THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

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

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Scott Schwab asks this Court to grant him summary judgment in this case for the following reasons: a) the record requested is not a record under the Kansas Open Records Act (KORA), despite this Court's prior rulings to the contrary; b) even if it were a record, the Kansas Secretary of State's Office (KSOS) has no internal agency use for it and it is not a record required by statute, so Defendant may destroy it; and c) KORA allows Defendant to make production of data/records more complicated and expensive than it has been previously or actually needs to be. Defendant's arguments either ignore the broader context of this case, misconstrue or ignore important facts, or misinterpret what KORA requires. Defendant further argues that the record requested is not an abstract of a voting record, despite how counties use that record.

For these reasons, as set forth below, Defendant is not entitled to summary judgment.

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Pursuant to Kansas Supreme Court Rule 141(b)(1), Mr. Hammet responds to Defendant's statement of uncontroverted facts as follows:

1. Uncontroverted.
2. Uncontroverted.
3. Uncontroverted.
4. Uncontroverted.
5. Uncontroverted.
6. Uncontroverted.
7. Uncontroverted.
8. Uncontroverted.
9. Uncontroverted.
10. Uncontroverted.
11. Uncontroverted.
12. Uncontroverted.
13. Uncontroverted.
14. Uncontroverted.
15. Uncontroverted.
16. Uncontroverted.
17. Uncontroverted.
18. Uncontroverted.
19. Uncontroverted.
20. Uncontroverted.

21. Uncontroverted.

22. Uncontroverted.

23. Uncontroverted.

24. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact. Additionally, this is not a material fact.

25. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact.

26. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact. Additionally, this is not a material fact.

27. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact.

28. Uncontroverted.

29. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact. Additionally, this is not a material fact.

30. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact. Additionally, this is not a material fact.

31. Uncontroverted.

32. Uncontroverted.

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

34. Uncontroverted.

35. Controverted, as no discovery has taken place in this case which would allow Plaintiff to confirm or deny this fact. Additionally, this is not a material fact.

ARGUMENT

I. Defendant's arguments are devoid of context, which plainly shows that Defendant constructively denied Mr. Hammet access to the provisional ballot detail report.

Defendant Schwab would like this Court to believe that he did not deny Mr. Hammet's KORA request because he never issued a formal denial, and instead went "beyond what KORA requires" to provide Mr. Hammet access to provisional ballot data. *See* Def. Mem. at 11-12. This argument ignores Defendant's long history of delaying, frustrating, and refusing Mr. Hammet access to the record he sought in this case.

On no fewer than three occasions, Defendant Schwab has challenged Mr. Hammet's right to access this information. *See* Mem. Order, *Loud Light, et al. vs. Schwab*, 2020-CV-000343 (Jul. 24, 2020) (describing litigation history of this issue) (hereinafter "Mem. Order"). Each time, Defendant's challenge has been unsuccessful. For reasons that are unclear, Defendant Schwab has repeatedly resisted turning over provisional ballot data to the public. But this Court already held that the provisional ballot detail report is subject to disclosure under KORA. *Id.* Defendant is correct that KORA does not create an obligation for agencies to compile data in a particular format, or create records out of whole cloth simply to respond to KORA requests. *See* Def. Mem. at 12. But that is not what happened here. Mr. Hammet requested a record from Defendant that already existed, that Defendant had access to, and that Defendant could easily produce through KSOS's pre-existing electronic database. Defendant knew he would be obligated to produce this

record, given this Court's prior ruling. *See* Mem. Order. And yet, Defendant *intentionally* destroyed KSOS's ability to produce that record.

Mr. Hammet acknowledges that when the Defendant destroyed his office's ability to produce the statewide provisional ballot detail report, it changed how the data contained in that report would be produced in response to future KORA requests. *See* Ex. A, Emails from between Davis Hammet and Clay Barker. Because Defendant elected to turn off his office's ability to easily produce the requested report, responding to Mr. Hammet's KORA requests will now require "months or years of staff time," going through each individual voting record. Def. Mem. at 13. Or, alternatively, Defendant could pay its software developer to create a new code to pull this data each time it is requested. *Id*. Defendant is essentially arguing that responding to Mr. Hammet's request would have been difficult and time consuming. But this is a problem entirely of Defendant's own making, and Defendant cannot ignore that context. Complying with Mr. Hammet's requests suddenly became burdensome only because Defendant Schwab made it so.

With this context in mind, the Court can and should draw negative inferences about *why* Defendant requested that the statewide provisional ballot detail report functionality be turned off. Defendant claims that it was because KSOS had no use for the report and that KSOS is not required to keep that record pursuant to any statute. *See* Def. Mem. at 8-9. However, based on the larger history of Defendant Schwab's unwillingness to let the public access information about provisional ballot voters, it is safe to assume that he did not *want* KSOS to retain the functionality and be forced to turn over the reports into the future. This assumption is made all the more plausible because of the timing of Defendant's revelation that the functionality needed to be removed. Defendant requested that the functionality be removed on August 13, 2020—two weeks after this Court ruled against Defendant on the issue. Case Mgmt. Order ¶ 5.f-g. At that

point, the only way to prevent turning over this record in the future would be to make sure it no longer existed. That is precisely what Defendant did. Defendant's actions violate both the letter and spirit of KORA, regardless of Defendant's desire to ignore this context.

Read in light of Defendant's prior refusal to provide these records, it is clear that Defendant Schwab's response to Mr. Hammet's valid KORA request was an actual and constructive denial of that request. There can be no dispute that the statewide provisional ballot detail report is a record under KORA. *See* K.S.A. 45-217(g)(1) (a public record is defined as "any recorded information, regardless of form or characteristics, which is made, maintained or kept or is in the possession of any public agency."); Mem. Order (holding that the provisional ballot detail report from the 2018 election is a record under KORA). Defendant previously confirmed his understanding that 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. *See* Def. SOF ¶¶ 7, 9. In fact, Defendant Schwab asked his agency's software provider to destroy KSOS's ability to produce this record *while Mr. Hammet was actively making these requests*, and shortly after publicly criticizing this Court's previous ruling. Def. SOF ¶¶ 8-10; 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. Defendant therefore intentionally destroyed his ability to answer these KORA requests, and his conduct actually and constructively denied Mr. Hammet's request. Defendant is not entitled to summary judgment.

II. Defendant reads requirements into KORA that do not exist.

In addition to ignoring the broader context of Defendant's attempts to deny access to provisional ballot voter data, Defendant reads several requirements into KORA that simply do not exist. Despite Defendant's contentions, KORA does not require that records be 100% accurate in order to be subject to disclosure, or that records be statutorily required in order to be maintained and produced. The Court should disregard both of these arguments.

A. Accuracy of record

Defendant repeatedly raises that the statewide provisional ballot detail report is "at best, an incomplete and inaccurate snapshot in time that pulls provisional ballot data that some of the 105 counties inconsistently input into ELVIS." Def. Mem. at 9. Mr. Hammet does not contest that the record may not contain data about every single provisional ballot cast throughout the state of Kansas in a given election.[1] But the fact that there may be some missing data, or that some data may not be fully accurate, does not make the provisional ballot detail report any less of a record under KORA.

Consider the broad array of records subject to disclosure under KORA, many of which are incomplete or contain inaccuracies. Government data exists in virtually every administrative agency in the state; some of this data is collected from other entities and compiled in agency-wide databases and reports. Mr. Hammet knows of no other agency that has or would claim that such data is somehow beyond the reach of KORA because there may be inaccuracies in how that data was inputted, or because there may be missing entries. For example, law enforcement agencies collect a multitude of data regarding the people they stop, search, ticket, or arrest. Data regarding some of the individual people stopped or cited may be missing from the database,

[1] Notably, Defendant did not present evidence that the provisional ballot detail reports were inaccurate. Instead, Defendant claims he "is not able to confirm the accuracy of information contained in the pre-programmed Provisional Ballot Detail Report of the ELVIS system." Def. SOF ¶¶ 30. As described above, KORA imposes no "accuracy" requirement on government records. The statute certainly imposes no requirement that the government confirm the accuracy of records produced under KORA.

including addresses, physical descriptors, or the individual's home address. Alternatively, individual law enforcement officials may enter some data incorrectly—for example, a driver's race. Individual inaccuracies or missing information entered by officers does not make the overall report of all of the agency's stops, searches, and arrests, a non-record under KORA. The same is true for the provisional ballot detail report—just because there may be inaccuracies in the data, or some county clerks fail to report all or part of their data, does not turn the report into a record no longer subject to KORA.

B. Records do not need to be statutorily mandated in order to be subject to KORA.

Defendant next argues he did not need to keep the statewide provisional ballot report because the report is not a record that KSOS is statutorily required to keep. *See* Def. Mem. at 9-10. Much like Defendant's argument about accuracy, there is nothing in KORA that limits its provisions to records that agencies keep pursuant to statute. Emails, memorandum, flyers, policies and a whole host of other documents are considered "records" pursuant to KORA, and thus subject to disclosure, despite the fact that no state statute mandated their creation. *See* K.S.A. 45-217(g)(1) (a public record is defined as "any recorded information, regardless of form or characteristics, which is made, maintained or kept or is in the possession of any public agency."). Nor is it relevant that Mr. Hammet failed to assert that Defendant Schwab was required to retain the functionality in order to avoid a violation of KORA. *See* Def. Mem. at 10. Mr. Hammet is not an attorney and is not required to assert legal arguments in his KORA requests.

Defendant also fails to cite any authority to support his argument that he can destroy KORA records so long as no statute requires him to keep them.[2] These arguments are a mere distraction from the fact that Defendant Schwab *could* previously produce this record, and did so in response to KORA requests, yet destroyed his ability to do so going forward when KORA requests for that record were ongoing. And once Defendant created the record—or, perhaps more accurately, realized it had the ability to create the record and did so in response to prior KORA requests—he was in possession of a record subject to disclosure under KORA. Op. Att'y Gen. No. 95-64, 1995 Kan. AG LEXIS 71 at *15 ("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."). Summary judgment in favor of Defendant is therefore inappropriate.

III. The $522 fee is unreasonable in light of the totality of Defendant's actions.

Although KORA permits government entities to charge a "reasonable fee" associated with the cost of producing records, KORA does not allow a government entity to deliberately frustrate access by making the process unduly burdensome and expensive. Yet that is precisely what Defendant Schwab did by removing the statewide provisional ballot detail report functionality in ELVIS.

Much of Defendant's motion for summary judgment attempts to misconstrue Mr. Hammet's request as a request only for individual provisional voter data, rather than the provisional ballot detail report itself. *See* Def. Mem. at 14-15. This is a mischaracterization of the

[2] Of course, Mr. Hammet did point to a statute that requires Defendant to keep the records—K.S.A. 25-2709. *See* Section IV, below; Compl. Count III. But, even if Mr. Hammet had not pled a claim specific to destruction of records required by statute, Mr. Hammet would still have a claim under KORA.

record. Mr. Hammet initially requested the report, not individual provisional voter data. *See* Ex. A, Emails between Davis Hammet and Clay Barker, Sept. 9, 2020 ("I do plan to KORA the Provisional Detail Report . . . should I go ahead and officially request it?") and Oct. 6, 2020 (stating "Pursuant to the Kansas Open Records Act, I request the Provisional Ballot Detail Report for the 2020 primary election."). When KSOS would not produce the report and claimed it no longer had the capability to do so, Mr. Hammet voluntarily reframed his request to get what KSOS *could* still access. *Id.* It was only then that KSOS proposed the solution of having their software provider write a special code to manually pull the data. *Id.* Mr. Hammet's willingness to take data in an alternative format did not withdraw his original KORA request for the statewide provisional ballot detail report itself

Defendant's arguments that the only solutions to produce the underlying data were to have staff go through each record one by one, or have the special code rewritten for $522, ignore two important points: (1) it was Defendant's actions that created that scenario; and (2) Defendant could have simply ordered the provisional ballot detail report functionality be turned back on. Instead, Defendant wants this Court to believe that he was being benevolent by offering to have the special code written and only charge $522—plus a future, to-be-determined amount for each subsequent KORA request. *See* Def. Mem. at 14 ("Not only was this fee reasonable under KORA, it was a lower fee than what KORA would have permitted."). Again, context matters. And taken in the context of Defendant's actions as a whole, and the fact that Defendant turned off the statewide report functionality to intentionally frustrate Mr. Hammet's access to this information, the $522 fee is presumptively unreasonable.[3]

[3] Mr. Hammet does not dispute that Defendant could charge a fee for producing the provisional ballot detail report in the future, if the statewide report functionality is turned back on in ELVIS. This is true even though Defendant has not previously charged a fee for producing this report. *See* K.S.A. 45-219(c); Def. Mem. at 15. Rather, Mr. Hammet

Moreover, this Court should consider the overall costs to government that have been created as a result of Defendant's actions. By removing the statewide report functionality from ELVIS and refusing to guarantee that any manual data pull would be completed prior to the end of the 2020 General Election, Defendant Schwab forced Mr. Hammet to file individual KORA requests with each county. This introduced unnecessary inefficiencies and added expenses, both for Mr. Hammet and for the counties. *See* Ex. B, Declaration of Davis Hammet. KORA's fees provisions do not allow agencies to 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)). Yet that is precisely what happened here. The fees charged to Mr. Hammet are therefore unreasonable, and Defendant is not entitled to summary judgment on this claim.

IV. This Court could construe K.S.A. 25-2709 to protect against destruction of the provisional ballot detail reports.

Defendant argues Plaintiff lacks standing to assert a violation of K.S.A. 25-2709 and that the provisional ballot detail reports are not abstracts of voting records.

A. Because Defendant violated K.S.A. 25-2709, plaintiff lost access to records he would have otherwise had; he thus has standing.

To establish standing, Plaintiff must demonstrate a "sufficient personal stake in the outcome of the controversy to invoke jurisdiction and to justify the court exercising its remedial powers." *Ternes v. Galichia*, 297 Kan. 918, 921 (Kan. 2013). "The determination of whether a sufficient interest exists to establish standing is highly fact-specific . . . Courts have pointedly avoided making definitive rules governing sufficiency of the interest." *Id.* at 922 (internal citations omitted). Kansas courts occasionally look to the Federal standing requirements and

asserts that Defendant's actions in this case, which served to intentionally suppress access to public records, then provided limited access but only at a high fee, make the imposition of that fee unreasonable.

require parties to "present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Id.* at 921, citing *Horne v. Flores*, 557 U.S. 433, 445 (2009).

If the Court determines K.S.A. 25-2709 applies, then Defendant's violation of the statute injured plaintiff. By destroying the provisional ballot detail reports, Defendant denied Mr. Hammet access to the records he was otherwise entitled to. Worse, a factfinder could infer that not only did Defendant violate K.S.A. 25-2709 and that doing so injured Mr. Hammet, but also that Defendant destroyed the records specifically because Mr. Hammet had requested them in the past. Defendant claims it has only provided provisional ballot detail reports to third parties but he identifies no third party other than Mr. Hammet. *See* Def. SOF, ¶ 26. Plaintiff's injury is thus "concrete, particularized, and actual." *Ternes*, 297 Kan. at 922.

B. Provisional ballot detail reports are abstracts of voting records.

Defendant argues that the provisional ballot detail reports are not abstracts of voting records under K.S.A. 25-2709 because of the Legislature's use of the word "abstract" elsewhere. As Defendant points out, "[o]rdinarily, identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning." *Callaway v. Overland Park*, 211 Kan. 646, 652 (Kan. 1973). But "[t]he 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." *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607 (2009).

Here, the statutory term in question is 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 21, 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.[4] Defendant points to nothing in the legislative history of K.S.A. 25-2709 that would categorically limit abstracts of voting records to a different definition, or to the category of abstracts of voting records references in other statutes. This Court therefore can and should rule that the statewide provisional ballot detail report is an abstract of a voting record that must be preserved pursuant to K.S.A. 25-2709.

In addition, there is good reason to treat provisional ballot detail reports as abstracts of voting records, thus requiring retention. Who is casting provisional ballots, and why, are crucial questions about Kansas's electoral process. Congress required provisional ballots by enacting the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545. The statute addresses the very problem Mr. Hammet and Loud Light are attempting to correct by requesting the provisional ballot detail reports:

> Studies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.

H.R. Rep. No. 107-329, at 38 (2001). "One purpose of HAVA was to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 211 (3rd Cir. 2012). Preserving abstracts of

[4] Defendant also argues that if Plaintiff is correct, then all Kansas counties are violating K.S.A. 25-2709. Def. Mem. at 20. But whether individual counties are violating the statute is not at issue here and has no bearing on the reading of the statute in this case. In addition, Defendant makes the claim without a citation to the record in violation of Rule 141(a).

provisional ballot information serves this very purpose by allowing voters and organizations like the one Mr. Hammet runs to collect information on who is forced to vote provisionally and whether their votes are ultimately counted.

Retaining abstracts of provisional ballot reports for the time K.S.A. 25-2709 mandates thus not only complies with the plain language of the statute, it also furthers the purpose of HAVA.

C. Defendant destroyed records.

Defendant argues last that he did not destroy any records. The argument ignores the history of this litigation and Defendant's own actions. While Defendant may not have shred documents or deleted the underlying data from the ELVIS database, a public record is "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).

> "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. Perhaps most significantly, this Court already determined that the provision ballot detail reports are public records under KORA. Mem. Order.

By intentionally instructing his technology provider to end access to the provisional ballot detail reports, Defendant destroyed the very records this Court previously ordered produced.

V. Summary judgment should also be denied because no discovery has been completed.

For the reasons explained in Plaintiff's Motion for Summary Judgment and Memorandum in Support, filed May 14, 2021, the stipulated and undisputed facts support summary judgment in Plaintiff's favor, and for the reasons described above, Defendant is not entitled to summary judgment. Nonetheless, summary judgment in Defendant's favor is also inappropriate because of the lack of discovery to date in this case.

Discovery on at least two issues could change the outcome at trial depending on what the parties learn in discovery. First, Defendant has not stated why he ended access to the provisional ballot detail reports. His memorandum in support of summary judgment suggests he did not need the records any more, but he does not give an exhaustive list of all the reasons he instructed his technology provider to shut down the provisional ballot detail report functionality. The affidavit offered in support does not indicate who precisely gave the order to remove the report functionality, or whether the order included direction to remove the functionality of other unused aspects of ELVIS or only the provisional ballot detail report. Given the history of this litigation, a reasonable fact finder could infer that Defendant ordered this particular functionality removed to frustrate Mr. Hammet's access to the reports. Further discovery could resolve the question with certainty or, at least, shed more light on Defendant's motive.

Second, Defendant has not provided evidence of the cost of turning the provisional ballot detail report functionality back on, nor has he stated what it cost to remove. If turning the provisional ballot detail report function back on is free—or less than $522—than his attempt to charge that amount to Mr. Hammet is unreasonable. If it cost any money for Defendant to remove his access to the reports, a jury could infer he incurred the cost for the purpose of frustrating Mr. Hammet's requests. The fact also bears on the reasonableness of the fee

Defendant is now trying to impose. It is unreasonable for Defendant to shift a voluntarily incurred cost to Mr. Hammet.

CONCLUSION

This is Defendant's third attempt to deny access to provisional ballot information. Defendant's order to his technology company came only weeks after this Court ordered him to turn over a provisional ballot detail report. Defendant has offered no legitimate reason for ending his access to this record, and, by admitting he only provided this record in response to KORA requests, Defendant all but concedes that he purposely frustrated access to open records. Defendant's attempt to charge a $522 fee is similarly unfounded. The fee is only a result of Defendant's choice—a choice Defendant knew would obstruct Mr. Hammet's access to the records.

The Court ruled on this matter last summer. That should have been the end of it. Instead, Defendant refuses to accept that the records Mr. Hammet seeks are public records under KORA and has, at this point, done nearly everything in his power to ensure Mr. Hammet does not gain access to provisional ballot data.

Respectfully, Defendant's motion should be denied.

Dated: June 4, 2021

Respectfully submitted,

/s/ Sharon Brett

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 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