

THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

DAVIS HAMMET,)	
)	
Plaintiff,)	
)	
v.)	Case No. 20-CV-638
)	Div. No. 3
)	
SCOTT SCHWAB,)	
Kansas Secretary of State, in his official)	
capacity,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT**

Plaintiff Davis Hammet, by and through his undersigned counsel, submits this memorandum in support of his motion for summary judgment in the above captioned case.

INTRODUCTION

Plaintiff Davis Hammet brings this action under the Kansas Open Records Act (“KORA”) to enforce his right to access records in the possession of the Kansas Secretary of State (“KSOS”) related to provisional ballot voters. Defendant Schwab intentionally frustrated Mr. Hammet’s access to public records, actually and constructively denied him that access, and then attempted to charge him an unreasonable fee to regain access, all in violation of the Kansas Open Records Act (KORA) § 25-124 and K.S.A. 25-2709. In support of his motion, Mr. Hammet states as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. The Kansas Secretary of State (“KSOS”) maintains the Electronic Voter Information System (“ELVIS”), which is the state’s centralized voter registration database. Case

Mgmt. Order ¶ 5.c. ELVIS “is the system of record for all voter registration records in the state.” Mem. Decision and Order at 2, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (Jul. 24, 2020) (hereinafter “Mem. Decision and Order”).

2. Mr. Hammet is a voting rights activist in Kansas, and the President of Loud Light, an organization focused on increasing civic engagement in Kansas. As a Kansas resident and activist, Mr. Hammet assists voters with curing deficiencies with their ballots if they are forced to vote provisionally in a primary or general election, so that their vote is included and counted at the time of the canvass. Ex. B (Affidavit of Davis Hammet), ¶¶ 1-2. Mr. Hammet and Loud Light also analyze provisional ballot data to ensure voters who cast incurable provisional ballots can fix any issues and cast proper ballots in future elections. They also use the provisional ballot data to conduct election research, help counties improve their election systems, and identify aspects of Kansas’s voting system that may be in need of reform.

3. Defendant Schwab contracts with Election Systems and Software (“ES&S”) to run and maintain the ELVIS database. Compl. ¶ 6, Ans. ¶ 6.

4. Counties are responsible for entering data into ELVIS during each election cycle, though counties may be inconsistent in how and when they enter the data and track those who cast provisional ballots. Case Mgmt. Order ¶ 5.d. KSOS can access information in ELVIS that is entered by those county election officials in real time. Ans. ¶ 7.

5. KSOS employees can view data in ELVIS and generate reports. Mem. Decision and Order at 2.

6. The provisional ballot detail report is a report that can be generated from ELVIS. Case Mgmt. Order ¶ 5.b.

7. As the counties continue to enter information into ELVIS, the provisional ballot detail report updates to reflect that additional and/or changed information. Case Mgmt. Order ¶ 5 d (county election officials input information into ELVIS); Compl. ¶ 7, Ans. ¶ 7 (KSOS can access information in real time); Mem. Decision and Order at 2, 5.

8. As a new election approaches, county election officials clear out data from ELIVS from prior elections to prepare for the upcoming election. Data is therefore lost each time ELVIS is “cleared.” Mem. Decision and Order at 5.

9. In 2019, Mr. Hammet requested, through KORA, that KSOS provide him with the provisional ballot detail report for the 2018 General Election cycle. KSOS denied that request. Mem. Decision and Order at 3.

10. In June 2020, Mr. Hammet filed suit against KSOS seeking declaratory and injunctive relief under KORA. In particular, Mr. Hammet requested access to the provisional ballot detail report, and disputed KSOS’s interpretation that Mr. Hammet was not entitled to that report because some of the data contained therein were protected from disclosure under a KORA exception. *See generally* Mem. Decision and Order at 3-4.

11. As part of the Verified Petition and Motion for Preliminary Injunction in his June 2020 lawsuit, Mr. Hammet made clear that he planned to request the provisional ballot detail report for subsequent elections, including the August 4, 2020 Primary Election, as part of Mr. Hammet’s work helping voters cure deficiencies with their ballots prior to the final canvass. *See, e.g.,* Pl. Mot. for Prelim. Injunction and Accompanying Mem. of Law, *Loud Light et al. v. Schwab*, 2020-CV-000343 (Jun. 24, 2020); Case Mgmt. Order ¶ 5.e (including among the parties’ stipulated facts that “Mr. Hammet noted that he would seek the same information for the 2020 primary and general elections.”).

12. On July 24, 2020, this Court granted Mr. Hammet’s request for declaratory and injunctive relief under KORA, holding that Mr. Hammet indeed had a right to the provisional ballot detail report he sought and that KSOS must provide him with the requested report. *See generally* Mem. Decision and Order at 14-15; Case Mgmt. Order ¶ 5.f.

13. Defendant openly criticized the Court’s July 24, 2020 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-rights-elections-31438bcdf478af87d336f01f024646bb>.

14. Following that ruling, Mr. Hammet requested copies of the 2020 Primary Election provisional ballot detail report on August 4, 2020 and August 11, 2020 pursuant to KORA. KSOS provided the reports in response to those requests. Case Mgmt. Order ¶ 5.g.

15. On August 13, 2020, two days after Mr. Hammet’s last request, KSOS asked ES&S to end KSOS’s access to the statewide provisional ballot detail reports. Case Mgmt. Order ¶ 5.h.

16. On September 9, 2020, Mr. Hammet sent an email to KSOS that requested another version of the primary provisional ballot detail report pursuant to KORA. KSOS responded that afternoon with an updated copy. Case Mgmt. Order ¶ 5.i.

17. In his September 9, 2020 email, Mr. Hammet noted that he planned to request the report, “once it’s (relatively) fully updated.” Case Mgmt. Order ¶ 5.i.

18. At no point on or before these email exchanges did Defendant inform Mr. Hammet that it had asked ES&S to remove KSOS's access to the report Mr. Hammet repeatedly requested under KORA. Ex. B (Affidavit of Davis Hammet), ¶ 10.

19. On September 13, 2020, ES&S made the changes to the ELVIS system that KSOS requested, removing ELVIS functionality that allowed KSOS to create the statewide provisional ballot detail reports that Mr. Hammet requested. Case Mgmt. Order ¶ 5.j. Individual counties can still run provisional ballot detail reports that contain only the data from their county.

20. Before ES&S removed the ability to create provisional ballot detail reports, KSOS easily produced the reports to Mr. Hammet. Ex. B (Affidavit of Davis Hammet), ¶¶ 3, 4, 6.

21. Before Defendant asked ES&S to end access to the provisional ballot detail reports, KSOS never informed Mr. Hammet that running the report cost anything and never charged Mr. Hammet for the reports. Case Mgmt. Order ¶ 5.k; Ex. B (Affidavit of Davis Hammet), ¶ 6.

22. On October 6, 2020, Mr. Hammet once again requested through KORA the provisional ballot detail report for the 2020 primary election. Case Mgmt. Order ¶ 5.l.

23. Between October 6 and October 14, 2020, Mr. Hammet sent KSOS several emails asking for updates regarding his October 6, 2020 request. Case Mgmt. Order ¶ 5.m.

24. At first, KSOS told Mr. Hammet that his request was sent to the elections division so the report could be run. However, on October 14, 2020, after Mr. Hammet sent several requests for updates, KSOS informed him for the first time that changes had been made to ELVIS and KSOS could no longer provide the report he was requesting. Case Mgmt. Order ¶ 5.m.

25. After receiving that email, Mr. Hammet attempted to engage in conversations with KSOS regarding what it would take to turn the functionality back on within ELVIS such that KSOS could once again run the report Mr. Hammet requested, or, in the alternative, provide the data in another format. *See* Ex. A, Emails between Mr. Hammet and Clay Barker.

26. On October 27, 2020, KSOS informed Mr. Hammet that it would not turn the functionality back on, but it could request that ES&S manually pull the data Mr. Hammet requested on October 6, 2020. Case Mgmt. Order ¶ 5.p. KSOS stated that the data pull would cost Mr. Hammet \$522, and that KSOS would not guarantee that ES&S would be able to complete the data pull prior to the 2020 General Election in November 2020. Case Mgmt. Order ¶ 5.p-q.

27. Defendant could ask ES&S to restore the ability to run provisional ballot detail reports but has not. Case Mgmt. Order ¶ 5.o-q.

28. After Defendant told Mr. Hammet the provisional ballot detail reports were no longer available, KSOS confirmed it still had the data that would be included in the report, but the report record was no longer available. Ex. A, Emails between Davis Hammet and Clay Barker.

29. Mr. Hammet requested the data in any format available. Ex. A, Emails between Davis Hammet and Clay Barker.

30. Mr. Hammet attempted to explain how to run a custom report through ELVIS that would not cost \$522, even with the provisional ballot detail report functionality removed. *See* Ex. A, Emails between Davis Hammet and Clay Barker. KSOS did not respond to these proposed solutions. Ex. B (Affidavit of Davis Hammet), ¶¶ 9-10.

31. KSOS has explained that, because they ordered the provisional ballot detail report functionality be removed from ELVIS, providing provisional ballot data to Mr. Hammet in response to valid KORA requests will now require a manual data pull each time. KSOS also explained that the manual data pull will require Mr. Hammet to pay an unknown amount of money for each request, and that the cost will be based on the volume of data that ES&S must manually pull and the time it takes to respond to such requests. *See generally*, Case Mgmt. Order 5.r-s; Ex. B (Affidavit of Davis Hammet), ¶ 13.

32. Waiting for ES&S to conduct a manual data pull after the 2020 General Election meant that Mr. Hammet lost access to the remaining information regarding provisional voters from the 2020 Primary Election, because the county election officials cleared that data in order to input data from the 2020 General Election. Ex. B (Affidavit of Davis Hammet), ¶ 12, 14; Mem. Decision and Order at 5. It also meant that KSOS denied Mr. Hammet access to public records that would have allowed him to assist provisional ballot voters in the 2020 General Election with curing ballot deficiencies and having their votes count in the 2020 General Election canvass.

33. Without provisional ballot detail reports, the only way Mr. Hammet or anyone else can gather the data that would be contained in the reports is by sending individual KORA requests to all counties in Kansas. Ex. B (Affidavit of Davis Hammet), ¶¶ 13-14.

34. After learning that Defendant would not turn the report functionality back on, and would not order ES&S to run a pre-General Election manual data pull, Mr. Hammet did send KORA requests to individual counties. This cost him \$281.97. Only 13 counties complied prior to the canvass. Ex. B (Affidavit of Davis Hammet), ¶¶ 14-15.

35. Defendant interfered with Mr. Hammet's attempts to gather the provisional ballot information from individual counties. After the Court's June 2020 Order, Defendant continued to

instruct counties to delay their responses to KORA requests. Defendant did not update its Election Standards Manual, which advised county clerks not to respond to KORA requests for provisional voter names. Election Standards Manual, pp. 6-7, available at <https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-III-Canvassing.pdf>. One county clerk reported that she was “advised” on the “state-wide conference call” on November 5, 2020, to not respond to KORA requests for provisional ballot data until after the canvass. Ex. C, Email from Charlotte Schmidt, Montgomery County Clerk/Election Officer, to Austin Spillar, Policy Associate at ACLU of Kansas.

36. Because of the delay caused by Defendant’s decision to end KSOS’s ability to run provisional ballot detail reports, Mr. Hammet was not able to gather all the information he sought before the 2020 General Election. Ex. B (Affidavit of Davis Hammet), ¶¶ 14, 16.

LEGAL STANDARD

A party seeking summary judgment must show that there are no genuine issues of material fact and that judgment must be entered in its favor as a matter of law. *Treat v. Chamberlain*, 308 Kan. 932, 935, 425 P. 3d 297 (2018); *Garn. v. Higgins*, 435 P.3d 59 (Kan. Ct. App. 2019); see also K.S.A. 60-256(c)(2). “Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that no material fact is substantially contested and that the moving party is entitled to judgment as a matter of law. When there are no genuine material factual disputes, the issue becomes one of law.” See, e.g., *State of Kansas v. Great Plains of Kiowa Co. Inc.*, 425 P.3d 290, 293 (Kan. 2018) (citing *Fawcett v. Oil Producers, Inc. of Kan.*, 302 Kan. 350, 339 (Kan. 2015)). With no material facts in dispute, the issues before this court are ones of statutory interpretation and thus involve only questions of law.

Frick v. City of Salina, 289 Kan. 1, 8 (Kan. 2009) (statutory interpretation presents a question of law).

ARGUMENT

On July 24, 2020, this Court ordered Defendant to turn over provisional ballot detail reports under KORA. SOF ¶ 12. The order came after KSOS refused to provide Mr. Hammet with the records, and it was the second time a Court ordered Defendant to disclose provisional ballot information. SOF ¶¶ 9-12; *see Mah v. Bd. Of County Commissioners of Shawnee County*, 2012 WL 5584613 (D. Kan. 2012) (rejecting the Secretary’s argument that disclosure violated federal law). Despite these rulings, Defendant is apparently still attempting to obfuscate Mr. Hammet’s access to provisional ballot data, this time by destroying the ability to provide that data efficiently and easily. On August 13, 2020, Defendant ordered ES&S to remove KSOS’s access to the reports entirely. SOF ¶ 15. He did so less than a month after this Court’s order and two days after Mr. Hammet’s most recent request for provisional ballot detail reports. SOF ¶ 12, 14. Most importantly, Defendant did so knowing Mr. Hammet intended to continue requesting the reports in the future. SOF ¶ 11, 17. KSOS’s actions violate the letter and spirit of KORA and this Court’s prior rulings.

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); Mem. Decision and Order at 5. The act “shall be liberally construed and applied” to promote the State’s policy of open access to public records. K.S.A. 45-216(a).

Defendant’s actions plainly violate the letter and spirit of KORA and constitute a deliberate attempt to block Mr. Hammet’s access to public records—records that this Court has

previously held Mr. Hammet is entitled to obtain. In addition to violating KORA, Defendant's actions also violate his record-keeping obligations. The provisional ballot reports are abstracts of voting records, and Kansas law required Defendant to maintain the records for twenty years. K.S.A. 25-2319; K.S.A. 25-2709.

For these reasons, Mr. Hammet is entitled to summary judgment.

I. The provisional ballot detail report is a public record under KORA subject to disclosure.

This case concerns one particular public record: the provisional ballot detail report. The report, and not just the data contained therein, is a public record subject to disclosure under KORA. The Act defines a public record as "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency." K.S.A. 45-217(g)(1). Further, as a public record, the provisional ballot detail report therefore "shall be open for inspection by any person" unless specifically exempt from disclosure under another provision of the Act. K.S.A. 45-218(a). No exemption applies. Mem. Decision and Order at 14-15.

Defendant previously confirmed its understanding that the provisional ballot detail report is a public record subject to disclosure under KORA when it fulfilled Mr. Hammet's KORA requests for the provisional ballot detail report in August and September. SOF ¶¶ 14, 16. Responding to the prior requests Mr. Hammet made under KORA for the provisional ballot detail report signal Defendant's agreement that the document is a record.

The fact that the record is stored electronically does not change the KORA analysis. KORA still requires public disclosure even though the record is stored in ELVIS. Nor does the fact that the reports are composites of other records affect whether or not KORA applies. If a

new record can be or has been created by virtue of the government's technology program, that record itself is also a public record.

“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. If a record exists only in “computerized or hardcopy [it] does not alter the uniformly applicable provisions of KORA.”

Op. Att’y Gen. No. 95-64, 1995 Kan. AG LEXIS 71 at *11. Here, the ELVIS database stored data in an electronic format which had the ability to create and produce a new record—the provisional ballot detail report. That new record, once created and maintained, became subject to KORA, just like the underlying data used to create it. Op. Att’y Gen. No. 95-64, 1995 Kan. AG LEXIS 71 at *15.

The provisional ballot detail report is therefore a public record that “shall be open for inspection by any person” pursuant to KORA. K.S.A. 45-218(a).

II. Defendant destroyed public records.

KORA explicitly prohibits agencies from destroying records. Public records “shall not be mutilated, destroyed, transferred, removed, damaged or otherwise disposed of, in whole or in part, except as provided by law, or as may be authorized in the retention and disposition schedules.”

K.S.A. 45-403(a). And “[t]he legislature declares that state... records with enduring value should be stored in conditions which are not adverse to their permanent preservation and should be properly arranged so that appropriate public access to such records is possible.” K.S.A. 45-410.

As noted above, if a new record can be or has been created by virtue of the government's technology program, that record itself is also a public record subject to KORA. It therefore

cannot be destroyed, removed, or otherwise disposed of without violating KORA. Op. Att’y Gen. No. 95-64, 1995 Kan. AG LEXIS 71, *15.

By removing the functionality to produce the provisional ballot detail report, Defendant destroyed or removed a public record in violation of state law, thereby denying access to that record going forward. KORA “requires that, once a record is created or possessed by an agency, all such records are public records and must therefore be open unless otherwise closed by law.” *Id.* at *10-11. Once KSOS produced data using the provisional ballot detail report functionality in KORA, it had created a record, and along with that an affirmative obligation to provide that record in response to future requests when it was known that future requests would be forthcoming. SOF ¶¶ 10, 15.

Government agencies cannot avoid their obligations under KORA by destroying or removing the very records that people are seeking. To hold otherwise would be to render KORA meaningless, as agencies could just destroy their ability to produce any record they want to withhold without consequence. This is why Kansas law specifically prohibits government agencies from destroying public records. K.S.A. 45-403. And while Defendant still had the underlying data formerly available in the provisional ballot detail reports, he was unable or unwilling to produce it to Mr. Hammet in any other form, other than through a costly manual data pull on an indeterminate timeline. SOF ¶¶ 29, 30. Defendant even attempted to thwart Mr. Hammet’s ability to gather the information through the painstaking task of making KORA requests of individual counties, by instructing county clerks not to comply with Mr. Hammet’s requests and not updating the state’s election manual in light of this Court’s previous ruling. SOF ¶ 36.

Although Defendant may argue that KSOS did not have a need for the record within the agency, KORA does not mandate retention and production of only those records that government agencies deem helpful to them. Rather, KORA requires production of *all* records unless a specific exemption applies that would preclude disclosure. “All government records made or received by and all government records coming into the custody, control or possession of a state... agency... shall be public property.” K.S.A. 45-403. There is no exception to KORA that allows government agencies to destroy or remove records that the agency itself does not wish to use. What’s more, Defendant cannot point to any other records for which he ordered ES&S to disable KSOS’s access. Instead, to the best of Mr. Hammet’s knowledge, Defendant appears to have targeted only those records it had twice been ordered to produce, and which it knew Mr. Hammet would be requesting again. SOF ¶¶ 11-12, 17.

Defendant’s intentional destruction of the functionality to create the provisional ballot detail report—only weeks after this Court’s order that he produce them—amounts to a clear violation of KORA and an interference with Mr. Hammet’s right to access a public record. Even worse, Mr. Hammet repeatedly asked for a work-around so that he could get the data he needed to fulfill his role assisting Kansas residents with ensuring their votes would count. SOF ¶¶ 25, 29-30. At each turn, KSOS put up obstacles. First, KSOS refused to turn the functionality for running the statewide provisional ballot detail report back on. SOF ¶ 26-27. Then KSOS refused to answer Mr. Hammet’s legitimate questions about other ways KSOS could manually run the report. SOF ¶ 25, 29-30. Finally, KSOS told Mr. Hammet that they would provide the underlying data requested, but only at great expense and on an indeterminate timeline. SOF ¶ 26. And Defendant did all this after telling individual counties not to respond to KORA requests for the information. SOF ¶ 36.

Defendant’s conduct is all the more egregious because he knew that time was of the essence, especially for the 2020 General Election. Counties input the provisional ballot data into ELVIS. SOF ¶ 4. As a new election nears, counties remove the data to prepare for the new election, “clearing” ELVIS before every election. ¶ 8. Thus when Defendant relinquished access to the provisional ballot detail reports and kept his intention to do so secret, he did not just delay production of the reports. SOF ¶ 18. Rather, Defendant made it impossible for Mr. Hammet to assist voters who did not have their votes counted in the 2020 Primary Election in correcting deficiencies in advance of the 2020 General Election. And, by saying that the reports of provisional ballot voters would not be provided to Mr. Hammet between the 2020 General Election and the official canvass, Defendant successfully kept Mr. Hammet from receiving all the necessary information to help voters cure provisional ballot deficiencies for the 2020 General Election as well.¹ SOF ¶ 2, 35.

Defendant unlawfully destroyed records, and his actions constructively and actually denied Mr. Hammet access to the public records he rightfully sought under KORA, in violation of K.S.A. 45-220(a).

III. Defendant constructively denied Mr. Hammet’s request.

Despite knowing that the provisional ballot detail report was a public record under KORA, Defendant ordered its technology provider to destroy KSOS’s ability to access the records. SOF ¶¶ 12, 15. He gave his order only a few weeks after this Court ruled that KSOS had to turn over the reports. *Id.* Defendant also made the order knowing that Mr. Hammet would be

¹ Importantly, there are several uses for the statewide provisional ballot detail report beyond helping voters cure their ballots between the election and the official canvass for each election cycle. Mr. Hammet uses the report to identify trends in provisional ballot voters, assist state lawmakers and legislative committees with evaluating issues and potential election reform laws, and assist county clerks with reforming processes at the local level. SOF ¶ 36. Although the timing of Defendant’s removal of the statewide report functionality is most relevant to KORA request at issue in this case, the removal of the functionality on a permanent basis is also problematic, as it would impede Mr. Hammet’s ability to carry out Loud Light’s broader election integrity work.

requesting the records from KSOS in the future. SOF ¶¶ 11, 17. Removing the ELVIS functionality that allowed for easy production of the provisional ballot detail reports violated the letter and spirit of KORA, and amounts to a denial of Mr. Hammet's request for a public record.

Public agencies cannot deny or delay response to a KORA request because of a technicality, "unless it is impossible to determine the records to which the requester desires access." K.S.A. 45-220(a). This includes denying or delaying access to records because information is stored electronically. Although the availability of computerized records "does not always fit neatly within concepts previously applied to paper records," KORA applies to all records, paper or electronic, and applies "even when a newly created software program allows the creation of a heretofore non-existent record." Op. Att'y Gen. No. 95-64, 1995 Kan. AG LEXIS 71, at *11.

ELVIS allowed Defendant to create and produce the provisional ballot detail reports easily. ELVIS constitutes a "software program" that allows "the creation of a heretofore non-existent record." *Id.* Plaintiff is entitled to the reports under KORA. And when Defendant ordered ES&S to remove the ability to create the provisional ballot detail report from ELVIS, he did so knowing Mr. Hammet would be requesting them in the future. Defendant's decision thus ended Mr. Hammet's access to a public record, and amounts to a constructive denial of Mr. Hammet's requests, in violation of KORA.

IV. Defendant attempted to charge Mr. Hammet an unreasonable fee for access to a public record, by intentionally making access more expensive than necessary.

Government agencies may charge individuals "reasonable fees for providing access to or furnishing copies of public records." K.S.A. 45-219(c). Fees "may not exceed the actual cost of furnishing copies, including cost of staff time." *Id.* A similar provision allowing public agencies to charge fees is contained in the federal Freedom of Information Act. 5 U.S.C. § 552(a)(4)(A).

That provision, much like the one contained in KORA, was intended to allow public agencies to recover actual costs related to production of requested records—it was not intended that agencies charge fees “for the purpose of discouraging requests for information as or obstacles to disclosure of requested information.” *See* Op. Att’y Gen. No. 87-4, 1987 Kan. AG LEXIS 191, at *3-4 (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. (1974)).

Purposely ending his ability to produce a record because Defendant does not *want* to produce it in the future, and thereby increasing the cost of access, amounts to imposing an unreasonable fee. Defendant cannot destroy a record simply to make public access to the information that record contains more onerous and expensive. But that is exactly what Defendant did here: despite knowing that future requests would be forthcoming, Defendant decided to remove its ability to comply with Mr. Hammet’s KORA requests by destroying the ability to create a record, thereby absolving itself of responsibility for providing open access to that record and the information contained therein.

Here, Mr. Hammet requested the same public record through KORA several times. SOF ¶¶ 9, 14, 16, 22. After losing his legal battle to prevent disclosure, Defendant provided the record to Mr. Hammet without a fee on three occasions. SOF ¶¶ 14, 16. In fact, prior to turning off the functionality in ELVIS for KSOS to run the provisional ballot detail report, Defendant could produce that report in response to KORA requests at little or no cost. SOF ¶¶ 20, 21. Once Defendant ordered ES&S to remove that functionality, Defendant attempted to charge Mr. Hammet \$522 to do a manual pull of the data that would have otherwise been contained in the provisional ballot data detail report. SOF ¶ 26. It also is not clear why Defendant cannot simply ask ES&S to turn the functionality back on, rather than charge Mr. Hammet \$522 for a manual pull of the data.

Defendant also maintains that it can and will charge Mr. Hammet some undetermined amount of money going forward each time Mr. Hammet requests provisional ballot data, which he is entitled to under KORA, because for each request ES&S will have to conduct a new data pull. SOF ¶ 31. Defendant essentially maintains that Mr. Hammet will have to incur expensive, unpredictable costs to access public records that he previously accessed for free, all because Defendant purposely ended his office's access to the records.

Of course, Defendant would be entitled to charge Mr. Hammet for actual costs incurred by running the provisional ballot detail report through ELVIS, even if he has not done so in the past. *See* K.S.A. 45-219(c). KORA “does... make clear the legislative intent that *actual costs* of furnishing copies of public records may be recovered by the agency and that the person seeking the records should bear the *actual expense*.” *Data Tree*, 279 Kan. at 465 (emphasis added). But here, the actual cost to KSOS was negligible or nothing at all. The cost only went up because Defendant ordered ES&S to end his access and thereby make recovery of the records more expensive.

Another case is telling. Under a previous open-records statute, the Kansas public records inspection act, the Supreme Court held that a reasonable fee could include “the creation of a special computer program” and allowed the agency to pass on the cost of developing and running the program. *State ex rel. Stephan v. Harder*, 230 Kan. 573, 589 (1982). But here, the program and ability to run it already existed. Defendant may not arbitrarily remove the ability to run the report at low or no cost, and replace it with an option that comes with a significantly high cost. Doing so amounts to a constructive denial of Mr. Hammet's lawful right to access that record, an abuse of Defendant's discretion, and a manipulation of the presumption in favor of open access to public records that animates KORA. It also imposes an unreasonable, and foreseeable, fee on

Mr. Hammet for his future requests. Situating Defendant's actions in the context of his broader, years-long fight to prevent disclosure of records regarding provisional ballot voters, Defendant's actions should be viewed as what they are: a bad faith attempt to impose high fees on Mr. Hammet and discourage him from filing future requests for these records. Defendant intentionally removed the benefit of ELVIS's ability to run the provisional ballot data report, which played an important, although imperfect, role in improving the way the KSOS collated provisional ballot voter data. Worse still, Defendant took his actions knowing that Mr. Hammet would be making future requests for this report. SOF ¶¶ 11, 17.

Defendant may argue that the \$522 was simply the cost associated with having ES&S conduct a manual data pull, and the cost of future data pulls is dependent on the amount of data and is therefore unpredictable. But the argument would ignore the fact that KSOS *had* the ability to produce the report for free (or at least for a nominal fee), and intentionally made it harder and more expensive to fulfill Mr. Hammet's valid KORA requests.

Beyond the cost to Mr. Hammet, Defendant's actions also place a larger burden on government officials more generally. Without KSOS's ability to run a centralized report from data collected around the State, the only way to collect state-wide provisional ballot detail reports is to request them individually from each of Kansas's 105 counties. And while he did not request a report from each county, Mr. Hammet in fact did send individual KORA request to multiple counties. Doing so not only cost Mr. Hammet unnecessary expense, but also increased the burden on county clerks to respond to these requests.²

² Of course, the fact that Mr. Hammet could conceivably request and receive county-wide provisional ballot detail reports from each of Kansas's 105 counties does not absolve Defendant of his obligation to produce records that are also within KSOS's custody and control. See K.S.A. 45-217(g)(1) (KORA applies to any document or record made or kept by an agency); *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (disclosure under Freedom of Information Act, a federal corollary to KORA, not an "official" response if "made by someone other than the agency from which the information is being sought."); *Church of Scientology of Cal. v. U.S. Dep't. of the Air Force*, No. 75-

Defendant should not be able to purposely obscure access to public records by making the process more complex and expensive than it needs to be, and passing the costs on to those requesting the records. This is especially true where, as here, Defendant was on notice that Mr. Hammet had a right to these records and would be requesting them, and has offered no other reason for ending access to the reports, other than that Defendant allegedly does not have a personal need for the report. To charge Mr. Hammet \$522 to access records that Defendant previously provided for free, that this Court held Mr. Hammet has a right to access, simply to make accessing those documents more difficult, is wholly inconsistent with the very purpose of KORA, which is to provide efficient, open access to public records. The \$522 fee is therefore presumptively unreasonable and violates K.S.A. 45-219(c).

V. Defendant destroyed an abstract of a voting record by removing the provisional ballot detail report functionality.

In addition to destroying a public record as defined by KORA, Defendant's removal of the ability to produce subsequent provisional ballot detail reports amounts to destruction of an abstract of a voting record, in violation of K.S.A. 25-2709. Kansas's election law requires Defendant to make provisional ballot voter lists, like the report at issue here, available to the public for inspection. K.S.A. 25-2320(a). The provisional ballot detail report, as a list of provisional ballots cast, would also be open to inspection under the National Voter Registration Act's public disclosure provision. *See* 52 U.S.C. 20507(i); *Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1336-40 (N.D. Ga. 2016) (noting that Section 8(i) of the NVRA provides "public access to a broad scope of information that shows how a state makes voter eligibility determinations" and includes records that show results of the registration and list maintenance process."); *Truth the*

1008, 1978 U.S. Dist. LEXIS 18428, at *12 (D.C. April 12, 1978) (Department of Defense violated FOIA with policy of forwarding FOIA requests to the agency that "originated" requested documents).

Vote v. Hosemann, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014) (purged voter information open under public disclosure provision of NVRA).

Defendant may destroy abstracts of voting records only after they have been on file for twenty years. K.S.A. 25-2709(5). There is little caselaw interpreting what constitutes an abstract of a voting record, and what this Court must do if it finds destruction in violation of K.S.A. 25-2709. See *Cure v. Bd. Of Cnty Comm'rs*, 263 Kan. 779, 799 (1998) (“There is no statutory sanction for election materials’ being destroyed before the period specified in 25-2709 has passed.”). Regardless, the Court can read the statute as written. “The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.” *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607 (2009). “The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.” *Id.*

K.S.A. 25-2709 is plain and unambiguous. An “abstract” is “[a] summary... a condensed version of a longer document.” Stephen Michael Sheppard, *The Wolters Kluwer Bouvier Law Dictionary Desk Edition*, “abstract,” (2012). It is “a summary of points” or “something that summarizes or concentrates the essentials of a larger thing or several things.” *Abstract*, *Webster’s Dictionary Online*, <https://www.merriam-webster.com/dictionary/abstract> (last visited May 5, 2020). The provisional ballot detail reports are just that. They summarize, condense, and concentrate the information from a larger database of election records and information. As such, they are an abstract of a voting record, and K.S.A. 25-2709 required Defendant to keep them for 20 years. By ordering ES&S to end his access to the reports, Defendant destroyed abstracts of voting records in violation of the statute’s record-keeping requirements.

CONCLUSION

This Court previously ordered Defendant to provide provisional ballot detail reports to Mr. Hammet. Defendant complied and provided the reports as ordered. Then, knowing Mr. Hammet would continue requesting the reports, Defendant instructed its technology company to end KSOS's ability to fulfil Mr. Hammet's current and future requests. Defendant's decision destroyed public records, constructively denied Mr. Hammet's request, imposed an unreasonable fee, and violated KORA. It also violated State election law requiring Defendant to retain election records.

For these reasons, Plaintiff respectfully asks the Court to grant his motion and enter judgment against Defendant, as specified in Plaintiff's Motion for Summary Judgment.

Dated: May 14, 2021

Respectfully submitted,

/s/ Sharon Brett

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2021, I electronically filed the foregoing with the Clerk of the District Court's electronic filing system which will serve all registered participants, and a copy was also served by email to counsel for the Kansas Secretary of State, Garrett Roe (garrett.roe@ks.gov) and Clay Barker (clay.barker2@ks.gov).

/s/ Sharon Brett
Sharon Brett