No. 21-124679-A

IN THE
COURT OF APPEALS
OF THE
STATE OF KANSAS

Davis Hammet
Plaintiff-Appellant

vs.

Scott Schwab, Kansas Secretary of State
Defendant-Appellee

Brief of Appellant

Appeal from the District Court of Shawnee County, Kansas
The Honorable Teresa Watson
District Court Case No. 2020-CV-638

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Oral argument requested.

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NATURE OF THE CASE

This case is brought under the Kansas Open Records Act ("KORA"), K.S.A. § 45-215, *et seq*. Plaintiff-Appellant Davis Hammet requested documents from the Secretary of State's Office containing information about provisional ballots cast in the 2020 primary elections. Specifically, Mr. Hammet requested a database report called a "provisional ballot detail report" ("the report") which contains compiled information from the state's election database, Election Voter Information System ("ELVIS"). Mr. Hammet and Defendant-Appellee Secretary Schwab previously litigated KORA's applicability to the report, and the District Court held that KORA required the production of the report. Despite that ruling, and aware Mr. Hammet would be requesting the report again, the Secretary deliberately ended his office's ability to access the document by instructing the office's technology provider to remove ELVIS's ability to generate the report.

The Secretary then denied the KORA request at issue here, claiming that his office was no longer in possession of the record, and therefore, KORA did not apply. Ultimately, the Secretary offered to provide the information contained in the report for $522, when he could previously produce the report for free.

The parties filed cross motions for summary judgment, and the District Court entered judgment in the Secretary's favor.

STATEMENT OF ISSUES

I. The Secretary violated KORA by deliberately ending his office's access to electronic records for the purpose of obstructing KORA requests that he knew would be forthcoming.

II. The fee the Secretary imposed was unreasonable because he deliberately assessed it to discourage KORA requests.

STATEMENT OF FACTS

Kansas's Secretary of State maintains a central database of voter registration information called the Election Voter Information System ("ELVIS"). R. I, 34-35, ¶ 1 and 288, ¶ 1.[1] The Secretary contracts with Election Systems and Software ("ES&S") to run and maintain the ELVIS database. R. I, 35, ¶ 3 and 288, ¶ 3. County election officials upload information into ELVIS every election, including information about provisional ballots. R. II, 3. Provisional ballots are those cast by voters deemed ineligible to vote at the polls. 52 U.S.C. § 21082. There are several reasons a voter may cast a provisional ballot, including if an election official believes they are not eligible to vote, the person failed to present required identification, the person's signature does not match the one on file, or the voter attempted to vote at the wrong polling place. Mem. Decision and Order at 1-2, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (July 24, 2020). Federal law requires that when one of these issues arises, and the voter declares they are registered to vote, the individual may vote provisionally. *Id.*

When an election worker requires a voter to vote by provisional ballot, an entry is made in the poll book noting that the ballot is provisional. The person is then provided a provisional ballot envelope, a Kansas voter registration form, and a ballot to fill out. *See* K.S.A. § 25-409. The voter marks their ballot and places it in the envelope. The envelope is then sealed, the election judges write the reason for the provisionally cast ballot on the

[1] Where possible, record cites are provided to statement of facts in the summary judgment briefing and their uncontroverted responses. Stipulated facts are also referenced.

envelope, and the election workers and voter sign the envelope. *Id.* Poll workers then transmit the provisional ballot to the county election officer and ultimately the county board of canvassers, who determine whether the ballot will be counted or not. *See* K.S.A. §§ 25-409(b); 25-1136(e); and 25-3002; Mem. Decision and Order at 3, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (July 24, 2020).

Counties in Kansas then upload information about those provisional voters into ELVIS, and the Secretary's staff can view and search the database by generating various database reports. R. I, 35, ¶ 5 and 288, ¶ 5. As counties continue to upload information in advance of an election, the ELVIS database updates as well. R. I, 36, ¶ 7 and 288, ¶ 7. Also, as new elections approach, county officials clear out data in ELVIS from prior elections. R. I, 36, ¶ 8 and 288, ¶ 8.

Mr. Hammet and the organization he leads, Loud Light, are interested in the records contained in ELVIS because they work to ensure all Kansans eligible to vote can do so. R. I, 35, ¶ 2 and 288 ¶ 2. Mr. Hammet thus sought provisional ballot information to help voters cure the deficiencies that caused them to vote provisionally, as well as address any incurable deficiencies so that voters may cast proper ballots in future elections. *Id.* He also uses the provisional ballot data to conduct election research to help counties improve their election systems and identify aspects of Kansas's voting system that may be in need of reform. *Id.* Mr. Hammet's continual efforts—and his KORA requests seeking provisional ballot information—thus ensure eligible voters can exercise their fundamental right to vote in state and national elections

To gather provisional ballot information, Mr. Hammet made requests in 2019 to the Secretary under KORA asking for information from the 2018 general election and the 2020 primary election. R. II, 3. But ELVIS contains 1.9 million individual records, so a request for specific entries would be impractical. R. I, 294, ¶ 1 and 328, ¶ 1. Thus, Mr. Hammet asked the Secretary to query the ELVIS database and provide a provisional ballot detail report—one of the reports available in the software—which would provide the provisional ballot information Mr. Hammet sought. R. II, 3.

The Secretary refused, and Mr. Hammet sued in June 2020. R. II, 3-4. In that lawsuit, Mr. Hammet made clear he would continue seeking the report in future elections. R. II, 3-4. Then, in July 2020, Mr. Hammet prevailed, and the Shawnee County District Court ordered the Secretary to produce the report, finding that KORA applied to the report and the information contained therein. R. II, 4; Mem. Decision and Order at 2, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (Jul. 24, 2020).

Upset by the ruling, the Secretary openly criticized the District Court's Order, saying, "The Kansas Judiciary, once again, paid disrespect to the intent of policy. . . . The entitlement of these activist organizations to confidential information of those they also claim to champion is sad." Roxana Hegeman, *Ruling: Kansas must release the names of provisional names*, Assoc. Press (July 28, 2020) available at https://apnews.com/article/general-elections-lawsuits-kansas-voting-rightselections-31438bcdf478af87d336f01f024646bb; R. I, 36, ¶ 13 and 289, ¶ 13.

Soon after, Mr. Hammet again requested the reports on August 4 and 11, 2020. R. II, 4. The Secretary complied with KORA and provided the requested documents. R. II,

4. But two days later, on August 13, 2020, the Secretary asked ES&S to modify ELVIS and end his office's access to the provisional ballot detail report. R. II, 4. Now, to produce records contained in the reports, the Secretary's staff would be required to spend months, if not years, searching and reviewing individual records within the ELVIS database. R. I, 186-187, ¶ 7 (Defendant's affiant). This would have cost hundreds of thousands of staff hours. R. I, 186-187, ¶ 7 (Defendant's affiant).

On September 9, 2020, Mr. Hammet again inquired about gathering provisional ballot detail reports under KORA, making clear he planned to request the report again. R. II, 4. The Secretary responded the same day by providing the report. R. II, 4. But on September 13, 2020, ES&S implemented the Secretary's requested changes and ended the ability to run the provisional ballot report in ELVIS. R. II, 4.

Mr. Hammet would not learn of the change for a few weeks. On October 6, 2020—after the Secretary could no longer access the report in ELVIS—Mr. Hammet once again requested the report under KORA. R. II, 4. On October 14, 2020, the Secretary eventually disclosed that his office could no longer run the report in ELVIS. R. II, 5. At this point, needing the information for the upcoming general election, Mr. Hammet attempted to discuss how the Secretary could restore access, or in the alternative, provide the provisional ballot information in another format. R. I, 39, ¶ 25 and 290, ¶ 25; *see also* R. I, 56—66.

In response, the Secretary made clear his office would not restore access but could ask ES&S to manually pull the data Mr. Hammet requested. R. II, 5. The Secretary informed Mr. Hammet that doing so would cost $522 this time, and an unknown amount

for all future requests—an especially acute problem since the database is updated regularly. R. I, 81, ¶¶ 17-18 and 260, ¶¶ 17-18; R. II, 5; R. I, 36, ¶¶ 7-8; R. I, 288, ¶¶ 7-8. Notably, before ending access to the report, the Secretary never charged Mr. Hammet and could easily provide the data in his database in the report format. R. I, 38, ¶¶ 20-21 and 290, ¶¶ 20-21. Thus, Mr. Hammet suggested that "the simplest solution is for [the Secretary's] office to contact [ES&S] and ask them to turn back on [the] provisional report functionality." R. I, 82, ¶ 20 and 260, ¶ 20.

Indeed, the Secretary could do just that. R. II, 5, ¶ 5.o. He refused. This lawsuit followed.

ARGUMENT AND AUTHORITIES

Issue I: The Secretary violated KORA by deliberately ending his office's access to electronic records for the purpose of obstructing KORA requests that he knew would be forthcoming.

Standard of Review and Preservation of the Issue

This is an appeal from the District Court's grant of summary judgment in the Secretary's favor and this Court reviews *de novo*. "The standard of review for a motion for summary judgment is well established. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. On appeal, [the Court applies] the same rules, and where [the Court] finds reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *State ex rel. Graeber v. Marion County Landfill, Inc.,* 276 Kan. 328, 341 (2008).

Any dispute over KORA's meaning is subject to unlimited review. "Interpretation of a statute is a question of law, and [the Court's] review is unlimited." *Purvis v. Williams*, 276 Kan. 182, 187 (2003).

Mr. Hammet raised this issue in his motion for summary judgment and in response to the Secretary's Motion for Summary Judgment. R. I, 47-48 and 262-264.

Analysis

The Secretary deliberately ended his access to provisional ballot data because he knew Mr. Hammet would be requesting the data again. Doing so ensured the Secretary could plausibly deny Mr. Hammet's future KORA requests—requests the Secretary knew

were coming. Mr. Hammet made clear as early as June 2020 he would continue requesting provisional ballot detail reports. R. I, 26, ¶ 11 and 288, ¶ 11. The Secretary then instructed ES&S to end his office's access to the report on August 13, 2020, two days after Mr. Hammet made a request for the report under KORA. R. II, 4. The Secretary's calculated manipulation of his database purposefully interfered with Mr. Hammet's KORA request, violating KORA. *Hunter Health Clinic v. Wichita State Univ.*, 52 Kan. App. 2d 1, 9-10 (2015) ("Any person whose request for records *under the act* has been *denied or impeded* may bring an action in the district court of the county where the records are located.") (emphasis original) (citing Ted P. Fredrickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act*, 33 Kan. L. Rev. 205, 261 (1985)).

A. Open records statutes embody a policy of openness and transparency.

The Kansas Open Records Act reflects our state's commitment to transparent and publicly accountable governance. Every state, as well as the federal government, has an open records law designed to ensure that government business is open, accessible, and free from corruption. *See Ky. New Era v. City of Hopkinsville*, 415 S.W.3d 76, n.3 (Ky. 2013) (citing Roger A. Nawadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urban Lawyer 65 (1996)). KORA is no exception—by its very nature, the statute ensures elected officials and other government actors cannot hide government and its functions from public view. Yet that is precisely what the Secretary did in this case: he obscured access to data subject to KORA that he did not want to produce and which he knew would be requested under the statute. This conduct runs counter to very purpose of KORA, and this Court should disallow it.

Open records laws reflect the important public policy aim of making government functions more transparent and accountable. "A government that is open to scrutiny by the people it represents is more likely to be responsive to their wishes and needs, honest and fair in its exercise of power, and accountable for its expenditure of public money." Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. at 206. Discussing the federal equivalent to KORA, federal courts have remarked that "[t]he Freedom of Information Act embodies a profound and powerful commitment to the ideals enshrined in our Constitution." *Leopold v. DOJ*, 130 F.Supp.3d 32, 39 (D.D.C. 2015). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "Given this purpose, FOIA is broadly construed in favor of disclosure." *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1260 (10th Cir. 2021). The same ideals explicitly animate KORA.

The Kansas legislature codified KORA's purpose when enacting the statute. Under K.S.A. § 45-216, "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy." Thus, "KORA does not allow an agency unregulated discretionary power to refuse to release information sought by the public. The stated policy of KORA is that public records are to be open to the public for inspection unless otherwise provided in the Act. As used in KORA 'public' means 'of or belonging to the people at large.'" *State, Dep't of Social &*

Rehab. Serv., etc. v. Pub. Emp. Relations Bd. of Kan. Dep't of Human Res., 249 Kan. 163, 170 (1991). Indeed, the language of KORA represents a "strong statement of public policy" that records should be open to the public unless specifically closed. *See* Maxwell Kautsch, *Kan. Open Gov't Guide*, Rep. Comm. for Freedom of the Press (last updated Aug. 2021), available at https://www.rcfp.org/open-government-guide/kansas-2/#author. "[A]ny judicial inquiry [into the meaning of KORA] should begin with a review of the act's strongly stated purpose." 33 U. Kan. L. Rev. at 265.

Our legislature enacted KORA to promote openness and transparency, and the Act is explicit about its purpose, even providing a rule of statutory construction to accomplish its aims: "[T]his act shall be liberally construed and applied to promote such policy." K.S.A. § 45-216. Viewed in this light, the Secretary's actions are a shocking derogation of the openness the statute demands.

B. Secretary Schwab's actions run counter to KORA's purpose.

The record in this case makes clear that the Secretary took affirmative steps to obscure public records that were subject to KORA for the purpose of avoiding compliance with a known, forthcoming KORA request. This violates the entire purpose of the statute and should not be permitted.

The Secretary's motive is obvious. He litigated to prevent disclosure R. II, 3-4. Then, after losing, openly criticized the court's ruling. R. II, 4; R. I, 36, ¶ 13 and 289, ¶ 13. He complained about KORA's application to the report and the data contained therein and accused "the Kansas Judiciary" of "once again" disrespecting policy. R. I, 36, ¶ 13 and 289, ¶ 13. He also accused the ACLU and Mr. Hammet of being "activist

organizations" seeking "confidential information"—information which the district court just declared open, not confidential. *Id.*

Soon after, the Secretary manipulated his data systems so his office could no longer comply with KORA requests for the report and the data contained therein—requests that the Secretary knew were coming. Specifically, the Secretary ordered his database company to end access to the statewide provisional ballot detail reports. R. II, 4. Doing so made complying with requests for the underlying provisional ballot voter data virtually impossible. After the change, rather than query the database and provide a free report (R. II, 4), the Secretary would need to employ a third party to write and run new code to access the data in the Secretary's own database. R. II, ¶ 5. The Secretary's order intentionally degraded his electronic database, itself a "record" under KORA. Op. Att'y Gen. No. 95-64, 1995 Kan. AG LEXIS 71 at *15 ("Once [an 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."); *see infra*, I. D.

The Secretary's scheme runs counter to the purpose of KORA and the openness it demands. His actions also purposely frustrated future KORA requests that the Secretary knew Mr. Hammet would be submitting. Mr. Hammet had requested the report and underlying data before—the subject of parties' previous litigation—and in that lawsuit Mr. Hammet made clear that he would continue requesting the report and underlying data. R. I, 36, ¶ 11 and 288, ¶ 11. The Secretary thus knew Mr. Hammet would be

submitting future KORA requests, including the request at issue in this case, and acted to avoid having to comply with KORA.

When the Secretary ended access to provisional ballot detail reports, he was not merely adjusting computer systems or engaging in some benign housekeeping, the inference he asked for on summary judgment. *See* R. I, 87 (claiming "[i]t is not sound policy for the Secretary of State to retain and disseminate inaccurate information."). While it is true that KORA does not require government agencies to maintain particular records (K.S.A. § 45-216(b)), the Secretary's actions here are of a different order. The records existed, he had easy access to them, and he had provided them in response to previous KORA requests. R. II, 3-4. When the Secretary ended his access to the report, and therefore his ability to access the data therein, he was deliberately avoiding his obligations under KORA and knowingly interfering with future KORA requests. R. II, 4. The Secretary was obviously, and all but admittedly, closing records and obscuring access for the sole purpose of impeding KORA requests. This Court should not permit such deliberate attempts to frustrate the purpose and intent of KORA.

The Secretary's actions—and the District Court's Order—therefore do more than deny Mr. Hammet records he is entitled to under KORA. They also set a dangerous precedent that severely undermines government transparency. If the Act's explicit purpose is to mean anything, courts cannot tolerate the government's destruction or obfuscation of records *for the purpose of avoiding KORA's obligations*. If the District Court's ruling on summary judgment is allowed to stand, then the Secretary has not only avoided his own obligations but has also laid a powerful example for future agencies

hoping to hide records. Any government actor that knows of an imminent KORA request for public documents need only end access to those documents before the formal KORA request is filed. Then, when the request comes, the agency can claim it no longer has the records. The scheme would apparently work even if, as the Secretary did here, the agency could simply turn access to the records back on but refuses to do so. R. II, 5.

The Secretary raised the example of emails in his summary judgment briefing. R. I, 301. It is an apt comparison, but not in the way the Secretary describes. Generally, public officials' electronic communications about their work would be subject to disclosure under KORA so long as an exception did not apply. *See* K.S.A. § 45-221 (listing KORA exceptions). Most email platforms have a search function where the email can be queried for keywords, and a list is easily produced with all emails containing the keyword. This parallels how the ELVIS database worked before the Secretary's actions at issue here: ELVIS could be queried for all votes that were cast provisionally, and it would produce a list—the report—that listed all relevant entries for provisional ballots. The Secretary then ended his access to that report and the data contained therein. It was as though the Secretary ordered his email provider to end keyword searches for emails in order to avoid responding to a KORA request he knew was on the way. Although KORA does not, on its face, require the government to use the search function in its emails, neither does KORA permit the government to *delete* the search function to avoid complying with an imminent KORA request. That is precisely what occurred when the Secretary turned off his office's ability to query the ELVIS database for provisional voters.

Using this analogy, the implications of the District Court's ruling are therefore profound. If the order is allowed to stand, any time a public official knew a KORA request was coming for emails the official did not want made public, he could simply order his IT department to remove his email search function. The emails would still exist, but it would be impossible to respond to a KORA request seeking specific ones without a manual search. As the Secretary claimed here, the search would be so impractical and expensive that it would be impossible to respond to any KORA requests for the emails. The District Court's opinion ignores this reality and overlooks how the result is fundamentally incompatible with the purpose of KORA. Allowing any state agency to undermine KORA so brazenly all but unwrites the statute and leaves the Act's promises unfulfilled.

C. Drawing all inferences in favor of Mr. Hammet, the Secretary's motivation for ending access to the report, and the data in it, precludes summary judgment in the Secretary's favor.

Summary judgment for the Secretary was inappropriate because when all reasonable inferences are drawn in Mr. Hammet's favor, it is clear the Secretary purposely acted to interfere with Mr. Hammet's KORA request, in violation of KORA. "On summary judgment, [the court] may not draw inferences favoring the moving party." *Estate of Randolph v. City of Wichita*, 57 Kan.App.2d 686, 716 (2020); *Becker v. Bar Plan Mut. Ins. Co.*, 308 Kan. 1307, 1316 (2018) ("[D]isputed questions of fact typically make summary judgment—as granted in the instant case—inappropriate."). There are at least four pieces of evidence from which a factfinder could infer that the Secretary deliberately ended his access to provisional ballot detail reports for the purpose of

interfering with Mr. Hammet's KORA requests, thereby making summary judgment in the Secretary's favor inappropriate.

First, the timing of the Secretary's request to end access is strong circumstantial evidence of his motive. *See Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n*, 272 Kan. 546, 557 (2001) (proximity in time between claim and firing is circumstantial evidence of retaliation in employment case). The Secretary lost his prior KORA case in July 2020. R. II, 4. Mr. Hammet then made another KORA request on August 4th and 11th. R. II, 4. Two days later, on August 13, 2020, the Secretary instructed ES&S to end the provisional ballot detail reporting function. R. II, 4. The Secretary thus acted within weeks of losing in court and within days of Mr. Hammet's final KORA request. The timing alone is strong evidence of the Secretary's motive.

Second, the Secretary's desire to keep these records closed is perfectly clear: he previously litigated to prevent their disclosure. R. II, 3-4. After Mr. Hammet prevailed, the Secretary publicly denounced the ruling and reiterated his belief that these open records should instead be confidential. R. I, 36, ¶ 13 and 289, ¶ 13. A factfinder could therefore easily and reasonably infer that the Secretary acted to deliberately hide records subject to disclosure under KORA.

Third, there is no evidence that the Secretary modified his voter database in any other way. Instead, he requested ES&S remove a single database function—the one used to respond to Mr. Hammet and the one that allowed easy access to the provisional ballot data Mr. Hammet requested and was planning to request in the future R. II, 3-4; R. I, 36, ¶ 11 and 288, ¶ 11. The action speaks for itself: the Secretary wanted to prevent future

KORA requests—requests he knew were coming—for this record and the information it contained.

Finally, the Secretary's office all but admitted it ended database access to interfere with KORA requests. In support of summary judgment, the Secretary admitted he used the provisional ballot detail reporting function exclusively to respond to "requests by parties outside of the office of the secretary of state." R. I, 185, ¶ 3. The Secretary's affiant also made clear that "[t]he 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." *Id.* Drawing the reasonable inference in Mr. Hammet's favor, a factfinder could have concluded the Secretary's affiant was referring to Mr. Hammet's KORA requests. *Osborn v. Anderson*, 56 Kan. App. 2d 449, 453 (2018) ("The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought.") (citing *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 24 (2016)).

The Secretary claims the report functionality was turned off not to avoid compliance with KORA requests, but because the report is incomplete and that county clerks may not enter all the required data into the database. R. I, 185-186, ¶ 5; R. I, 185, ¶ 4. All this evidence indicates is that the record may not be comprehensive—not that the data contained in it is somehow inaccurate. Importantly, KORA does not require public records to be complete or even accurate in order to be subject to disclosure. *See* K.S.A. § 45-215, *et seq.* This argument is therefore simply a red herring, and because all

inferences must be drawn in favor of Mr. Hammet, does nothing to change the calculus that summary judgment in favor of Secretary Schwab was inappropriate here.

Based on all these reasonable inferences in favor of the non-moving party, Mr. Hammet, Secretary Schwab is not entitled to summary judgment.

D. KORA applies to the records at issue even though the Secretary kept them electronically.

Finally, KORA applies to the records Mr. Hammet sought even though the records are in an electronic form. To allow the Secretary—or any other agency or official—to avoid KORA's obligations simply by keeping documents electronically, and thus manipulating their retrieval, would be to seriously undermine KORA's applicability and power in the modern world.

A public record for purposes of KORA "means any recorded information, *regardless of form, characteristics or location*, which is made, maintained or kept by or is in the possession of: (A) Any public agency; or (B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of any public agency." K.S.A. § 45-217(j)(1) (emphasis added). The statute thus applies to electronic and physical records equally, as "[c]omputer files and data are considered records." Op. Att'y Gen. No. 09-14, 2009 Kan. AG LEXIS 17 at *4 (citing *State ex rel. Stephan v. Harder*, 230 Kan. 573, 582 (1982)).

Moreover, "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.

Cases interpreting and applying KORA, especially regarding new record-keeping technologies, are somewhat sparse. Kansas courts are responsible for interpreting and enforcing KORA, although the Kansas Attorney General continues to interpret the law administratively in various opinions. *Id.* Importantly, many of the opinions interpreting KORA—judicial or administrative—are from the days when record retention and management technology was at its nascent stages. It is therefore both appropriate and consistent with the underlying public policy rationale of KORA to interpret its provisions and requirements considering technological advances that make accessing records—or manipulating access to records—relatively easy.

In an early case addressing computerized records, the Attorney General made clear that the public should reap the benefits of improved, electronic records.

> "We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection, and safety."

Op. Att'y Gen. No. 88-152, *3 (citing *Ortiz v. Jaramillo*, 483 P.2d 500, 501 (N.M. 1971)). This Court recently affirmed this principle: "To be clear, under KORA's plain language, a public agency's electronic records, unless specifically exempted under KORA, constitute public records that are subject to inspection and, if requested, copies provided to the requester." *Roe v. Phillips County Hospital*, No. 122,810, 2022 Kan. App. Unpubl. LEXIS 82, at *18 (Kan. App. Feb. 11, 2022).

Here, the report Mr. Hammet sought was a way of accessing the Secretary's electronic records: data regarding those voters who voted provisionally in the August 2020 primary. The report and data in it were not subject to any exception, so KORA applied. *See* Mem. Decision and Order at 2, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (Jul. 24, 2020). And while this Court recently held that KORA does not require the production of documents in any specific form, that is not the issue in this case. *Roe*, 2022 Kan. App. Unpubl. LEXIS 82, at *18. Unlike the Plaintiff in *Roe*, Mr. Hammet originally requested the provisional ballot detail report itself, but ultimately made clear that he would accept the information "in any form." R. I, 39, ¶ 25 and 290, ¶ 25; R. I, 64 ("Again, to clarify, my request is not limited to the 'Provision Ballot Detailed Report.' My request is for provisional data related to the 2020 primary election."). Thus, he was not demanding that the Secretary produce the provisional ballot data in a specific format, or even in electronic form versus hardcopy, as was the issue in *Roe.* Instead, Mr. Hammet sought provisional ballot data—data which the Secretary admits still exists—in any form the Secretary could produce it. But the Secretary deliberately ended his ability to produce that data when instructing ES&S to remove the reporting function. This clearly violates KORA.

Moreover, the Secretary cannot hide electronic records behind third party technology providers, like ES&S, to avoid complying with valid KORA requests. Addressing an arrangement in which a private company would have provided public access to governmental records for a fee, the Attorney General wrote that the arrangement with the third party "may not adversely affect the ability of a person making

a request for documents directly from [the Government], including in an electronic format if the record is available in such a format." Op. Att'y Gen. No. 09-17, *7. "Such a contract does not relieve the [Government] from its requirements under KORA." *Id.* at 10. As the opinions and *Ortiz* case make clear, Kansans should expect to benefit from technological advances, not be disadvantaged by them by allowing government agencies to game their new technology. Similarly, the Secretary cannot avoid obligations to provide data under KORA by making its own data available only upon payment to a third-party private company to write access code.

Here, despite KORA's clear applicability to electronic records, the Secretary has managed to avoid his obligations by manipulating those records and their organization in a way that only electronic records can be manipulated, and placing sole access to those records in the hands of a third party technology provider, ES&S. Rather than allow for more transparent government and easier access to records—as the ELVIS database did—the Secretary gamed his record retention system to avoid disclosure and compliance with known, forthcoming KORA requests.

The ELVIS database the Secretary maintains still contains the information previously produced in the provisional ballot detail reports. R. II, 3-4; R. I, 186-187, ¶ 7 (the Secretary's affiant). But now, because the Secretary can no longer query the database using the provisional ballot detail report, his staff is functionally unable to provide the information to Mr. Hammet without contracting with a third-party technology provider. *Id.* In essence, while maintaining the information Mr. Hammet seeks, the Secretary has purposely degraded and manipulated his record to such a degree that he now claims

KORA does not apply. It is a maneuver which would be unavailable to him for more traditional, paper records. More striking still, the Secretary refuses to simply turn access to the data back on. R. II, 5. Allowing the Secretary's tactics to prevail seriously undermines KORA's applicability to electronic records not only in the Secretary's office, but more generally in agencies throughout the State.

In sum, the legislature explicitly designed KORA to promote openness and transparency, and courts are to construe the statute to further those aims. K.S.A. § 45-216. Despite this mandate, the Secretary purposely closed access to public records and impeded a KORA request he knew was coming. His actions violate KORA. *Hunter Health Clinic*, 52 Kan. App. 2d at 9-10 ("Any person whose request for records *under the act* has been *denied or impeded* may bring an action in the district court of the county where the records are located.") (emphasis original) (citing Fredrickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act*, 33 Kan. L. Rev. 205, 261 (1985)). Allowing government officials to purposely obstruct public access, especially by manipulating electronic records which should expand access rather than create new ways to hide information, violates both the letter and spirit of KORA. This Court should disallow the practice, reverse the District Court, and rule that Secretary Schwab violated KORA.

Issue II: The fee the Secretary imposed was unreasonable because he deliberately assessed it to discourage KORA requests.

Standard of Review and Preservation of the Issue

This is an appeal from the District Court's grant of summary judgment in the Secretary's favor and this Court reviews *de novo*. "The standard of review for a motion for summary judgment is well established. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. On appeal, [the Court applies] the same rules, and where [the Court] finds reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *State ex rel. Graeber*, 276 Kan. at 341.

Any dispute over KORA's meaning is subject to unlimited review. "Interpretation of a statute is a question of law, and [the Court's] review is unlimited." *Purvis*, 276 Kan. at 187.

Mr. Hammet raised this issue in response to the Secretary's Motion for Summary Judgment. R. I, 48-52.

Analysis

The Kansas Open Records Act limits what agencies may charge for requested documents. Under K.S.A. § 45-219(c), agencies may only impose "reasonable fees" for responding to KORA requests. This is because KORA was crafted to avoid creating an "undue burden" for state agencies in responding to records requests. However, a burden

that is self-imposed—and therefore increases the costs of fulfilling a KORA request—is unreasonable. *See generally* 33 U. Kan. L. Rev. at 226 ("A financial burden on the agency also does not make a request unreasonable, particularly when the act allows reasonable fees to be charged to compensate the agency for the costs of producing records . . . [but] a court should make sure that the burden on the agency is not self-imposed.").

Here, the fee the Secretary imposed is unreasonable because he incurred it deliberately. The Secretary knew Mr. Hammet would be making the KORA request at issue. R. II, 3; R. I, 36, ¶ 11 and 288, ¶ 11. But rather than accept that KORA applied to the records, the Secretary purposely ended his ability to access to his own records. As planned, the Secretary then claimed that the only way to recover the data Mr. Hammet sought was by asking ES&S—the Secretary's technology provider—to write a unique code. The process would cost $522 this time and an untold amount for each future request (R. II, 5), an especially pressing problem given that Mr. Hammet had already requested the report several times and intended to continue doing so in the future. The Secretary was therefore creating an unduly large expense for Mr. Hammet for the purpose of discouraging his KORA requests. The Secretary's position is even more unjustifiable given that he had the authority and ability to simply turn access to the records back on. R. II, 5, ¶ 5.o.

It is true that the requestor bears the costs associated with gathering and producing documents under KORA. K.S.A. § 45-219(c)(1) (fee not to exceed the actual cost of furnishing copies); *Data Tree, LLC v. Meek*, 279 Kan. 445 (2005) (requestor to bear any

redaction costs). But any costs an agency charges must be "reasonable" and may not exceed the actual costs of furnishing the records. *Id.* This limitation encourages the openness KORA was designed to promote and prevents government agencies from discouraging access to public records by charging fees. K.S.A. § 45-216 (the public policy of the state for public records to be open; KORA to be liberally construed to promote this policy). Addressing the federal counterpart to KORA, the Freedom of Information Act (FOIA), courts have observed that "[t]he legislative history indicates that the intent of the amendment [permitting fees] was so that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information"—precisely what happened here. Op. Att'y Gen. No. 87-4, 1987 Kan. AG LEXIS 191, *3-4 (citing *Long v. U.S. Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979)).

Again, although there are limited cases and administrative opinions interpreting KORA, "there have been numerous examples of excessive charges which are thought to be discouragement" of records requests, and therefore in violation of KORA. *See* Open Gov't Guide, Sect. I.D.5, available at https://www.rcfp.org/open-government-guide/kansas-2/#c-does-the-existence-of-information-in-electronic-format-affect-its-openness. According to the legislators that enacted KORA, the drafters included the reasonable fee provision to "try[] to keep the agencies from charging fees which were excessive, which in effect would close the records." 33 Kan. L. Rev. at 228, n. 168 (citing Interview with Rep. Neil Whitaker, Mar. 8, 1984).

The fee the Secretary imposed here is unreasonable because the Secretary did precisely what the reasonableness limitation on fees was designed to prevent—he created an unnecessary $522 fee and attempted to pass it along to Mr. Hammet *for the purpose* of discouraging access to the records. The Secretary previously responded to three KORA requests from Mr. Hammet for the provisional ballot detail report without charge. R. II, 4. The Secretary has never claimed that running the report cost anything before he destroyed his own access to the report, and there is no evidence of any fees associated with Mr. Hammet's initial requests. And while the Secretary may charge the actual cost of responding even if he had not charged Mr. Hammet before, the cost charged must be related to the request itself—not costs purposely incurred to discourage KORA requests.

Where, as here, the public official creates the undue burden intentionally, the public policy rationale behind KORA should preclude the imposition of that burden on the requesting party. The Secretary opposed providing the requested document, and when a court forced him to comply with a previous request for this document, the Secretary deliberately made access burdensome and expensive. R. II, 3-4. The costs associated with Mr. Hammet's request are thus the designed outcome of the Secretary's decision to end his access to provisional ballot detail reports. The costs ES&S would now charge to gather the underlying data for the Secretary's office—data that was formerly available for free, or without cost to Mr. Hammet—are of the Secretary's own making. But for the Secretary's deliberate actions, ES&S's involvement in complying with Mr. Hammet's request would be unnecessary. R. II, 3-4.

The Secretary deliberately ended his access to the provisional ballot detail reports. He litigated to avoid providing them and, days after his loss and Mr. Hammet's additional requests, purposely made it so that any response cost money. The Secretary thus imposed a fee for the purpose of discouraging KORA requests, and the fee is therefore unreasonable. Op. Att'y Gen. No. 87-4, 1987 Kan. AG LEXIS 191, *3-4.

CONCLUSION

The Secretary deliberately interfered with Mr. Hammet's KORA request. Knowing the request was on its way, the Secretary threw away the key to the records he did not want to produce. Then, in receipt of Mr. Hammet's formal request, the Secretary claimed responding was too burdensome because—due to his own intentional actions—he no longer had the key. The Secretary's gambit stands in stark contrast to the ideals and purpose animating KORA and should not be permitted.

The Kansas Open Records Act embodies a commitment to open and transparent government. It is a powerful tool for the public's access to the workings and intentions of its elected government. The Secretary purposely undermined those ideals and deliberately worked to close government activity rather than open it. Worse still, allowing the Secretary's actions to stand would only invite further manipulation of public documents whenever government actors sought to shield information which they would prefer kept private. Such a ruling would seriously undermine the explicit goals of KORA and the important ends the statute was intended to achieve.

For these reasons, Mr. Hammet respectfully requests that this Court vacate the District Court's judgment and either enter judgment in favor of Mr. Hammet or remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief of Appellant will be served on counsel for each party through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney. On February 22, 2022, a PDF copy was also served on counsel for Defendant-Appellee by electronic mail at the following address:

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Roe v. Phillips County Hosp.

Court of Appeals of Kansas

February 11, 2022, Opinion Filed

No. 122,810

Reporter
2022 Kan. App. Unpub. LEXIS 82 *; 2022 WL 414402

KELLY ROE, Appellee, v. PHILLIPS COUNTY HOSPITAL, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from Phillips District Court; PRESTON PRATT, judge.

Disposition: Reversed and remanded with directions.

Counsel: Russell J. Keller, Keynen J. Wall, and Quentin M. Templeton, of Forbes Law Group, LLC, of Overland Park, and John F. McClymont, of McClymont Law Office, PA, of Norton, for appellant.

Kelly Roe, appellee, Pro se.

Maxwell E. Kautsch, of Kautsch Law, L.L.C., of Lawrence, amici curiae Kansas Press Association, Inc., et al.

Judges: Before WARNER, P.J., BUSER and CLINE, JJ. CLINE, J., concurring.

Opinion by: BUSER

Opinion

MEMORANDUM OPINION

BUSER, J.: This is an interlocutory appeal by the Phillips County Hospital (Hospital) of the district court's granting of partial summary judgment in favor of Kelly Roe in her lawsuit brought under the *Kansas Open Records Act (KORA), K.S.A. 45-215 et seq.*

In her cause of action, Roe contends the Hospital violated KORA by failing to provide her with copies of public records in the exact format she specified—in this case, the native-based electronic format. The Hospital repeatedly offered Roe the opportunity to inspect or receive hard copies of the original electronic records. However, Roe asserted that KORA requires public agencies to produce copies of public records in the format requested. The district court agreed, ruling that "the public records [*2] must be provided in the format requested if the public agency has the capability of providing the records in that format." Concluding that the Hospital could provide the requested electronic records in their native-based electronic format, the district court granted partial summary judgment to Roe.

On a related issue, the Hospital also appeals the district court's ruling denying its motion to seal, to strike, and for sanctions because, it alleges, communications that Roe secretly recorded during the Hospital's executive session on November 16, 2017, are protected by the attorney-client privilege.

Upon our review, we conclude the district court erred as a matter of law in ruling that under KORA, public records must be provided in the format requested if the public agency has the capability of providing the records in that format. More specifically, we hold that KORA does not require a public agency to produce electronic public records in the format of the requester's choice—such as a native-based electronic format—if the agency has the capability of producing the record in that requested format.

Moreover, we hold the district court also erred as a matter of law in declining to seal and [*3] strike communications that were protected by the attorney-client privilege. Accordingly, we reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The Hospital is a public agency within the meaning of *K.S.A. 2020 Supp. 45-217(f)*. As a result, it is subject to KORA. Roe served as a trustee on the Hospital's Board of Trustees (Board) for about two years until she resigned on February 15, 2019.

Three days after her resignation, on February 18, 2019, Roe sent the Hospital a KORA request for records. Roe sent additional KORA requests to the Hospital on February 28, 2019; March 1, 2019; March 14, 2019; April 29, 2019; June 4, 2019; and July 8, 2019. These KORA requests sought the

production of the following public records available in their native-based electronic format or hard copies delivered by fax if not available in electronic format: Hospital documents, Board meeting minutes with accompanying handouts and packets, Excel and PowerPoint presentations and files, slides, newsletter, CEO reports of purchases and employment evaluation, and documents regarding a CT scanner and ultrasound machine. The requested materials were mostly related to at least seven different Board meetings.

On February 20, 2019, **[*4]** the Hospital answered Roe's first KORA request, stating that it would not provide Roe with electronic records because "[n]either the Kansas Open Records Act nor the [Hospital's Open Records] Policy allow for native-based electronic production or the faxing of documents, as you requested." The Hospital attached a copy of its Open Records Policy. This policy did not explicitly exclude native-based electronic copies, but it expressly stated that requested documents would be provided by photocopies or access/inspection of the records. In its letter, the Hospital stated: "Please let us know if you want copies of the requested records or want to view the records at the Hospital." The Hospital also asked Roe if she wanted an estimate of the fees associated with the document production. Consistent with KORA, the Hospital's policy required requestors to prepay the costs associated with KORA requests.

In subsequent refusal letters responding to Roe's additional requests, the Hospital referred to its policy and noted that it did not allow for native-based electronic production or the faxing of documents. In response to Roe's fifth and sixth requests for native-based electronic documents, the Hospital **[*5]** stated that Roe was "well aware of [the] policy." In a letter dated May 28, 2019, the Hospital's attorney advised that, contrary to Roe's request, the hospital would not provide her with a computer terminal to inspect computer files, but it would provide hardcopy documents for her inspection.

Roe noted that her requests for electronic copies were denied even though it is undisputed that the Hospital regularly uses computer programs to create electronic files, the Hospital regularly sends emails to the members of its Board containing electronic files, the Hospital regularly shows PowerPoint presentations and Excel spreadsheets at its open Board meetings, and individual cells in Excel spreadsheets may contain formulas or references to other spreadsheets or records.

Beginning on February 21, 2019, Roe filed numerous complaints with the Kansas Attorney General regarding the Hospital's refusal to provide her with the requested records in their original, native-based electronic format. On May 29, 2019, before the Attorney General had responded to any of her complaints, Roe filed a lawsuit in the district court to enforce her right to receive the records as requested under KORA. Roe filed an **[*6]** amended petition on June 17, 2019.

On September 26, 2019, after investigating Roe's complaints against the Hospital, the Attorney General concluded that "KORA contains no language requiring records be provided in their native format. A public agency retains the discretion to determine the format in which the records are produced."

Roe and the Hospital filed competing motions for summary judgment. Roe's motion was filed on December 2, 2019. In her motion, Roe claimed summary judgment was appropriate because KORA requires that all public records be disclosed to a requestor in the format requested if the public agency is capable of producing the records in that format. On January 2, 2020, the Hospital filed its motion for summary judgment, arguing that the Hospital did not violate KORA because KORA did not entitle Roe to native-based electronic copies of public records.

In her reply in support of summary judgment, Roe filed a transcript of a recording that she claimed she had made on November 16, 2017, during an executive session of the Hospital's Board meeting. In response, John McClymont, one of the Hospital's attorneys, sent a letter to the district court asking that Roe's reply be sealed **[*7]** and stricken because it contained a transcript from an executive session—which was closed for privileged attorney-client consultation under *K.S.A. 75-4319(b)(2)*—and the disclosure of the contents of that meeting violated the attorney-client privilege.

The district court temporarily sealed the document for 14 days to allow the Hospital to file a motion under *K.S.A. 2020 Supp. 60-2617*, that gives the court discretion to seal court records after a hearing and a finding of good cause. Within the time allotted, the Hospital filed a motion to seal, to strike, and for sanctions under *K.S.A. 2020 Supp. 60-2617*. In response, Roe argued that the attorney-client privilege either did not apply or had been waived. The Hospital filed a reply, reprising its earlier arguments, and asking the district court to impose sanctions "to discourage Roe from further abusing her rights within the judiciary."

On April 7, 2020, the district court granted Roe's motion for summary judgment in part and denied the Hospital's competing motion for summary judgment. The court summarized the central issue in this case by using an analogy:

> "This is a case in which Roe requested to buy an apple, but Hospital responded it will sell her an orange if she first pays for the orange. Roe's petition **[*8]** is based on alleged KORA violations because she requested copies

> of public records in their native-based electronic format (the apple), but Hospital refused to provide electronic copies and insisted that only hard copies (the orange) be provided by printing the records and the standard photocopy charges being paid."

The district court concluded that "the public records must be provided in the format requested if the public agency has the capability of providing the records in that format." The district court granted partial summary judgment to Roe, finding that the Hospital "is capable of providing the records in electronic format . . . ." In entering the order, the district court acknowledged: "While true that KORA does not specifically say copies must be produced in electronic format, that is implied."

In addition, the district court also denied the Hospital's request to seal or to strike the disclosed transcript from the record as well as its request for sanctions. The district court ruled that the attorney-client privilege did not apply to the November 16, 2017, executive session because a third party was present during the session which meant the privilege did not apply. Additionally, **[*9]** the district court ruled the Hospital waived the attorney-client privilege regarding communications made during the executive session wherein a *Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq.* investigation was discussed.

In both rulings—the motion granting Roe partial summary judgment and the motion denying the motion to seal, to strike, and order sanctions—the district court provided findings to allow the parties to file an interlocutory appeal from its rulings and staying the matter pending appeal. The Hospital filed a notice of appeal from both rulings under *K.S.A. 2020 Supp. 60-2102(c)*. Our court granted the interlocutory appeal on May 15, 2020.

DOES KORA REQUIRE A PUBLIC AGENCY TO PRODUCE ELECTRONIC PUBLIC RECORDS IN THE FORMAT OF THE REQUESTER'S CHOICE—SUCH AS A NATIVE-BASED ELECTRONIC FORMAT—IF THE AGENCY HAS THE CAPABILITY OF PRODUCING THE RECORD IN THAT FORMAT?

On appeal, the Hospital contends the district court erred in granting Roe's motion for summary judgment in part and ruling that KORA requires the Hospital to provide the electronic public records to Roe in the format she requested. The Hospital argues that the plain language of *K.S.A. 2020 Supp. 45-219*—read together and in harmony with related provisions of KORA—unequivocally shows that KORA does not require production **[*10]** of public records in native-based electronic format or the specific format requested by the party making the request.

Our court's standard of review on summary judgment provides:

> "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.'" *Patterson v. Cowley County, Kansas, 307 Kan. 616, 621, 413 P.3d 432 (2018)*.

When parties have not provided any disputed facts relevant to the legal issue raised, an appellate court's review of an order granting or denying **[*11]** a motion for summary judgment is unlimited. *Becker v. The Bar Plan Mutual Insurance Company, 308 Kan. 1307, 1311-12, 429 P.3d 212 (2018)*. In this appeal, the parties have not disputed any of the facts that the other party asserts is uncontroverted as to the issue raised regarding the interpretation of KORA, so the facts are deemed admitted.

The Hospital, a public agency within the meaning of KORA, refused to produce copies or allow inspection by Roe of native-based electronic records it made, maintained, kept, or held in its possession at the time of her request, and in the manner in which she requested production. However, the Hospital advised that it would allow hard copies of the files to be inspected or provide hard copies to Roe. The Hospital does not contend that the requested electronic records are subject to any statutory exemption, nor does it claim the records do not exist (other than the McClymont report discussed later), or that it could not produce the computer files in their original native-based electronic format.

Resolving this issue calls for the statutory interpretation of certain provisions of KORA. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Nauheim v. City of Topeka, 309 Kan. 145, 149, 432 P.3d 647 (2019)*. The most fundamental rule of statutory construction is **[*12]** that the intent of the Legislature governs

if that intent can be ascertained. State ex rel. Schmidt v. City of Wichita, 303 Kan. 650, 659, 367 P.3d 282 (2016). This court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Nauheim, 309 Kan. at 149. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. Ullery v. Othick, 304 Kan. 405, 409, 372 P.3d 1135 (2016). Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. Nauheim, 309 Kan. at 149-50.

Of particular relevance to this appeal, even if "the court believes that the legislature has omitted a vital provision in a statute," the remedy lies solely with the Legislature unless the omitted provision can be found under any reasonable interpretation of the language actually used. Bussman v. Safeco Insurance Co. of America, 298 Kan. 700, 725, 317 P.3d 70 (2014); see State v. Prine, 297 Kan. 460, 475, 303 P.3d 662 (2013) ("No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one that the legislature **[*13]** alone can correct.").

Having briefly surveyed our general rules of statutory interpretation, we next summarize the relevant Kansas law relating to KORA. The records kept by a county hospital are public records as defined by KORA, K.S.A. 45-215 et seq., and, therefore, are subject to the provisions of KORA, including the provision of K.S.A. 2020 Supp. 45-221. Public record means any recorded information, regardless of form, characteristics, or location, which is made, maintained, kept, or possessed by any public agency. K.S.A. 2020 Supp. 45-217(g)(1)(A). All public records shall be open for inspection by any person under K.S.A. 45-218(a), and any person may make abstracts or obtain copies of any public record to which such person has access. K.S.A. 2020 Supp. 45-219(a). KORA provides limited specific exceptions to disclosure which are subject to the declared public policy of Kansas that public records shall be open for inspection by any person unless otherwise provided by KORA and shall be liberally construed and applied to promote such policy. Hunter Health Clinic v. WSU, 52 Kan. App. 2d 1, 11, 362 P.3d 10 (2015) (KORA must promote the public policy of openness). KORA shall be liberally construed to promote the public policy that public records should be open for inspection. K.S.A. 45-216.

We begin the analysis with a simple question: Does KORA's plain statutory language require a public **[*14]** agency to produce electronic public records in the format of the requester's choice—such as a native-based electronic format—if the agency has the capability of producing the records in that requested format?

The Hospital focuses its argument on the fact that KORA does not explicitly provide any such statutory mandate: "Nowhere in this plain language does the legislature impose the burden on the public agency to accommodate requests for copies in specific formats or otherwise empower a person to compel reproduction in native-based electronic format."

For her part, at oral arguments, Roe candidly conceded that "that specific language" is not found in KORA. As she contended in her brief, however, Roe argued that a liberal construction of KORA implied such a requirement.

In its order, the district court answered the question this way: "*While true that KORA does not specifically say copies must be produced in electronic format*, that is *implied*." (Emphases added.) Later in its order the district court again candidly acknowledged: "Even though the Court has determined under Count 1 that Hospital must provide Roe with electronic copies, *that is not clearly stated within KORA*." (Emphasis added.) **[*15]** In essence, the district court adopted Roe's reasoning that the omission of explicit language is not determinative since KORA's provisions should be liberally construed to promote the policy of open records. See K.S.A. 45-216.

Our independent review of KORA's provisions reveals there is no plain statutory language which requires a public agency to produce electronic public records in the format of the requester's choice—such as a native-based electronic format—if the agency has the capability of producing the records in that format.

In this regard, it should be noted that KORA includes two limitations to accessing and copying electronic records. The first is found in K.S.A. 2020 Supp. 45-219(g), added as an amendment in 2010, which limits the means by which the public may receive electronic copies:

> "Nothing in the open records act shall require a public agency to electronically make copies of public records by allowing a person to obtain copies of a public record by inserting, connecting or otherwise attaching an electronic device provided by such person to the computer or other electronic device of the public agency."

The second reference to electronic records in KORA is in K.S.A. 2020 Supp. 45-221(a)(16), which, exempts from disclosure "[s]oftware programs **[*16]** for electronic data

processing and documentation thereof," with the caveat that "each public agency shall maintain a register, open to the public," that describes "[t]he information which the agency maintains on computer facilities" and "the form in which the information can be made available using existing computer programs." K.S.A. 2020 Supp. 45-221(a)(16)(A)-(B).

A plain reading of KORA, K.S.A. 2020 Supp. 45-221(a)(16) and K.S.A. 2020 Supp. 45-219(e), shows that while an agency may produce electronic records in response to an open records request, there is no *mandatory* language requiring a public agency to provide copies of electronic documents in their native-based electronic formats upon request.

It is a central tenet of statutory construction that when a statute is plain and unambiguous, an appellate court should refrain from reading something into the statute that is not readily found in its words. Ullery, 304 Kan. at 409. A court does not read into the statute words that are not found in the plain language of the statute. Estate of Graber v. Dillon Companies, 309 Kan. 509, 516, 439 P.3d 291 (2019). "'An appellate court merely interprets the language as it appears; it is not free to speculate and *cannot read into the statute language not readily found there.*'" (Emphasis added.) Harsay v. University of Kansas, 308 Kan. 1371, 1381, 430 P.3d 30 (2018). "A court presumes the Legislature expressed its intent through the statutory language used." **[*17]** Estate of Graber, 309 Kan. at 516-17. As a result, *an appellate court's role is not to "delete provisions or supply omissions in a statute."* (Emphasis added.) Prine, 297 Kan. at 475.

In response to the district court's ruling that while no express statutory language requires disclosure in a particular requested format it is implied by KORA's liberal construction, the Hospital points out that the district court's interpretation goes beyond liberal construction. We agree. See Barnes v. Board of Cowley County Comm'rs, 47 Kan. App. 2d 353, 361, 274 P.3d 697 (2012) ("Although the legislature intended the Act to be liberally construed, when a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.").

As an appellate court we are duty bound to apply the law as the Legislature enacted it, which is as expressed in the plain and ordinary statutory language. Upon our review, we find an absence of language that expresses the Legislature's intent under KORA to require public agencies to provide copies of electronic public records in their native, electronic format upon request. As a court, we will not add a requirement to KORA's inspection and copying provisions that the Legislature did not include in the plain language **[*18]** of the act.

To be clear, under KORA's plain language, a public agency's electronic records, unless specifically exempted under KORA, constitute public records that are subject to inspection and, if requested, copies provided to the requester. See K.S.A. 2020 Supp. 45-219(a); K.S.A. 45-218(a); and K.S.A. 2020 Supp. 45-217(g)(1)(A). While the Hospital declined to provide electronic records in their native, electronic format, it contends their offer to produce hard copies of those electronic records fulfilled the disclosure requirements under KORA. While Roe asserts that KORA mandates that the Hospital provide computerized records in their electronic format, the Hospital insists that "[t]he plain meaning of K.S.A. 45-219(a) confirms that a public agency need only provide a substantively accurate reproduction of the original to the requesting party, regardless of the form or format, to satisfy its obligation under KORA to provide 'copies' upon request." In this regard, the district court found as an uncontroverted fact that the "Hospital offered to provide hard copies or allow Roe to view the records at the hospital."

Under KORA, a public agency's obligation is to provide "copies" of a public record, if requested. K.S.A. 2020 Supp. 45-219(a), K.S.A. 2020 Supp. 45-217(g)(1). The Hospital asserts that the plain and ordinary meaning of **[*19]** the word "copies" evidences the Legislature's clear intent. It contends that KORA permits a party to obtain reproductions of the original record, but nowhere in this plain language of the Act does the Legislature impose the burden on the public agency to accommodate requests for copies in specific formats or otherwise compel reproduction in a native-based electronic format.

What is meant by the term "copies"? Our Supreme Court has instructed that when a statute does not define a term, "[d]ictionary definitions are good sources for the 'ordinary, contemporary, common' meanings of words." Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n, 306 Kan. 845, 851, 397 P.3d 1205 (2017). In Midwest Crane & Rigging, LLC, our Supreme Court relied on Black's Law Dictionary and the Merriam-Webster Dictionary to define a statutory term.

Applying dictionary definitions to this case, Black's Law Dictionary defines "copy" as "[a]n imitation or reproduction of an original." Black's Law Dictionary 423 (11th ed. 2019). Similarly, the Webster's dictionary defines a "copy" as "a thing made just like another; imitation of an original; full reproduction or transcription." Webster's New World College Dictionary 328 (5th ed. 2014). It is apparent that the common usage and plain meaning of the term "copies" allows for reproductions **[*20]** which may involve numerous formats or mediums. Employing these dictionary definitions, we are persuaded that, provided the public agency delivers an

accurate reproduction of the original electronic records to the requester, KORA's requirement that a copy of the public record must be provided is satisfied.

While the Hospital maintains the plain language of K.S.A. 2020 Supp. 45-219(a) which provides that a person "may make abstracts or obtain copies of any public record to which such person has access under this act" is dispositive, it also argues that other provisions of KORA and related legislation, considered together, shows that "the legislature intended the public agency retain discretion over the method or manner by which it responds to requests to inspect or copy public records, unless otherwise *expressly* limited."

KORA grants the public the important right to inspect public records. K.S.A. 45-216. In Wichita Eagle and Beacon Publishing Co., Inc. v. Simmons, 274 Kan. 194, Syl. ¶ 4, 50 P.3d 66 (2002), our Supreme Court held that under KORA, "any nonexempt document, computer file, or tape recording in the possession of a public agency is subject to public disclosure under KORA." However, there is no explicit statutory requirement regarding the form such disclosure must take. Under KORA, the time, place, and manner of **[*21]** inspection are matters largely left to the discretion of the public agency. The Legislature simply requires the public agency to make "suitable facilities . . . available" for this purpose. K.S.A. 45-218(a). The time for inspection is tied to the public agency's regular business hours and "any additional hours established by the public agency." K.S.A. 45-218(b). In addition, the public agency has the discretion to "charge and require advance payment of a fee for providing access" to inspect the public records. K.S.A. 45-218(f). And the public agency retains its discretion to refuse requests that place an unreasonable burden on the agency or are intended to disrupt its essential functions. K.S.A. 45-218(e).

On the other hand, when the Legislature intended to restrict the time, place, or manner of inspection under KORA, it did so explicitly. For example, the public agency is required to act on requests for inspection within three business days or provide a written explanation for the delay. K.S.A. 45-218(d). Another example is that when a request for inspection is not directed to the official custodian of records, the public agency is required to inform the requestor and provide contact information for the custodian. K.S.A. 45-218(c). The Legislature limits reasonable charges for **[*22]** various public agencies, as set forth in K.S.A. 2020 Supp. 45-219(c)(1)-(5). And the Legislature has directed public agencies to remit such payments to appropriate funds. K.S.A. 2020 Supp. 45-219(d)-(e).

The provisions of KORA also balance the public's right to request copies of public records with the agency's autonomy, control, and discretion throughout the copying process. For example, copies of public records "shall be made while the records are in the possession, custody and control of the custodian or a person designated by the custodian." K.S.A. 2020 Supp. 45-219(b). Additionally, when practical the copies must "be made in the place where the records are kept" by the agency. K.S.A. 2020 Supp. 45-219(b). If the agency deems it necessary to use other facilities to complete the reproduction process, the person requesting the record is obligated to pay the vendor the associated copying costs, and the public agency may charge a "fee for the services rendered in supervising the copying" and establish the "schedule of times for making copies at other facilities." K.S.A. 2020 Supp. 45-219(b).

Another example of agency discretion in KORA relates to KORA's requirement that every public agency "designate a local freedom of information officer." K.S.A. 45-226(a). The Legislature does not specify qualifications for this position and defers to the public **[*23]** agency for such matters. K.S.A. 45-226. While the responsibilities of the public information officer are generally outlined in the statute, the officer is empowered to develop educational materials and information regarding the open records act and create a brochure outlining the agency's KORA procedures. K.S.A. 45-226(b)(1), (4). Relevant to this appeal, the brochure must set forth "the procedures for inspecting and obtaining a copy of public records." K.S.A. 45-226(b)(4). The provisions relating to the freedom of information officer demonstrate the Legislature's intent to delegate to public agencies the authority to control the time, place, and manner of copying, unless expressly declared to the contrary. Consistent with KORA's other provisions, nothing in K.S.A. 45-226 limits the officer's discretion in determining the form or format in which copies of records will be provided.

Considered together, these statutes make clear that under KORA the Legislature did not authorize the requestor to have control over the original records or copying process but afforded the responsibility of determining the manner and method of reproduction to the public agency. And in the limited circumstances wherein the Legislature imposed limitations upon an agency's discretion, **[*24]** it did so explicitly and not by implication.

The Hospital also points out that, unlike Kansas, in more recent years, other jurisdictions have enacted explicit production format requirements into their open records act legislation. For example, in the Freedom of Information Act, Congress provided that "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B) (2018). The Kentucky Legislature

added a similar requirement. See Ky. Rev. Stat. Ann. § 61.874(2)(a) (providing that records "shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format"). See Neb. Rev. Stat. § 84-712(3)(a) (open records act provides that records "may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to . . . electronic data . . . ."); Vt. Stat. Ann. tit. 1, § 316(i) ("If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by the party requesting the records."). **[*25]**

Notably, the provisions expressly providing for the disclosure of documents in electronic form were added after Kansas first adopted KORA. For example, 5 U.S.C. § 552(a)(3)(B) did not become law until 1996 when it was added to the Freedom of Information Act as part of the Electronic Freedom of Information Act Amendments of 1996 (*Pub. L. No. 104-231, sec. 5, § 522(a)(3), 10 Stat. 3048, 3050 [1996]*). Similarly, the Kentucky Legislature did not enact Ky. Rev. Stat. § 61.874(2)(a) into law until 1994 (1994 Ky. Acts, ch. 262, sec. 4).

Clearly, in more recent times, some jurisdictions with open records laws have added the one-sentence disclosure requirement that Roe is seeking in this case. Yet, although KORA has been amended numerous times since its original enactment, and our Legislature presumably is aware of these updated statutory provisions, the Legislature has not amended KORA to add a similar requirement. See State v. Bee, 288 Kan. 733, 738, 207 P.3d 244 (2009) (An appellate court presumes that the Legislature acts with full knowledge and information about the statutory subject matter, prior and existing law, and the judicial decisions interpreting the prior and existing law and legislation.).

In support of her legal position, Roe cites to several Kansas attorney general opinions issued from 1988 through 2009 wherein the attorney general interpreted KORA to require production of certain computerized records in their native format. **[*26]** In its order granting partial summary judgment, the district court noted these opinions and concluded: "Previous attorney general opinions have determined that KORA requires, *by implication*, providing records that are kept or created upon computers in their electronic format." (Emphasis added.) We acknowledge that some prior attorney general opinions issued from 1988 through 2009 did, under various factual circumstances and related to specific computerized documents, state that KORA impliedly requires disclosure of electronic public records when requested in an electronic format.

On the other hand, the district court did not rely on or discuss the most recent attorney general's opinion issued on September 26, 2019. This 10-page opinion was filed in direct response to Roe's KORA complaints and pertains to the same public records at issue in this litigation. Regarding Roe's repeated complaints that the Hospital failed to provide native-based electronic production of open records, the attorney general relied on the plain language of KORA and found: "KORA contains no language requiring records be provided in their native format. A public agency retains the discretion to determine the format **[*27]** in which the records are produced." The attorney general concluded: "In order to find a violation, we must conclude by a preponderance of the evidence that a public agency knowingly violated the KORA. For the reasons described above, we conclude that the [H]ospital did not knowingly or intentionally violate the KORA."

In this latest opinion, the attorney general considered the past opinions of the attorney general's office but concluded that the Hospital's responses to Roe's request in this case did not violate the provisions of KORA. During oral arguments, Roe stated she was not able to reconcile the older attorney general opinions with the latest one, except to say the September 26, 2019, opinion in response to her complaints was "unsubstantiated." For its part, the Hospital argues that the latest opinion directly related to the public records at issue in this litigation is more relevant than opinions issued by the attorney general 10 to 30 years ago.

Appellate courts are not bound by the conclusions of attorney general opinions, but they may provide persuasive authority. Data Tree, LLC v. Meek, 279 Kan. 445, 455, 109 P.3d 1226 (2005). Like Roe, we have difficulty reconciling the contradictory opinions issued by the attorneys general over the **[*28]** years, and for that reason we do not place much weight on their conclusions. If there is a common thread in the opinions, however, it is that when the attorney general found that KORA required disclosure of public records in the format requested, this right was usually described as "implied." See Att'y Gen. Op. No. 89-106, 1989 WL 455546, at *4 (indicating that "[b]y implication," the statute requires the production of information in the format requested); Att'y Gen Op. No. 2009-14, 2009 WL 1999673, at *2 (same).

The September 26, 2019 opinion, however, dispenses with statutory construction to discern an implied right, and employs a plain reading of the statute to conclude that no such language requiring a public agency to provide public records in a native format is found in KORA. As discussed earlier, we

find this is the proper approach to understanding the meaning of KORA's provisions. See *Fort Hays State University, v. Fort Hays University Chapter, American Assoc. of University Professors, 290 Kan. 446, 464-65, 228 P.3d 403 (2010)*; *Bussman, 298 Kan. at 725* ("It is not [the court's] place to add a provision to [the statute]" that is unavailable under its plain language.).

All things considered, we hold the district court erred as a matter of law in granting partial summary judgment to Roe. This is because KORA does not require a public agency to produce electronic public records in the format of the requester's choice—such **[*29]** as a native-based electronic format—if the agency has the capability of producing the record in that requested format. Accordingly, the judgment is reversed, and the case is remanded for further proceedings with directions.

We pause to address the subject of metadata and formulas that may be contained within the electronic records subject to disclosure under KORA. In its order, the district court mentioned the characteristics of some of the Hospital's electronic records. For example, it is uncontroverted that the Hospital uses computer programs such as Microsoft Word, PowerPoint, Adobe Acrobat.pdfs, and Excel spreadsheets to create electronic files. The district court noted that "individual cells in the Excel spreadsheets Hospital creates may include formulas."

During oral argument, the Hospital's attorney discounted the importance of formulas and metadata stating, "Even if metadata is part of a record there's really no allegation that the things that are hidden—formulas in an excel spreadsheet—are relevant to any request that's been made by Ms. Roe in this matter." The Hospital also cautions that production of metadata could result in discovery of notes and preliminary drafts that, **[*30]** in some circumstances, are exempt from KORA. See *K.S.A. 2020 Supp. 45-221(a)(20)*.

For her part, Roe stated that she did not specifically request metadata but "metadata doesn't contain the separate previous drafts or copies or whatnot. If I saw in the metadata that there had been a previous draft I would have to request that separate draft." Both attorneys agreed that no expert testimony was presented in this case regarding the production of different computer formats or metadata.

In short, the state of our record and argument in this regard is less than ideal. As a result, we decline to weigh in and decide this specific matter, especially since the focus of the briefing was on the overarching question of whether KORA requires production in native format. On remand, the parties may brief and submit arguments to the district court regarding the production of hard copies relating to metadata and formulas contained in the Hospital's electronic public records subject to disclosure under KORA.

DID THE DISTRICT COURT ERR BY DENYING THE HOSPITAL'S MOTION TO SEAL AND STRIKE ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS?

For its second issue on appeal, the Hospital contends the district court erred in denying the Hospital's motion **[*31]** to seal Roe's reply in support of her motion for summary judgment, to strike the offending portions of documents in support, and for sanctions, "because the communications during Hospital's executive session that Ms. Roe surreptitiously recorded are protected by attorney client privilege." Roe counters that the district court properly determined that the executive session was not subject to the attorney-client privilege and, if any privilege applied, the Hospital waived that privilege.

As part of her open records request, Roe sought disclosure of an investigative report she claimed McClymont provided to the Board in an executive session on November 16, 2017. Roe asserted this report gave legal advice to the Hospital regarding a potential violation of KOMA. On August 16, 2019, Roe petitioned the district court to enforce her right to receive the report. To support her motion for summary judgment regarding her right to receive the report, Roe submitted her own affidavit wherein she stated that she believed the report was prepared by McClymont regarding his investigation of the KOMA matter.

The Hospital's response controverted Roe's allegations. In particular, the Hospital stated that McClymont **[*32]** had not finalized his report at the time of the executive session, and the report subsequently was not finalized because the Hospital received advice from the attorney general's office that it was not necessary to self-report because there was no KOMA violation. In support of its claims, the Hospital submitted affidavits from the Board Chairman Stanley Kats and the Hospital's Chief Executive Officer Rex Walk, stating that the report was not provided to any Board member at the November 16, 2017, executive session.

In her reply to the Hospital's response, Roe included a certified transcript of an audio recording of the executive session, which she stated she had secretly recorded. According to Roe, the recording supported her claim that the McClymont report existed and that during the meeting, McClymont handed the investigative report to Kats.

In response, McClymont sent a letter to the district court asking that Roe's reply be sealed and the transcript references be stricken because any communications that occurred during

the executive session—which was closed for privileged attorney-client consultation under K.S.A. 75-4319(b)(2)—and the disclosure of the contents of that meeting violated the attorney-client **[*33]** privilege. The district court temporarily sealed the document for 14 days pursuant to K.S.A. 2020 Supp. 60-2617. The Hospital filed a timely motion under K.S.A. 2020 Supp. 60-2617 and both parties presented their arguments.

Relevant to this issue, Les Lacy, the vice president of regional operations for the management company Great Plains Health Alliance, Inc., a third-party contractor, was present during the November 16, 2017, executive session. The Hospital acknowledged that Lacy was present during the executive session because he was responsible for managing the Hospital's operations.

The district court denied the Hospital's request to seal or to strike the disclosed transcript from the record as well as its request for sanctions. The district court found that "because Lacy did not give information to the lawyers nor could he take action on the advice given by the lawyers, he was a third party and the communications made between Hospital and its attorneys in the executive session on 11/16/2017 regarding the alleged KOMA violation were not confidential and therefore not privileged." In addition, the district court ruled that the Hospital waived its attorney-client privilege with McClymont regarding the KOMA investigation.

In the district **[*34]** court's ruling, it found that "there remains a factual dispute about whether or not McClymont handed a written report to the Hospital's board chairman. That dispute of fact will need to be determined at trial, but the evidence which can be presented at trial depends upon the Court's proper application of the attorney-client privilege."

As a preliminary matter, Roe contends the Hospital did not appeal this ruling and, as a result, the issue is abandoned. The notice of appeal, however, explicitly covers the ruling by the district court on the Hospital's motion. Roe's claim that this issue has been waived or abandoned lacks merit. We will address the issue.

Roe also claims the Hospital did not argue on appeal that sanctions should have been imposed, other than noting the district court could reconsider sanctions on remand. We agree this issue is not appropriate for our review. We will not review the district court's ruling denying sanctions. See Russell v. May, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (A point raised incidentally in a brief and not argued therein is deemed abandoned.).

Our standard of review provides: "When the underlying facts are undisputed, a ruling on the existence and effect of an attorney-client privilege is reviewable **[*35]** by an appellate court de novo." Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 639, 264 P.3d 500 (2011) (citing State v. Jones, 287 Kan. 547, 554, 198 P.3d 756 (2008)).

In denying the Hospital's motion, the district court reasoned that the Hospital waived the attorney-client privilege due to Lacy's presence. The district court found that a waiver arises if a corporate representative (1) provides no information to counsel in connection with a communication; or (2) lacks authority to unilaterally implement counsel's advice. The Hospital asserts this decision "would radically restrict the attorney-client privilege, discarding statutory authority and putting the State of Kansas out of step with other jurisdictions." As a second reason to deny the motion, the district court also found the Hospital expressly waived its attorney-client privilege during the November 16, 2017, executive session.

We begin the analysis with a brief review of Kansas law relating to attorney-client privileged communications. K.S.A. 2020 Supp. 60-426(a) provides that "communications found by the judge to have been between an attorney and such attorney's client in the course of that relationship and in professional confidence, are privileged . . . ." See State v. Gonzalez, 290 Kan. 747, 234 P.3d 1 (2010). The Legislature has defined "communication" to include "advice given by the attorney in the course of representing **[*36]** the client." K.S.A. 2020 Supp. 60-426(c)(2). See Cypress Media, Inc. v. City of Overland Park, 268 Kan. 407, 419-20, 997 P.2d 681 (2000) (recognizing that K.S.A. 2020 Supp. 60-426(c) includes communications from lawyer to client); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1371 (10th Cir. 1997) (Kansas courts favor a broad approach to protecting attorney-client communications "without the qualification that the communications must contain confidential matters revealed by the client earlier to the attorney."). "It is well settled that corporations may assert the attorney-client privilege." Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 196 (D. Kan. 1993) (citing Upjohn Co. v. United States, 449 U.S. 383, 389-90, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). Importantly, the Kansas Supreme Court has admonished that "[t]he privilege should not be set aside lightly." Wallace, Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co., Inc., 250 Kan. 54, 63, 824 P.2d 933 (1992).

Our Supreme Court has held that the attorney-client privilege applies if all eight of the following factors are present:

> "'(1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) communications made in the course of that relationship (4) made in

> confidence (5) by the client (6) are permanently protected (7) from disclosures by the client, the legal advisor, or any other witness (8) unless the privilege is waived.'" *Cypress Media, Inc., 268 Kan. at 418*.

The Hospital has the burden to show the privilege applies. *268 Kan. at 425*; see *State ex rel. Stovall v. Meneley, 271 Kan. 355, 374, 22 P.3d 124 (2001)* (party asserting the privilege bears the burden of proof).

Relevant to this appeal, the attorney-client privilege does not apply to communications made in the presence **[*37]** of third parties. See *Fischer v. Mr. Harold's Hair Lab, Inc., 215 Kan. 515, 519, 527 P.2d 1026 (1974)*. Relying on this authority, the district court determined the attorney-client privilege was waived by Lacy's presence in the executive session. Lacy is an employee of the Hospital's management team and serves as an agent of the Hospital under a management agreement. The district court found that Lacy should be treated as an employee in this case, and that in the corporate context, an employee may have relevant information needed by corporate counsel if counsel is to adequately advise the client. See *Upjohn, 449 U.S. at 391*. The court reasoned that Lacy's presence at the executive session constituted a waiver of attorney-client privilege because "Lacy provided no information to Hospital's attorneys regarding the alleged KOMA violation, nor did Lacy have the ability to act on the advice of Hospital's attorneys regarding the alleged KOMA violation."

The Hospital disputes the finding that Lacy was a third party, noting that it had a management agreement with Lacy. When a county hospital enters into a management agreement "to carry out the regular management of the county hospital, the managing entity serves as an instrumentality of the county government." *State v. Great Plains of Kiowa County, Inc., 308 Kan. 950, Syl. ¶ 1, 425 P.3d 290 (2018)*; see *K.S.A. 19-4611(d)*. It is undisputed that Lacy **[*38]** was the vice president of regional operations for the company hired to manage the Hospital's operations, and as such, he was acting as an instrumentality of the county during the executive session.

In support of her legal position, Roe relies on *In re Bieter Co., 16 F.3d 929, 937-38 (8th Cir. 1994)*, contending that the presence of a third party waived the attorney-client privilege. However, *Bieter* does not support Roe's position. In *Bieter*, the Eighth Circuit granted the writ of mandamus and held that the attorney-client privilege applies to communications between corporate counsel and outside consultants, finding that "it is inappropriate to distinguish" between employees and independent consultants when applying the attorney-client privilege. *16 F.3d at 937*. See *In re Copper Market Antitrust Litigation, 200 F.R.D. 213, 220 (S.D.N.Y. 2001)* (finding third-party disclosure analysis "inapposite" regarding outside consultants because they are functional equivalents of employees for purposes of the attorney-client privilege).

Moreover, Kansas law does not require that Lacy provide information to the Hospital's attorneys for the privilege to attach. The district court found it significant that Lacy did not provide information to the lawyers, nor could he take any action on the advice given to the lawyers. But Lacy was part of the Hospital's **[*39]** management group, and the privilege also applies when receiving advice from counsel. *K.S.A. 2020 Supp. 60-426(c)(2)* ("'Communication' includes advice given by the attorney in the course of representing the client . . . ."); see *Natta v. Hogan, 392 F.2d 686, 693 (10th Cir.1968)* ("The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client."). In other words, the fact that Lacy did not provide information to the Hospital's lawyers in the executive session is immaterial. The fact remains that Lacy, in his capacity as manager of the Hospital's operations, received legal counsel from the Hospital's lawyers.

Regarding the district court's finding that Lacy did not "have the ability to act on the advice of the Hospital's attorneys regarding the alleged KOMA violation," we find no factual support in the record for this assertion. On the contrary, the record shows that Lacy was one of the Hospital's authorized representatives with managerial responsibility.

In summary, *K.S.A. 2020 Supp. 60-426(c)(1)* provides that a client's "authorized representative" is included within the scope of the attorney-client privilege. Lacy served as the Hospital's managing agent. Given this managerial authority and responsibility, **[*40]** it was appropriate for Lacy to be privy to the legal opinion and strategy developed through the attorney-client communications during the executive session. Although the district court reasoned that the privilege may not extend beyond the Hospital's attorneys and the Board, we disagree. No Kansas law recognizes such a bright-line test, which could even prohibit the attorney-client privilege from attaching to otherwise confidential communications between counsel and the Hospital's chief executive officer. Moreover, this understanding is contrary to *K.S.A. 19-4611*, which confirms there is no legal distinction between the Hospital and its Board of Trustees. *K.S.A. 19-4611(g)*. We conclude the district court erred in finding that Lacy's presence in the executive session constituted a waiver of the attorney-client privilege.

The district court's second reason for denying the Hospital's motion is that the Hospital expressly and impliedly waived

privilege as to any communications made during the executive session. Roe claims the privilege was waived both through a general motion authorizing the disclosure of McClymont's advice and a specific motion authorizing the disclosure of McClymont's findings to the attorney general. **[*41]** The Hospital counters that it never waived its attorney-client privilege as to communications made during the executive session.

The November 16, 2017, executive session was attended by three separate attorneys from two law firms (McClymont Law Office, P.A. and Forbes Law Group, LLC). During the executive session, the Hospital authorized attorney Frankie Forbes to disclose McClymont's KOMA findings to the attorney general. Based on this authorization, the district court ruled that any communication between McClymont and the Hospital was waived.

Our review of the record on appeal, however, shows the Board's purpose during the executive session was to only waive the attorney-client privilege as to McClymont's findings regarding his KOMA investigation in order to inform the attorney general's office of this matter. We discern no intent to generally waive the attorney-client privilege as to the communications and contents of the Board's executive session to any person. The record shows the Hospital provided Forbes with limited authorization to disclose McClymont's investigative findings to the attorney general's office. However, the motion to disclose the findings was limited to McClymont's **[*42]** findings and did not constitute a waiver of all privileged attorney-client communications exchanged between the Board and its attorneys during the executive session. We are persuaded that the district court mistakenly viewed the Board's limited authorization as a general waiver of all privileged communications made by all counsel during the executive session.

Additionally, the district court erred in finding a waiver of attorney-client privilege because no disclosure of a written or oral report—or any other information—occurred. That is because the Hospital ultimately did not provide a copy of McClymont's report to the attorney general. Roe counters that the mere authorization of a waiver is sufficient, but *K.S.A. 60-437* provides that privilege is waived, in part, where a party "made disclosure of any part of the matter or consented to such a disclosure made by anyone." See *Butler ex rel. Commerce Bank, N.A. v. HCA Health Services of Kansas, Inc., 27 Kan. App. 2d 403, 427, 6 P.3d 871 (1999)* (waiver of a privileged communication may be withdrawn at any time before it has been acted on).

In the case on appeal, although there was no express withdrawal of the waiver, the Hospital never made an actual disclosure. Based on a discussion with the attorney general's office, the Hospital decided that disclosure of McClymont's **[*43]** report was unnecessary. Consequently, the Hospital's counsel neither acted on the limited authorization to waive the privilege in connection with McClymont's investigative findings, nor did he otherwise disclose any privileged, attorney-client communications to a third-party. Because the limited disclosure authorized by the Board was not made by anyone, no waiver of the attorney-client privilege occurred.

Finally, the Hospital asserts that the district court's ruling ignores Forbes' right to privileged communications. The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients" to "promote broader public interests in the observance of law and administration of justice." *Upjohn, 449 U.S. at 389*; *Meneley, 271 Kan. at 373* (privilege fosters candid communication). Kansas law protects communications made by McClymont to Forbes as he was actively receiving facts and giving advice to the Hospital. The privilege extends to communications between an attorney and a client's "authorized representative." *K.S.A. 2020 Supp. 60-426(c)(1)*. McClymont was the Hospital's authorized representative to investigate the possible violation of KOMA. The communications made during the executive session—between the Board, the Hospital's **[*44]** attorneys, and its representatives—are privileged, and that privilege was not expressly waived.

The district court erred in denying the Hospital's motion to seal or to strike based on a finding that the attorney-client privilege did not apply to protect the communications made during the executive session. Accordingly, the district court erred in denying the Hospital's motion to seal Roe's reply in support of her motion for summary judgment, and to strike the attorney-client privileged communications contained in portions of the documents in support.

The district court's ruling is reversed and the matter is remanded. On remand, the district court is instructed to strike those portions of Roe's reply, including but not limited to the transcript of the audio recording of the November 16, 2017 executive session, that disclosed the privileged attorney-client communications. Upon the district court's review and confirmation that all attorney-client privileged information has been redacted, Roe may file the redacted reply.

Reversed and remanded with directions.

Concur by: CLINE

Concur

CLINE, J., concurring: I concur but write separately to express my view that electronic files and electronic information associated [*45] with such files (like metadata and spreadsheet formulas) fall within Kansas Open Records Act's (KORA) definition of "public record." *K.S.A. 2020 Supp. 45-217(g)(1)* (defining "public record" to mean "any recorded information, *regardless of form, characteristics* or location, which is made, maintained or kept by or is in the possession of: (A) Any public agency; or (B) any officer or employee of a public agency . . . ." (Emphasis added.)

I agree Kelly Roe is not entitled to dictate the format in which Phillips County Hospital (Hospital) produces its public records under KORA. And I would leave the details of the production of the electronic information and files (including the reasonableness of the cost of such production and applicability of any exemptions from production) in the hands of the district court. But I would remand with directions that the Hospital must satisfy the district court that its proposed format of production (a paper copy) includes the relevant electronic information associated with the public records (like metadata and spreadsheet formulas), so long as KORA's other provisions are satisfied and no exception exists.

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