



Court: Shawnee County District Court
Case Number: 2020-CV-000343
Case Title: Loud Light, et al. vs. Scott Schwab - Kansas
Secretary of State
Type: Memorandum Decision and Order

SO ORDERED.

A handwritten signature in black ink, appearing to read "T. Watson", is written in a cursive style.

/s/ Honorable Teresa L Watson, District Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE**

LOUD LIGHT and DAVIS HAMMET,

Plaintiffs

2020-CV-343

SCOTT SCHWAB,
KANSAS SECRETARY OF STATE,

Defendant

MEMORANDUM DECISION AND ORDER

Plaintiffs Loud Light and Davis Hammet seek injunctive and declaratory relief to obtain access to certain documents under the Kansas Open Records Act (“KORA”), K.S.A. 45-215 *et seq.* Plaintiffs allege that they have been denied access to the documents by Defendant Scott Schwab, the Kansas Secretary of State. This matter comes before the Court on Plaintiffs’ request for a temporary injunction ordering Defendant to release certain information from the 2018 general election. The matter has been briefed and argued to the Court. The Court is ready to rule.

STATEMENT OF FACTS

This case involves an open records request for information relating to provisional ballots. Votes cast in an election, whether in person or by advance ballot, are regular or provisional. A regular ballot is one cast by a person registered to vote and qualified to vote at the polling location where the ballot is cast. A provisional ballot is one that an election judge has challenged for one or more reasons set forth in state law. There are several reasons a ballot might be challenged, for example, the person was not registered to vote, the person failed to present

required identification, the person's signature does not match a signature on file, or the person attempted to vote at the wrong polling place.

When an election judge challenges an in-person ballot, an entry is made in the poll book with a notation that the ballot is provisional. The person is provided a provisional ballot envelope, a Kansas voter registration form, and a ballot to complete. See K.S.A. 2019 Supp. 25-409. The ballot is marked, sealed in the envelope, and the election judge writes on the envelope the reason the ballot is provisional. Two election judges and the voter sign the envelope. *Id.* A similar process occurs in a challenge to a mailed advance ballot. The mailed advance ballot envelope is not opened and the word "provisional" is written on the envelope, as is the reason the ballot is considered provisional. See K.S.A. 2019 Supp. 25-1136. Provisional ballots are forwarded to the county election officer and ultimately to the county board of canvassers, where a determination is made whether they will be counted, not counted or partially counted. See K.S.A. 2019 Supp. 25-409(b); K.S.A. 2019 Supp. 25-1136(e); and K.S.A. 2019 Supp. 25-3002.

The Election Voter Information System ("ELVIS") is the statewide voter registration database for the state of Kansas. ELVIS is managed and hosted through the Secretary of State's office. ELVIS is the system of record for all voter registration records in the state. Each county election office is responsible for adding, canceling or modifying voter registration data in its own county. No other county and no state official has the authority or responsibility for changes to a county's voter registration records. Fewer than ten people in the Secretary of State's office have access to ELVIS. These people, along with the database software support contractor, are responsible for maintenance and support of the database. Employees of the Secretary of State's office can view data and generate reports, but cannot add, delete or modify data.

Hammet is the founder of Loud Light, an organization interested in election-related issues. On Wednesday, September 4, 2019, Hammet made a KORA request for the “entire ELVIS Provisional Ballot Detail Report” (hereinafter simply “the Report”) for the 2018 general election. Hammet said he wanted the report to include the “Registration ID, Name, Address, and Status Reason such that it is clear which individuals’ ballots were not counted and the reason their respective ballots were not counted.”

Three business days later, on Monday, September 9, 2019, Defendant denied the request, stating: “Under K.S.A. 45-222(a)(1) records prohibited from disclosure by federal law are exempted from disclosure under the Kansas Open Records Act. Section 302(a) of the Help America Vote Act, 52 U.S.C. §21082(a), restricts access to information about the contents of an individual provisional ballot to the individual who cast the provisional ballot.”

Later in the evening on September 9, 2019, Hammet sent the Secretary of State additional information with citations to court cases supporting his request.

On September 24, 2019, Defendant sent correspondence to Hammet, stating:

“1. We are waiting to review the Attorney General’s opinion on the applicability of state and federal law to releasing personal information linked to provisional ballots. The Office of the Attorney General is apparently still in the research phase.

2. An additional factor is the federal District of Kansas’ recent recognition of a constitutional right to informational privacy and its applicability to state government. Although the contours of this privacy right are as-yet undefined; it appears that disclosure of some personal information, appropriate under the transparency policy of the Kansas Open Records Act, may violate, and thus be barred by, constitutional privacy protections.”

Hammet did not respond to this correspondence. Though the details are not entirely clear in the record before the Court, it appears that Hammet did not otherwise contact Defendant’s office about this issue until mid-June 2020. On June 19, 2020, the American Civil Liberties

Union sent a letter to Defendant on Hammet's behalf demanding the documents requested or a written denial of the request. The parties conferred by phone on June 22, 2020.

On June 23, 2020, Defendant sent Hammet another letter denying his records request, asserting that: 1) the Help America Vote Act ("HAVA") creates a federal law exemption to disclosing the information under K.S.A. 2019 Supp. 45-221(a); 2) K.S.A. 2019 Supp. 25-2422 creates a state law exemption under K.S.A. 2019 Supp. 45-221(a); and 3) a constitutional right to informational privacy precludes disclosing information about whether a voter cast a provisional ballot or why it was considered provisional.

Plaintiffs filed this suit on June 24, 2020. Defendant asserts in his answer to Plaintiffs' petition that Hammet, not Loud Light, requested the records at issue, and Loud Light may not be a proper party to this lawsuit. The Court notes the assertion, but it does not change the legal analysis of the issues set forth below.

CONCLUSIONS OF LAW

Plaintiffs seek declaratory and injunctive relief under KORA. This matter comes before the Court on Plaintiffs' motion for temporary injunction seeking an order requiring Defendant to release the Report from the 2018 general election. But the parties agreed at oral argument that the legal issues supporting the request for declaratory judgment are fully briefed and ready for decision. Thus, the Court will cut to the chase and determine the legal issues underlying the declaratory judgment and make accompanying orders as appropriate. This eliminates the need for a separate analysis regarding Plaintiffs' entitlement to a temporary injunction based on the same legal issues. See K.S.A. 2019 Supp. 45-222(a) (district court has jurisdiction to enforce KORA through declaratory or injunctive relief or any other appropriate order); and K.S.A. 2019 Supp. 45-222(g) (KORA proceedings shall heard at the earliest possible date).

Part of the urgency of Plaintiffs' request stems from a belief that the Report they seek from the 2018 general election would somehow be "deleted" in anticipation of the August 4, 2020, primary. Defendant explained that approximately 29,000 provisional ballots were cast in the 2018 general election. County election officials, not Defendant, are responsible for not only inputting information but also "clearing" an election's data from ELVIS after its results are final. As a result, as of the date this suit was filed, Defendant stated that the Report contained information about only 35 provisional votes. The Court ordered Defendant to print the Report sought by Plaintiffs and retain it pending further direction of the Court. There is thus no danger of losing the information in the Report.

Kansas Open Records Act.

The purpose of KORA is "to ensure public confidence in government by increasing the access of the public to government and its decision-making processes." *Data Tree v. Meek*, 279 Kan. 445, 454, 109 P.3d 1226 (2005). "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." K.S.A. 45-216(a). The parties do not dispute that if the Report is subject to disclosure under KORA, the provisional voter's social security number, driver's license number, identification card number, or any part of these numbers must be redacted prior to disclosure. See K.S.A. 2019 Supp. 25-2320(b).

The parties do not dispute that the information in the Report meets the definition of a public record under KORA. See K.S.A. 2019 Supp. 45-217(g). The question is whether it is an open record not otherwise subject to an exception to disclosure. "The KORA provides specific exceptions to disclosure; however, the exceptions are to be narrowly interpreted, and the burden is on the public agency opposing disclosure." *Data Tree, LLC*, 279 Kan. at 454-55.

K.S.A. 2019 Supp. 45-221 contains more than 50 categories of records that a public agency is not required to disclose. Pertinent to this analysis, K.S.A. 2019 Supp. 45-221(a)(1) says that unless disclosure is otherwise required by law, a public agency shall not be required to disclose:

“Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, to restrict or prohibit disclosure.”

Help America Vote Act.

Defendant first argues that he cannot disclose the Report because federal law, specifically HAVA, prevents disclosure of the status of a provisional ballot and the reason it was considered provisional.

Congress passed HAVA in response to issues raised in the state of Florida during the 2000 presidential election. At that time in Florida, if a person’s entitlement to vote was challenged, the person was not allowed to cast a ballot. See *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1076-77 (N.D. Fla. 2004). HAVA changed this to require each state to institute a system for provisional balloting. This change allowed a person to submit a ballot despite a challenge, and whether a ballot would be counted was based on a later determination of the person’s entitlement to vote. HAVA also required each state to establish a free access system to allow a person casting a provisional ballot to learn whether the vote was ultimately counted, and if not, why not. See 52 U.S.C. §21082(a).

52 U.S.C. §21082(a)(5)(B) says:

“The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted the reason that the vote was not counted.

States described in section 20503(b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). *Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.*” (Emphasis added.)

Defendant argues that the last sentence of 52 U.S.C. §21082(a)(5)(B) prohibits disclosure of the status of a provisional ballot and the reason it was considered provisional because that is “information about an individual provisional ballot” and thus it cannot be revealed to anyone but “the individual who cast the ballot.”

Defendant acknowledges that a federal district court in Kansas rejected this argument in the context of disclosing the names of those who cast provisional ballots. In *Mah v. Shawnee County Comm’n*, 2012 WL 5584613 (D.Kan. 2012) (unpublished), an incumbent candidate for state representative, Ann Mah, submitted a KORA request seeking the names of those who cast provisional ballots in her race. The request was denied. Mah filed an action in state district court seeking an order compelling disclosure of the names. The state district court noted that Mah asked only for the names. She did not ask for any other information on the content of the ballots or the reasons the ballots were considered provisional. The state district court ordered the names released to Mah. *Id.* at *1.

The Secretary of State sued in federal district court seeking to prevent disclosure of the names by court order. He argued that 52 U.S.C. §21082(a)(5)(B) [then 42 U.S.C.

§15842(a)(5)(B)] prevents disclosure of the names of voters who cast provisional ballots. But the federal district court, considering only the plain language of the statute, concluded that it protects only “information about an individual provisional ballot” not information about the individual casting the ballot. 2012 WL 5584613 at *3.

Defendant correctly points out that *Mah* does not address disclosure of the status of the provisional ballot or the reason it was considered provisional. Defendant argues that the status and reason constitute “information about an individual provisional ballot” rather than information about the individual casting the ballot, and thus he cannot disclose it.

Resolution of this issue requires interpretation of 52 U.S.C. §21082. This Court must follow binding federal court precedent, if any exists, interpreting a federal statute. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 848, 397 P.3d 1205 (2017). Plaintiffs direct the Court’s attention to an unpublished Ohio federal district court opinion (addressing a motion to quash during discovery), a Washington state court opinion, and an Ohio attorney general’s opinion. Only one of these is a federal decision, and none of them are binding precedent.

Absent binding federal authority, this Court is within its power to interpret the statute subject to the usual rules. *Midwest Crane*, 306 Kan. at 848.

“Statutory interpretation is a question of law subject to unlimited review. The most fundamental rule of statutory construction is that the Legislature’s intent governs if that intent can be ascertained. We must, first, try to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, we should not speculate about the legislative intent behind that clear language, and we should refrain from reading something into the statute that is not readily found in its words.” *Montgomery v. Saleh*, 2020 WL 3479264 at *4 (Kan. June 26, 2020) (internal citations omitted).

The plain language of 52 U.S.C. §21082(a)(5)(B) requires the establishment of “a free

access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted the reason that the vote was not counted.” Further, those responsible for the free access system must “establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system.” And finally, “[a]ccess to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.” This is the last sentence of a subsection devoted to the creation of a free access system.

It is clear from the plain language of the statute that the last sentence does not impose broad limits upon access to provisional ballot information by anyone under any circumstances. Rather, it limits access to information about an individual provisional ballot through the free access system. It simply says that the only person who may find out about an individual provisional ballot from or through the free access system is the person who cast the ballot.

Hammet made his request under KORA, not through Kansas’ version of the free access system. Thus, the last sentence of 52 U.S.C. §21082(a)(5)(B) does not prevent disclosure by Defendant here of the status of a provisional ballot or the reason it was considered provisional.

State law.

Defendant next argues that it cannot disclose the names of any voters who cast a provisional ballot because state law prohibits it. Defendant points to K.S.A. 2019 Supp. 25-2422, which says:

- “(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.” (Emphasis added.)

When interpreting a statute, its language is the “paramount consideration,” but even when a statutory provision is unambiguous, the Court may still construe it *in pari materia* with other provisions to reconcile them and bring them into workable harmony. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015). Further, “[w]ords are given meaning by their context,” so no single phrase or provision should be read in isolation from others. *Sandate v. Kansas Dep't of Revenue*, 2020 WL 4032819 at *7 (Kan. Ct. App. July 17, 2020).

Defendant argues that the plain language of the statute prohibits disclosure of the contents of a regular or provisional ballot, and independently, the name of any voter who cast a regular or provisional ballot. The Court disagrees. The plain language of K.S.A. 2019 Supp. 25-2422(a) criminalizes the intentional exposure or disclosure by an election officer of the contents of the ballot, in other words, how a voter marked his or her ballot. Defendant focuses on this language in K.S.A. 2019 Supp. 25-2422(a)(1): “Unauthorized voting disclosure is, while being charged with any election duty, intentionally . . . [d]isclosing 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.” But “such ballot” refers to the ballot whose contents have been exposed. So K.S.A. 2019 Supp. 25-2422(a)(1) criminalizes the intentional exposure or disclosure of the name of a person who cast a ballot whose contents have been exposed, except pursuant to court order in an election contest.

To hold otherwise would be to ignore the clear purpose of K.S.A. 2019 Supp. 25-2422, which “is not to hide a voter’s name, but to prevent election officials from disclosing how the voter actually voted or even to attempt to learn how the voter might have voted.” *Hammet v. Metsker*, 2019 WL 400273 at *4 (Kan.Dist.Ct. 2019). In that case, Hammet (one of the Plaintiffs here) asked a county election official to disclose pursuant to KORA a list of provisional voters and the reasons their ballots were considered provisional. The election official refused to disclose the names of the provisional voters, but did not challenge disclosure of the reasons the ballots were considered provisional. The Johnson County, Kansas, District Court held that the plain language of K.S.A. 2019 Supp. 25-2422(a) did not prohibit disclosure of the names of provisional voters under KORA. The court held that even if the statute was ambiguous, its legislative history revealed an intent to make the names of provisional voters subject to disclosure. 2019 WL 400273 at *4-6.

Though the state district court decision in *Hammet* is not binding on this Court, its logic is sound and the Court finds it persuasive. The plain language of K.S.A. 2019 Supp. 25-2422(a)(1) does not criminalize disclosure of the names of those who cast a regular or provisional ballot and does not prohibit Defendant from disclosing the Report from the 2018 general election. Because the statute is not ambiguous, the Court need not explore the parties’ additional arguments about its legislative history.

Constitutional concerns.

Finally, Defendant argues that disclosure of the ELVIS provisional ballot detail report is prohibited by a constitutional right to informational privacy, citing *Moore v. Kobach*, 359 F.Supp.3d 1029 (D.Kan. 2019). In *Moore*, registered voters sued the Kansas Secretary of State following the release of voter data to another state for purposes of identifying persons who might have registered to vote in multiple states. The data included the name, birth date, address and partial social security number of the registrants. The Secretary of State moved to dismiss the case on multiple bases, including that Moore and others failed to state a claim based on 42 U.S.C. §1983 for a violation of informational privacy. The federal district court in *Moore* acknowledged that the United States Supreme Court has not decided whether there exists a right to informational privacy. It also acknowledged the possibility that the United States Supreme Court would reject the existence of such a right. But it noted that the Tenth Circuit recognizes such a right, and Moore's claim could not be dismissed outright for failure to state a claim. *Id.* at 1049.

The court in *Moore* articulated the Tenth Circuit's two-pronged test to establish violation of a right to informational privacy by government disclosure: 1) the individual has a legitimate expectation that information will remain confidential while held by the government; and 2) if there is a legitimate expectation, there must be a compelling state interest in releasing it, and it must be released in the least intrusive manner. *Id.* at 1050-51. The legitimacy of the expectation depends in part upon the intimate or personal nature of the information, such as that contained in personal medical or financial records. *Id.* at 1050.

At issue in *Moore* were the names, birth dates, addresses and partial social security numbers of some 945 people. The court's opinion did not make clear whether each of these informational items was subject to a right to informational privacy, in other words, it did not

evaluate whether there was a legitimate expectation that each type of information would remain confidential. The court simply held that the Tenth Circuit recognized a right to informational privacy, and Moore had at least stated a claim for violation of that right.

Hammet did not seek the social security numbers or driver's license numbers of provisional voters. Defendant acknowledges that these items may be removed electronically from the ELVIS provisional ballot detail report before disclosure. The following remaining information is contained in the Report: the name of each provisional voter, residential address, voter registration number, county, type of polling place, residence precinct, precinct where voted, name of precinct where voted, status of provisional ballot and the reason each ballot was considered provisional. Defendant focuses primarily upon the status of the provisional ballot and the reason the ballot was considered provisional. He argues that these items of information are protected from disclosure by the constitutional right to informational privacy outlined in *Moore*.

Defendant asserts that the reason a ballot is considered provisional is personal and might be embarrassing to the person who cast it. For example, a person might be embarrassed by the fact that he or she was not registered to vote, attempted to vote in the wrong polling place, or had moved and not updated the address on his or her voter registration. These situations do not implicate information so sensitive it requires constitutional protection. See, e.g., *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994), and *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000), recognizing "a constitutional right to privacy in the non-disclosure of information regarding one's HIV status by a government official." *Herring*, 218 F.3d at 1175. Compare this to *Leiser v. Moore*, 903 F.3d 1137, 1144 (D.Kan. 2018), where the Tenth Circuit held that it was not clearly established that government disclosure of a person's cancer diagnosis, a very personal but less stigmatized piece of information, violated a constitutional right to informational privacy.

Defendant also claims that the way information is collected from a provisional voter creates an expectation of privacy. He points to the fact that when a person's qualification to vote is challenged, the person works one-on-one with election staff (whether in person at the polling place or over the phone in the case of an advance mail ballot) to discuss and possibly remedy the reason triggering a provisional ballot. The fact that a conversation takes place between only two people does not by itself give rise to a constitutionally protected expectation of privacy. Further, the ballots cast are placed in an envelope labeled "provisional" and the reason they are considered provisional is written on the outside of the envelope. These envelopes pass through the hands of election officials and ultimately those involved in the county canvass. This does not suggest that the provisional status and the reason for it are closely guarded secrets.

Finally, Defendant points out that Plaintiffs' intended use of this information is intrusive. Plaintiffs say they intend to use the Report to assist 2018 provisional voters in remedying the reason for the provisional vote before the August 4, 2020, primary. But Defendant posits that someone who cast a provisional vote in 2018 has either: 1) already discovered the problem and remedied it; and/or 2) does not care to be reminded of it through contact from a stranger offering assistance. This may be an accurate assessment, but it is not necessarily a strong legal argument. Defendant cites no case law suggesting that this is a consideration in the constitutional analysis. Disclosure of the Report is not prohibited by a constitutional right to informational privacy.

CONCLUSION

For the reasons set forth above, the Court concludes that Defendant's disclosure of the ELVIS provisional ballot detail report for the 2018 general election sought by Hammet is required under KORA. Disclosure is not prohibited by 52 U.S.C. §21082(a)(5)(B), part of HAVA, nor is it prohibited by K.S.A. 2019 Supp. 25-2422(a)(1). Disclosure is not prohibited by

a constitutional right to informational privacy as recognized in the Tenth Circuit. Thus, Defendant must produce to Hammet the 2018 general election ELVIS provisional ballot detail report before 5 p.m. on the next business day following the filing of this order. Defendant must produce the Report with the social security numbers and driver's license or identification card numbers removed.

The parties are directed to contact the Court to schedule a telephone status conference to discuss any remaining issues pending in this case.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

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