

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT**

DAVIS HAMMET,	)	
	)	
Plaintiff,	)	
	)	Case No. 18CV05173
v.	)	Division No. 7
	)	K.S.A. Chapter 60
	)	
RONNIE METSKER,	)	
in his official capacity as Election Commissioner	)	
in Johnson County, Kansas	)	
	)	
Defendant	)	

**ANSWER**

COMES NOW defendant, Ronnie Metsker, in his official capacity as Johnson County Election Commissioner, by and through the undersigned attorney, and for his answer to plaintiff's petition states:

1. In response to the allegations contained in the introductory paragraph of plaintiff's petition (which is not numbered), Mr. Metsker admits that plaintiff requested the records described in the introductory paragraph but states that plaintiff's description of the records is incomplete. Further answering, Mr. Metsker states that plaintiff additionally requested the "reason for provisional ballot rejection" for each provisional voter. The petition does not clearly state whether plaintiff is now seeking the records described in the introductory paragraph of the petition or the records originally requested by plaintiff. Based on the wording of the petition, Mr. Metsker's understanding is that plaintiff has abandoned the portion of his original request seeking the "reason for provisional ballot rejection." Further answering, Mr. Metsker admits that plaintiff's requests for records were denied for the reasons stated, based on the provisions of

K.S.A. 2017 Supp. 25-2422, as amended by L. 2018, ch. 87, sec. 2 (“K.S.A. 25-2422”), and Mr. Metsker denies that he violated the Kansas Open Records Act, K.S.A. 45-215 *et seq.* (“KORA”).

2. Mr. Metsker admits that this court has jurisdiction of this case and that venue is proper in this judicial district as generally alleged in paragraphs 1 and 2 of plaintiff’s petition.

3. Mr. Metsker is without knowledge or information sufficient to form a belief as to the truth of the allegations, statements, and averments set forth in paragraph 3 of plaintiff’s petition and, therefore, denies the same.

4. Mr. Metsker admits the allegations contained in paragraphs 4, and 5 of plaintiff’s petition.

5. Mr. Metsker is without knowledge or information sufficient to form a belief as to the truth of the allegations, statements, and averments set forth in paragraphs 6, 7, and 8 of plaintiff’s petition and, therefore, denies the same. Further answering, statements by individuals are not conclusive of legislative intent.

6. Mr. Metsker admits the allegations contained in paragraph 9 and 10 of plaintiff’s petition.

7. Mr. Metsker denies the allegations contained in paragraphs 11 and 12 of plaintiff’s petition to the extent that they do not contain the actual numbers of ballots in each category.

Further answering, Mr. Metsker states that the following are the actual number of provisional ballots cast in Johnson County in the August 2018 primary:

- 2349 provisional ballots cast:
  - 1176 were fully counted
  - 275 were partially counted
  - 898 were not counted. This includes 153 advance ballots not counted because the signature on the envelope did not match the voter’s record.

Further answering, provisional ballots are presented to the county board of canvassers of Johnson County pursuant to K.S.A. 2017 Supp. 25-3107. The board of canvassers determines whether to count individual provisional ballots based upon state statutes and the Election Standards established by the Kansas Secretary of State.

8. Mr. Metsker admits the allegations contained in paragraph 13 of plaintiff's petition.

9. Mr. Metsker denies the allegations contained in paragraph 14 of plaintiff's petition.

10. In response to paragraph 15 of plaintiff's petition, Mr. Metsker admits that Exhibit C attached to the petition is a true and correct copy of his denial of plaintiff's August 22, 2018 request but denies plaintiff's characterization of his denial and the cited statute. Further answering, Exhibit C speaks for itself.

11. Mr. Metsker admits the allegations and legal arguments contained in paragraph 16 of plaintiff's petition.

12. In response to paragraph 17 of plaintiff's petition, Mr. Metsker admits that Exhibit D attached to the petition is a true and correct copy of his denial of plaintiff's August 27, 2018 request but denies plaintiff's characterization of his denial and the cited statute. Further answering, Exhibit D speaks for itself.

13. Mr. Metsker denies the allegations contained in paragraphs 18 and 19 of plaintiff's petition.

14. In response to paragraph 20, Mr. Metsker denies the allegations set forth in the first sentence of paragraph 20. Further answering, Mr. Metsker states that the Johnson County Election Office provides voter history upon request but that any notations indicating that the voter voted provisionally are redacted from such history prior to release as required by K.S.A. 25-2422. Further answering, Mr. Metsker states that the Secretary of State's Office provides

voter history online but only upon submission of both the voter's name as registered and the voter's full birthdate, including the year of birth.

15. In response to paragraph 21 of plaintiff's petition, Mr. Metsker incorporates his responses to each of the allegations contained in the introductory paragraph and in paragraphs 1 through 20 of plaintiff's petition.

16. In response to paragraphs 22 and 23 of plaintiff's petition, Mr. Metsker states that the statutes speak for themselves.

17. Mr. Metsker denies the allegations contained in paragraphs 24, 25, 26, and 27 of plaintiff's petition.

18. Mr. Metsker denies each and every allegation of plaintiff's petition not herein expressly admitted.

19. Mr. Metsker is without knowledge or information sufficient to form a belief as to the truth of the allegations, statements, and averments set forth in each and every footnote of plaintiff's petition and, therefore, denies the same.

20. Further answering, Mr. Metsker states that he has acted in good faith and with a reasonable basis in fact and law in responding to plaintiff's requests for records, that he has complied with the requirements of the Kansas Open Records Act, K.S.A. 45-215 *et seq.*, and that he meets the burden of proof established by the Kansas Open Records Act and the Kansas cases interpreting the Act.

#### **Affirmative Defenses**

21. Further answering and by way of an affirmative defense, plaintiff's petition fails to state a claim upon which relief can be granted.

22. Further answering and by way of an affirmative defense, pursuant to K.S.A. 19-3419 *et seq.*, the Kansas Secretary of State appoints the Election Commissioner for Johnson County, who is responsible for conducting elections in Johnson County. K.S.A. 19-3424, as amended by L. 2018, ch. 59, sec. 6, provides that “[t]he election commissioner, in the conduct of elections, shall operate under the general supervision of the secretary of state and shall comply with the statutes, rules and regulations and standards and directives that relate to the registration of voters and the conduct of elections.”

23. Further answering and by way of an affirmative defense, K.S.A. 25-2422, provides:

(a) Unauthorized voting disclosure is, while being charged with any election duty, intentionally:

- (1) Disclosing or exposing the contents of any ballot, whether cast in a regular or provisional manner, or the name of any voter who cast such ballot, except as ordered by a court of competent jurisdiction in an election contest pursuant to K.S.A. 25-1434 *et seq.*, and amendments thereto; or
- (2) inducing or attempting to induce any voter to show how the voter marks or has marked the voter’s ballot.

(b) Nothing in this section shall prohibit the disclosure of the names of persons who have voted advance ballots.

(c) Nothing in this section shall prohibit authorized poll agents from observing elections as authorized by K.S.A. 25-3004, 25-3005 and 25-3005a, and amendments thereto.

(d) Unauthorized voting disclosure is a severity level 10, nonperson felony.

24. Further answering and by way of an affirmative defense, K.S.A. 25-2422(a)(1) prohibits the disclosure of whether a ballot was cast provisionally, except as ordered by a court in an election contest. Disclosure of whether a ballot was voted provisionally is a felony.

25. Further answering and by way of an affirmative defense, K.S.A. 25-2422(a)(1) mandatorily closes the names of provisional voters and the reason each particular provisional ballot is categorized as provisional. Pursuant to the express language of K.S.A. 25-2422(a)(1), the names

of provisional voters and the reason each particular provisional ballot is categorized as provisional is not an open record under KORA.

26. Further answering and by way of an affirmative defense, as required by K.S.A. 25-2422(a)(1) and K.S.A. 19-3424, as amended by L. 2018, ch. 59, sec. 6, Mr. Metsker denied plaintiff's requests for the names of provisional voters and the reason each particular provisional ballot was categorized as provisional, including the names of voters whose advance mail ballots were not counted because their signature did not match their voter record.

27. Further answering and by way of an affirmative defense, in responding to plaintiff's requests, Mr. Metsker complied with the directives and standards established by the Secretary of State's Office regarding the processing, handling, and counting of provisional ballots and records requests relating to provisional ballots and voters.

28. Further answering and by way of an affirmative defense, the Help America Vote Act ("HAVA") requires election officials to establish a free access system whereby any individual who casts a provisional ballot may discover whether that individual's ballot was counted and, if not, the reason it was not counted. 52 U.S.C. §21082 (a)(5)(B). HAVA further provides that "Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot." *Id.* Defendant's denial of plaintiff's requests is consistent with HAVA's provisions protecting the privacy and confidentiality of provisional voters.

29. Mr. Metsker reserves the right to assert any further affirmative defenses that may become known to him during the course of this action.

WHEREFORE, having fully answered plaintiff's petition, Mr. Metsker respectfully requests that the Court deny plaintiff's request for disclosure of the requested records and for

injunctive relief for future elections, and for such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

/s/Cynthia Dunham  
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Answer was served by email on October 3, 2018, addressed to:

Lauren Bonds  
Zal Kotval Shroff  
ACLU FOUNDATION OF KANSAS  
lbonds@aclukansas.org

/s/Cynthia Dunham  
Cynthia Dunham #13851