Judgment.[2]

III. The Secretary is not Reading Requirements into KORA

KORA requires that "[a]ll public records shall be open for inspection" absent an exemption. K.S.A. 45-218(a). A public record is recorded information, regardless of form, which is made, maintained or kept by or in the possession of any public agency or any officer or employee of a public agency pursuant to official duties and related to functions, activities, programs or operations of the agency K.S.A. 45-217(g)(1). The Secretary has not argued otherwise.

Plaintiff wrongly claims that the Secretary is trying to limit disclosure under KORA to only accurate records and those required to be created by statute. Pl. Memo at 7-9. The Secretary never argued that. The Secretary explained that no statute required the agency to create or maintain the provisional ballot detail report and that the function was removed due to accuracy concerns. SOF ¶ 30, Def. Memo. Summ. J. at 9-10; 13. The secretary was merely explaining why the function was removed, not modifying KORA's requirements.

IV. The Secretary's Requested Costs Comply with KORA

A. Plaintiff Concedes that the Secretary is Entitled to Summary Judgment under Count II as it was Pled

[2] Additionally, the arguments in the prior case were about disclosure, not whether the report itself was a record. *See* Mem. Order, *Loud Light, et al. v Schwab*, 2020-CV-000343, 5 (Jul. 24, 2020) ("The parties do not dispute that the information in the Report meets the definition of a public record under KORA.").

Count II in alleged that "The fees Defendant is requiring is presumptively unreasonable as the records have previously been produced for free." Pl. Pet. ¶ 49. Plaintiff concedes that the Secretary can charge Mr. Hammet a KORA fee despite not charging one previously. Pl. Resp. Br. at 10, n.3. ("Mr. Hammet does not dispute that Defendant could charge a fee for producing the provisional ballot detail report in the future . . . even though Defendant has not previously charged a fee for producing this report." The Secretary is entitled to Summary Judgment on Count II as pled.

B. Plaintiff Misunderstands that what Plaintiff seeks is not a public record and therefore the KORA Fee Provision is not applicable

Plaintiff's new theory, which concedes that the Secretary may charge a fee and argues that the requested costs are too high, ignores or misunderstands that KORA does not apply to what he is requesting. The KORA applies to "'public records' possessed by a public agency.'" Kan. Att'y Gen. Op. 2002-29, *2 (June 13, 2009). Whether a fee is "reasonable" under KORA is only an issue if the item being requested is a public record within the definition of KORA. *See* Kan. Atty. Gen. Op., *2 ("The KORA applies to any existing public record which is made, maintained, kept by or in the possession of" an agency.").

Rather than address the central issue, Plaintiff asks the Court to read into KORA requirements that do not exist. Plaintiff wants the court to focus on the fact that the Secretary could have allegedly turned a database function back on and then provided him with a record that he requested in that form. Pl. Resp. Br at 10. The Secretary explained to Mr. Hammet that the function would not be turned back on during an election cycle for security reasons. Memorandum in Support of Plaintiff's Motion for Summary Judgment, ("Pl. Memo. Supp. Summ. J."), p. 27 (Ex. A, Email from Clay Barker to Davis Hammet) ("The election security

people said there can be no changes to ELVIS until after the state canvas[.]"). Even if this Court were to read KORA consistently with Plaintiff's theory, which it cannot, at the time he made his request, the only way the Secretary would provide the information in a format similar to what Plaintiff wanted was through a script written by a third-party vendor. The vendor required payment of $522 to write that script. But more importantly, Plaintiff's argument is irrelevant. As discussed previously, neither KORA, nor any other statute, requires the Secretary to maintain this database function or to create or maintain the provisional ballot detail report and the function was removed prior to his request. The fact that Plaintiff wants a report that formerly could have been generated from a database does not change KORA's definition of a public record. Kan. Att'y Gen. Op. 01-1, *3. ("The electronic nature of the record does not change the application of the KORA rules."). What Mr. Hammet requested was not a public record under KORA. Therefore, KORA's cost provisions to produce it do not apply.

Plaintiff also raises another theory, relying on a partial quotation of legislative history from the Freedom of Information Act ("FOIA") cited in an Attorney General opinion. He claims that charging $522 violates KORA's reasonable fees provision it because "introduced unnecessary inefficiencies and added expenses" for Plaintiff and that charging the actual cost to produce the information Plaintiff sought would discourage KORA requests. Pl. Resp. at 11. These claimed inefficiencies, apparently, were that Plaintiff had to obtain documents that were in the possession of counties because what he wanted was not in the Secretary's possession. *Id.* The cited Attorney General's opinion stands for the unremarkable position that an agency cannot charge fees that would be incurred regardless of a KORA request being made, such as overhead costs. Kan. Att'y Gen. Op. 87-4, *2. The Secretary did not charge excess costs. The database function had been removed and was not going be turned on during an election; the Secretary also

does not want to maintain it in the future. The Secretary charged Mr. Hammet the actual cost to the Secretary to create a record which would provide the information Mr. Hammet wanted. This was not an expense that would have been incurred absent Mr. Hammet's request for information. *Id.* (An agency may include costs they would not incur absent "the requirement that public agencies furnish copies of public records."). The Secretary could have also sought staff time in this production, but he did not. *See* Def. Mtn. Summ. J. Br. at 14.

Furthermore, KORA provides "no right to obtain [public] records in the least expensive manner." Kan. Att'y Gen. Op. 87-137, *2 (Sept. 15, 1987). This is true even when the cost to obtain the information he wants would be "less expensive for the requestor to pay the costs of writing a computer program than to pay the costs of obtaining copies" of the records. *Id.* To respond to Plaintiff's request, the Secretary needed to produce the voter registration records in the ELVIS database. Those were the records in the Secretary's possession and would have fulfilled Plaintiff's request. But Plaintiff did not want the records the Secretary possessed. He wanted the database to sort and compile information from those records into a report using a database function that was not enabled. *See* Pl. Resp. Br. at 9-11. For Plaintiff's argument to succeed, this Court must hold, for the first time ever, that KORA requires an agency to maintain or enable database functions and create records in response to KORA requests if doing so could create a record at a lower price than producing the records the agency possesses. Attorney General Opinion 87-137 has already rejected that theory. The Secretary is only required to make available those records which the agency makes, maintains, keeps, or possesses. *Id.*; *see also* Kan. Atty. Gen. Op. 02-29, 2 (June 3, 2022).

Finally, Plaintiff claims that he was "forced" to go to counties to obtain the information he sought because the Secretary did not "guarantee" that he would receive the information he

wanted prior to the election. Pl. Memo. at 11. KORA does not require a government agency to produce records within the specific time a requestor wants. KORA requires each request to be acted upon within three days and if access is not granted, provide an explanation for the cause of the delay and when it could be available. K.S.A. 45-218(d). The Secretary explained to Plaintiff that it was unclear when the vendor could generate the report based on the current election cycle but that the vendor would not start until payment was received. The fact that Plaintiff had his own timeline has no bearing on the reasonableness of the costs.

To the extent KORA applies, the Secretary's fees are reasonable under KORA.

V. The Secretary is Entitled to Summary Judgment on Count III

A. Plaintiff confirms he lacks standing to enforce K.S.A. 25-2709

Plaintiff's response confirms that he asserts nothing more than a generalized grievance held by everyone and therefore lacks standing to enforce K.S.A. 25-2709(5). An injury for standing purposes "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" *Gannon v. State*, 298 Kan. 1107, 1123 (2014). Plaintiff's asserted injury is that "Defendant's violation of [K.S.A. 25-2709] injured plaintiff because it "denied Mr. Hammet access to the records he was otherwise entitled to" and potentially that the database function was removed "specifically because Mr. Hammet had requested them in the past." Pl. Resp. Br. at 12. In other words, Plaintiff argues that he suffers the same general injury that everyone else suffers—that a record that he believes was should have been retained, was not retained. That injury is not unique to him. Presumably, he thinks because he is bringing a KORA action, that somehow alters the standing analysis. It does not. Under Plaintiff's theory, anytime someone believes a record should have been retained, that

person need only file a KORA request and then sue to enforce a records retention statute. Even assuming that Plaintiff was correct that K.S.A. 25-2709 is somehow applicable to the provisional ballot detail report, this claimed injury is the exact kind of injury that is "more appropriately addressed in the representative branches," not in a private action. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 892 (2008). Plaintiff does not have a personal injury sufficient to raise a claim to privately enforce K.S.A. 25-2709(5).

Plaintiff's response also raises an additional standing problem, redressability. Even if Plaintiff is correct that he suffered an injury in fact sufficient to confer standing, no declaration by this Court that the Secretary did not retain a record would redress that injury. *See* Pl. Pet. at 10. At best, Plaintiff seeks an inappropriate advisory opinion as to what K.S.A. 25-2709(5) requires. *Morrison*, 285 Kan. at 897 ("[C]ourts do not have the power to issue advisory opinions.").

The Secretary does not dispute that Plaintiff has standing to raise a claim under KORA for Counts I and II, even if those claims are based on an incorrect premise and ultimately unsuccessful. *Hunter Health Clinic v. WSU*, 52 Kan.App.2d 1, 11 (Kan. App. 2015). Plaintiff does not have standing to bring Count III and attempt to privately enforce the provisions of K.S.A. 25-2709(5). *See Hunter Health Clinic*, 52 Kan. App.2d at 11. (a third party does not have standing to bring a cause of action under KORA to enjoin an agency from disclosing records he believes are private records even though KORA itself provides for a cause of action to challenge non-disclosure of records). Count III must be dismissed for lack of standing.

B. Plaintiff does not have a Cause of Action to Enforce K.S.A. 25-2709(5)

Additionally, Plaintiff has not established he has a cause of action to enforce K.S.A. 25-2709(5). The election code does not contain a private cause of action to enforce K.S.A. 25-

2709(5). Therefore, "[t]o 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." *Tudor v. Wheatland Nursing L.L.C.*, 42 Kan. App.2d 624, 633 (Kan. App. 2010). Nothing in K.S.A. 25-2709 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 only valid cause of action before this Court arises under KORA. This Court's jurisdiction is limited to enforcing KORA. K.S.A. 45-222. KORA does not create a separate cause of action or jurisdiction within this Court to enforce election code statutes. Count III should be dismissed.

C. A database function that could create a query in the future is not an abstract of a voting record within the meaning of K.S.A. 25-2709

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 underlying Plaintiff's other claims remains—a database query function which could create an extra-statutory report in the future is not an "abstract of a voting record." Plaintiff continues to focus on potential future results of a database query that the Secretary has no duty to maintain or generate. Before a record can be retained under K.S.A. 25-2709, the record must have "been on file" for a period of time. If the Secretary has not used the query function to create a report—or the function has been removed so that the report cannot be created—then nothing is "on file" and K.S.A. 25-2709(5) is not implicated. Even if the query function were still available to the Secretary to

generate reports, until it is used, no report exists. Simply put, a database function's results cannot meet the requirement that they be "on file" unless the database function is enabled and being used. A database function is not a voting records abstract within the meaning of K.S.A. 25-2709(5).

Even if this Court did decide that K.S.A. 25-2709(5) was somehow applicable, the provisional ballot detail report and the function that creates it are not "abstracts" as consistently described throughout the election code. Multiple statutes use the term "abstract" and they include totals of votes cast for and against candidates and questions submitted. *See e.g.* K.S.A. 25-3107(a), 25-3109(a), K.A.R. 7-25-1. The term "abstracts of voting records" under K.S.A. 25-2709(5) has the same meaning. *Kilner v. State Farm Mut. Auto. Ins. Co.*, 252 Kan. 675, 684 (1993) (identical words used in different parts of the statute have the same meaning).

Plaintiff asks this Court to ignore the repeated use of the term abstract throughout the election code and instead use a broader definition which would require this Court to find that anything involving elections that "summarizes or concentrates the essentials of a larger thing or several things" into one place becomes an abstract of a voting record subject to the 20-year retention rule. Pl. Resp. Br. at 12-13. A record retention statute cannot have a term defined so vague that agencies cannot know when something becomes a "voting records abstract." The results of Plaintiff's interpretation cause absurd results. *Garcia v. Ball,* 303 Kan. 560, 569 (2015) (courts interpret statutes to avoid absurd or unreasonable results) (citation omitted). Under Plaintiff's theory, if a county for whatever reason, printed off the names of three registered who voted in an election, that document becomes a "voting records abstract" subject to a 20-year retention under Plaintiff's extraordinarily broad definition. This Court should not accept Plaintiff's invitation to define an abstract of a voting record so broadly. Using the term

"abstract" in the same manner as the Legislature has throughout the election code as being limited to totals of votes cast for and against candidates and questions submitted, still constitutes something that "summarizes or concentrates the essentials of a larger thing or several things." Pl. Resp. Br. 12-13. But the Secretary's definition is tethered to statutory language and can be applied reasonably.

Furthermore, K.S.A. 25-2709(5) has been in existence since 1974 and has *never* been applied in the way Plaintiff suggests. *See* Kan. Sess. Laws 1974, ch. 106, § 8. The term "provisional ballot" has been used in Kansas since 1996 and the voter registration database has been mandated by statute since 2001. Kan. Sess. Laws 1996, ch. 187 § 1, Kan. Sess. Laws 2001, ch. 128, § 11. If the legislature intended the provisional ballot detail report, or the function that creates that report, to constitute an "abstract of a voting record" to be retained for 20 years, it would have given a clear statement somewhere in statute. It has not and instead provided statutory descriptions for abstracts.

Also, accepting Plaintiff's broad definition would create a records retention nightmare with which no county could comply. Counties are not required to track provisional ballots within the ELVIS database and the database is constantly updated and elections are cleared. *See* Pl. Memo. Supp. Summ. J. at 26 (Ex. A, Email from Hammet to Barker) ("Since I expect counties are about to start clearing provisional data to prep for the general . . ."); *Loud Light*, Memo. Or. at 5 ("County election officials, not Defendants, are responsible for not only inputting information but also 'clearing' an election's data from ELVIS[.]"). If this court determined that the provisional ballot detail report was a "voting records abstract," counties would be best served to not use the ELVIS database to track provisional ballot information. It would be impossible to comply with this Court's new retention requirement when using a database that changes in real-

time as records are inputted and modified. The fact that Plaintiff is trying to create new records retention policies across the 105 counties further illustrates why issues such as these are left to the legislative branch, rather than enforced through private rights of action.

Finally, even if this Court determined it was ambiguous as to what constituted an abstract of a voting record, the Secretary's interpretation is supported by various canons of construction while Plaintiff's is not. First, the Secretary's interpretation is consistent with how the term abstract is used throughout Kansas law whereas Plaintiff's interpretation improperly creates a new definition out of whole cloth based on one subsection of a subsection. *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). Second, the Secretary's interpretation is consistent with the structure of the election code. Chapter 27 of the Kansas code involves "voting places and materials thereof." That chapter primarily involves the counting board. Outside of being permitted to adopt rules and regulations, the Secretary does not have express duties in Chapter 27 and the counting board does not provide abstracts under Chapter 27 to the Secretary.[3] To define K.S.A. 25-2709(5) so broadly that it impacts the Secretary would be inconsistent with the structure of the election code. *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.").

Thus, even if this Court wants to use Plaintiff's definition in some manner, it does not follow that the Court should use it to create new records that do not exist in statute. It would be more logical to tether it to records the legislature requires to be created. For example, K.S.A. 25-

[3] The Secretary receives a certified abstract upon completion of the intermediate canvass by the county board of canvassers. *See e.g.* K.S.A. 25-3202.

3006 and 25-3007 both involve abstracts of election boards and logically fit within what K.S.A. 25-2709 may require to be retained.[4] Similarly, a county election official uses abstracts identified in 25-3006 and 25-3007 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 relevant to Chapter 27. Finally, if the Court determines that the term "abstract" in K.S.A. 25-2709 means something other than an "abstract" as that term is used throughout the code, there are other summaries of items used by election officials in articles 27 and 28 that would more likely be associated with K.S.A. 25-2709(5) than an extra-statutory report from a database function. *See* 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 . . ."). The Secretary believes that K.S.A. 25-2812 is the only statute in Chapter 25 that uses the term "voting records" besides K.S.A. 25-2709(5). This Court should not redefine the concept of an abstract in this case. It should interpret K.S.A. 25-2709(5) consistently with historical understanding, the same way similar terms are used throughout the election code, and consistent with the election code's structure.

Plaintiff also claims that "there is good reason to treat provisional ballot detail reports as abstracts of voting records." Pl. Memo. 13. From Plaintiff's perspective that may be accurate, but that is a decision for the Legislature, not this Court to make. There is an equally good policy to be made that the Legislature does not require agencies to guess what records must be retained for 20 years. The United States Congress does not require states to track and retain information

[4] K.S.A. 25-2708 also has a record retention requirement for abstracts of each voting place which requires the county election officer to permanently retain a copy.

on every individual who cast a provisional ballot at each election despite Plaintiff's citation to the Help America Vote Act. Congress requires states to submit an overall report of the total numbers of individuals casting provisional ballots and the reasons. 52 U.S.C. § 20981(b)(4); Def. Mtn. Summ. J. SOF ¶¶ 31, 32. The Kansas legislature requires retention of ballots in unopened envelopes for two years pursuant to K.S.A. 25-2708(b) but never addresses the provisional ballot detail report in statute. Even if Plaintiff is correct that "good reason" exists to compile this information, that is a decision for the Legislature to make.

Even assuming Plaintiff has standing to raise this claim and a cause of action to enforce K.S.A. 25-2709(5), the Secretary is entitled to summary judgment as to Count III. A non-statutory, un-generated, pre-programmed report from a database function is not an "abstract of a voting record" under K.S.A. 25-2709(5).

D. The Secretary did not destroy any records

Lastly, Plaintiff argues that the Secretary destroyed records by requesting that a function be removed from a database. Pl. Resp. Br. at 14. But that is not destroying records. The records remain within the ELVIS database. What was removed was the ability to generate a report that pulled information from records within a database. Plaintiff may be correct that utilizing this function could create a "new record," Pl. Resp. Br. at 14, but removing a function that *could* create a record in the future is not the same as destroying an existing record. The fact that an agency may have used software in the past does not mean that KORA prohibits the agency from ending that software's use. Plaintiff confuses destroying records with choosing not to create future records.

VI. The Issues Plaintiff Claims could be Addressed in Discovery are not Material such that they Would Preclude Summary Judgment in Favor of the Secretary

Lastly, Plaintiff incorrectly argues that this court should deny summary judgment to permit discovery on two issues: (1) An "exhaustive list of all the reasons" the provisional ballot detail report query function was removed from the State's ELVIS database access, and (2) The cost to turn back on the provisional ballot detail function. Pls. Resp. Br. at 15-16. "In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." *Osterhaus*, 39 Kan. App. 2d at 1005. Neither issue is material to the conclusive issues in the case.

As to the reason the query function was removed, Plaintiff does not explain how the reason would affect the viability of his KORA claim. The question for this Court is whether a query function that was removed prior to a KORA request meets the definition of a public record under KORA. Why it was removed has no bearing on that legal issue. Furthermore, KORA dispenses with Plaintiff's theory. "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). Motive as to why a query function was removed from a database is not material to the conclusive issues in this case. *See supra* at 8-9.

As to the costs associated with turning the query function on and off, that issue is also not material for purposes of summary judgment. Plaintiff theorizes three ways the costs could be relevant: (1) if the cost would be less to turn it on than $522, then the cost to Plaintiff is unreasonable, or (2) if it cost the Secretary any money to turn the function off, "a jury could infer he incurred the cost for the purpose of frustrating Mr. Hammet's requests" and (3) if the cost is less than $522 to turn the function back on, it "bears on the reasonableness of the fee" to charge that amount. Pl. Resp. Br. at 15.

These issues fall back to the ultimate problem in Plaintiff's theory of the case. He continues to focus on nonexistent possible future records the Secretary could create if only the database function was not removed. The provisional ballot detail report was not in existence when Plaintiff submitted his request and the query function used to create the provisional ballot detail report was removed prior to his KORA request. Whatever it costs this office to turn the function on or off is not material for purposes of defining a public record under KORA. Additionally, KORA did not require the Secretary to ask the vendor to create a record for Plaintiff. *See surpa* at 14-17. Plaintiff does not have the right under KORA to require the Secretary to maintain a computer program even if that program would be "less expensive" for him than "paying the costs of obtaining copies" of the records. Kan. Att'y Gen. Op. 87-137, *2. KORA only entitles him to records in the Secretary's possession at the time of the request and provides "no right to obtain the records in the least expensive manner." Kan. Att'y Gen. Op. 87-137, *2. KORA does not require the Secretary to create a record he does not possess. Yet, Plaintiff wants this Court to hold that because the Secretary went beyond his KORA statutory duties and offered to have a vendor create a record, it is material that the Secretary may have been able to go beyond his statutory duties in a different way. It is not.

Furthermore, even if a report the Secretary does not possess could constitute a public record under KORA, the function used to create the report was removed from the state's system. the Secretary offered Plaintiff essentially the same information at the same cost it would cost the Secretary to obtain that information. Plaintiff's theory on why this is material is based on his belief that he has a right under KORA to force an agency to maintain or enable database functions for his future KORA requests. This is a question of law, not fact, and Plaintiff is incorrect. *See supra* at 24-28.

Finally, it is unclear why Plaintiff raises what a "jury" could infer. Even if a KORA dispute could be a matter for a jury, Plaintiff has not made a jury demand or filed a demand as required by K.S.A. 60-238(b). Any right he may have had was waived.[5] *Id.* at (d). If Plaintiff is merely referring to the trier of fact, the issues identified are not a material fact for purposes of precluding summary judgment. As discussed previously, motive is not a factor as to whether something is a public record under KORA. *See supra* at 8-9. And even if it were, the Secretary charged less than the actual cost to produce the records in his possession that would have satisfied Plaintiff's requests, the voter registration records.

The issues raised Plaintiff do not preclude this Court from granting the Secretary summary judgment.

CONCLUSION

For the reasons stated above, and the reasons stated in his opening brief, the Secretary's Motion for Summary Judgment should be GRANTED.

Date: June 25, 2021

Respectfully submitted,

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[5] It is not clear that KORA issues are triable to a jury. *See* K.S.A. 45-222 (discussing the court taking actions, reviewing documents, and determining matters *de novo*); *see also Bollinger v. Nuss*, 202 Kan. 326, 342 (1969) (discussing garnishment proceedings not being subject to a jury trial).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 25th 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
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Attorney for Defendant