

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

DAVIS HAMMET,

Plaintiff,

vs.

Case No. 18CV5173
Chapter 60; Division 7

RONNIE METSKER, in his official capacity
as Johnson County Elections Commissioner,

Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Davis Hammet filed this action under the Kansas Open Records Act (“KORA”), K.S.A. 45-217 *et seq.*, to obtain access to a list of provisional voter ballots.¹ Defendant Ronnie Metsker, Johnson County Elections Commissioner, refused to produce any such list, contending, essentially, that to do so would be a crime pursuant to K.S.A. 25-2422 (Supp. 2018), the Unauthorized Voting Disclosure Act.

Both parties seek summary judgment and contended, at oral argument, that there are no factual disputes, only a question of law in interpreting K.S.A. 25-2422, most recently amended on July 1, 2018.² For purposes of summary judgment, the following facts are not controverted.

¹ He also asked for the reasons for the ballots being designated as provisional which is not being challenged.

² The recent amendment deleted former K.S.A. 25-2422(b) (Supp. 2017) [enacted in 2013], that placed a timeframe for not revealing the “name of any voter who has cast a ballot..until the final canvass of the election...”

UNCONTROVERTED FACTS

1. In May 2018, the Kansas legislature passed SB 336, an omnibus government transparency bill on the recommendation of the House Judiciary Committee. Governor Jeff Colyer signed the bill into law on May 10, 2018.

2. The bill, which went into effect on July 1, 2018, removed a subsection in the Unauthorized Vote Disclosure Act, K.S.A. 25-2422 that had previously provided “the name of any voter who has cast a ballot shall not be disclosed from the time the ballot is cast until the final canvass of the election by the county board of canvassers.”

3. The mid-term primary election took place on August 7, 2018. A record 118,708 Johnson County voters participated in the election, 2,349 of whom were directed to cast a provisional ballot. 898 provisional ballots were not counted, including 153 advance ballots that were rejected because the signature on the envelope did not match the voter’s record.

4. On August 22, 2018, Davis Hammet requested access to the list of names of voters who cast provisional ballots as well as the reason each voter was directed to vote provisionally. Several hours later, Mr. Metsker, through counsel, emailed Mr. Hammet to inform him that his request was denied, citing the Unauthorized Voting Disclosure Act.

5. On August 27, 2018, Mr. Hammet requested the names of advance voters who had their ballots rejected and the reasons why their ballots were rejected. Within several hours of receiving Mr. Hammet’s request, Mr. Metsker again declined to release the documents, explaining that the advance mail voters became provisional voters once their ballots were rejected again citing the Unauthorized Voting Disclosure Act.

6. Mr. Metsker is the duly appointed Election Commissioner for Johnson County, Kansas. He was appointed by the Kansas Secretary of State and is responsible for conducting elections in Johnson County.

7. In the performance of his duties as the Election Commissioner, Mr. Metsker is required to comply with K.S.A. 19-3424, as amended by L. 2018, ch. 59, sec. 6, which provides that “[t]he election commissioner, in the conduct of elections, shall operate under the general supervision of the secretary of state and shall comply with the statutes, rules and regulations and standards and directives that relate to the registration of voters and the conduct of elections.”

8. In the weeks following the August 7, 2018 primary election, the Johnson County Election Office received six requests to release certain provisional voting records, including Mr. Hammet’s request, which was the last of the six received. The requests varied, but all sought the names of voters who voted provisional ballots in the primary election.

9. Upon receipt of the first request seeking provisional records, election office staff and the Johnson County legal department, which provides legal assistance to the county election office, reviewed state and federal statutes, including any 2018 amendments and applicable case law, and determined that K.S.A. 25-2422 prohibited disclosure of provisional voting records.

10. The legal department confirmed its interpretation with the Secretary of State’s office.³

11. Prior to the 2018 primary election, the Johnson County Election Office received similar requests for provisional voting records and it also contacted the Secretary of State’s office.

CONCLUSIONS OF LAW

Standards for Determining KORA Cases

“Summary judgment is proper where the only question or questions presented are questions of law.” *Fletcher v. Nelson*, 253 Kan. 389, 391, 855 P.2d 940 (1993). The parties agree

³ The Court places little factual value in any consultation with the Secretary of State’s office, which advanced the same legal position in *Mah v. Shawnee County Commissioners, Kris W. Kobach, Kansas Secretary of State*, 2012 WL 5584613 (D. Kan. Nov. 15, 2012). Judge Marten interpreted the Helping America Vote Act (“HAVA”) and 42 U.S.C. 15482(a)(5)(B) to allow access to provisional voters’ names, rejecting the same position advanced here under. HAVA only prohibited access to “information about an individual provisional ballot” but not the individual’s names. *Id.* at *2. That case was mooted by passage of the 2013 version of the statute with the final canvass provision. *Mah v. Shawnee County Commissioners of Shawnee Cnty., Kan., et al.*, 2013 WL 3967952 (D. Kan. August 1, 2013).

that this case presents a question of statutory interpretation and thus, a questions of law. *In re Estate of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014).

I. WHETHER REVEALING PROVISIONAL VOTER NAMES ARE PROHIBITED.

The general rule is that public records are open for inspection unless otherwise provided by KORA. K.S.A. 45-216. KORA “shall be liberally construed and applied to promote” public access to government records. K.S.A. 45-216(a); *see also Hunter Health Clinic v. WSU*, 52 Kan. App. 2d 1, 11, 362 P.3d 10 (2015) (noting that the legislative intent was to ensure public confidence in government by increasing the access of the public to government and its decision-making processes).

A list of statutory exceptions to disclosure is found in K.S.A. 45-221 (Supp. 2017). These “exceptions are to be narrowly interpreted, and the burden is on the public agency opposing disclosure.” *Data Tree LLC v. Meek*, 279 Kan. 445, 454-55, 109 P.3d 1226 (2005); K.S.A. 45-222(c) (Supp. 2017).

In the case at bar, both parties cite the provisions of K.S.A. 25-2422 as either allowing or prohibiting access to the list of names of provisional ballots.

(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 provisional⁴ 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.

⁴ A provisional ballot accommodates voter error or official error. Examples are voting, though properly registered, but in the wrong precinct; (K.S.A. 25-3302(a)(3)); voter error in failing to bring proper identification to the polling place (K.S.A. 25-2908(d)); or voter error based on such voter's mistaken belief that such voter was properly registered, but was actually not, or, otherwise, some official error in not placing such voter's name in the registration books. (K.S.A. 25-2908(e)).

(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.)

The highlighted language above is the critical language each side cites for its respective positions. The prohibition against invading voter secrecy is longstanding. *See Burke v. State Board of Canvassers*, 152 Kan. 826, 107 P.2d 773, 778 (1940) (noting the right of secrecy exists in even absentee ballots although the names of such voters are evident on return envelopes). As the dissent in *Burke* noted, at one time, absentee voters *from within* the state required election officials to “keep the fact of such vote *and* the person for whom the same is recorded *and* contents thereof secret...” *Id.* at 782 (emphases added). Thus, the legislature knew how to use the conjunctive means of prohibiting (1) the fact of voting, (2) the voter’s name and (3) the contents of the ballot. That is not the structure of the current statute.

Defendant invokes K.S.A. 25-2422 because he argues that requiring him to provide an “unauthorized voting disclosure” would be a crime. An examination of what “disclosures” that statute targets is the focus of this matter. If it is any voter’s name, then, according to defendant, any such disclosure is exempt from KORA, which exempts any “disclosure [] which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court . . . 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 . . . to restrict or prohibit disclosure.” K.S.A. 45-221(a)(1).

State and federal law generally address the maintenance of voter records regarding election participation and the type of ballot a voter casts. *See* K.S.A. 25-2319 (“at every election,

one of the judges of the election board shall, as each person votes, enter on the registration book the word ‘voted,’ or some other distinguishing mark prescribed by the county election officer, on the line where such person’s name appears”); K.S.A. 25-2409(b) (“The judges shall write on the envelope the word ‘provisional’ and a statement of the reason for the challenge”); 52 U.S.C. 21082(a)(5)(B) (“The appropriate State or local election official shall establish a free access system...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”).

A. Statutory Interpretation of K.S.A. 25-2422

Legislative intent is unnecessary if the plain language of K.S.A. 25-2422 is evident. *State v. Paul*, 285 Kan. 658, Syl. ¶ 2, 175 P.3d 840 (2008) (“When a statute is plain and unambiguous, [courts] do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it.”). The rules of statutory construction are well-established. “The fundamental rule of statutory interpretation is that legislative intent governs if it can be discerned.” *In Interest of T.S.*, 308 Kan. 306, 419 P.3d 1159, 1162 (2018). “When construing a statute, a court should give words in common usage their natural and ordinary meaning.” *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005) (quoting *Sawyer v. Oldham’s Farm Sausage Co.*, 246 Kan. 327, 331, 787 P.2d 697 (1990)).

When interpreting statutory language, Kansas courts also apply the last antecedent rule:

In construing statutes, qualifying words, phrases and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. The last antecedent, within the meaning of this rule, has been regarded as the last word which can be made an antecedent without impairing the meaning of the sentence. [Citation omitted.] *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 (1968).

State v. Durham, 38 Kan. App. 2d 791, 794–95, 172 P.3d 88, 91 (2007).

The statute in question is among those identified as election crimes under Article 24 of Chapter 25. It prohibits those “charged with an election duty” from intentionally “[d]isclosing or exposing *the contents* of any ballot, whether case in a regular or provisional manner...” (Emphasis added.) This is the primary prohibition. It notes, by use of the word “whether,” that the prohibition applies to either kind of ballot, regular or provisional. The balance of the sentence, therefore, relates back to the subject of the prohibition, disclosing “the contents” along with the name of the voter. It does not prohibit the voter’s name other than in the context of revealing the contents of the particular ballot.

The overriding purpose of K.S.A. 25-2422 is evident. It is to protect the long-recognized right of ballot secrecy, not the fact that one has voted. Voter secrecy has been interpreted as being embedded in the Kansas Constitution at Article 4, § 1. *Sawyer v. Chapman*, 240 Kan. 409, 412-413, 729 P.2d 1220 (1986) (noting the ballot secrecy does not apply to party affiliation).

Further review of the statute underscores that the purpose of K.S.A. 25-2422 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. This is evident from subsection (a)(2) which prohibits “inducing or attempting to induce any voter to show *how the voter marks or has marked the voter’s ballot*.”⁵ (Emphasis added.)

Plaintiff argues that the clause “whether cast in a regular or provisional manner” merely modifies the antecedent clause and clarifies that the contents of both regular and provisional ballots must be kept confidential. Consistent with this interpretation is the fact that the prohibition of

⁵ Ironically, Judge Theis found that Secretary Kobach actually sought to violate this longstanding constitutional right for federal form registrants by using voter qualifications standards determined to be illegal. *Belenky v. Kobach*, 2015 WL 13066331, at *12 (Kan. Dist. Ct., August 21, 2015)

disclosing the regular or provisional voter's name is directly linked to the subject of the sentence prohibiting disclosure of a ballot's contents.

If identifying a voter's name was sacrosanct, then there would be no reason to allow voter names for advance balloting as expressly stated in K.S.A. 25-2422(b) which provides that "[n]othing in this section shall prohibit the disclosure of the names of persons who have voted advance ballots." This would create an unusual disconnect in how certain voters are treated. Only advance ballot voting, which is increasingly significant in primary and general elections, would result in voters' names being listed. Legislative intent may be determined from other provisions in this Unauthorized Voting Disclosure Act, thereby giving consideration to all parts of the act. *Richards v. Schmidt*, 274 Kan. 753, 755, 56 P.3d 274 (2002) ("In order to ascertain legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof *in pari materia*."). In this regard, the Court cannot ignore subsection (b) when considering the intent of subsection (a)(1).

Defendant concedes that it is "conceivable" that subsection (a)(1) could be interpreted to prohibit the disclosure of names of regular voters, but notes the legislature has provided other means of access to voter registration lists. Doc. 9 at 7 (citing [sic] K.S.A. 25-2323)⁶. By this, the defendant tacitly suggests his interpretation creates an ambiguity in the statute. If so, that ambiguity does not assist in an interpretation that criminalizes providing provisional voters' names. It now requires election officials to give any person access to voter registration books, active voter lists, and other required lists. K.S.A. 25-2320(a). The statute explicitly enumerates what is redacted from the lists, and it does not include names, only personal identifiers like social security numbers and driver's license numbers. K.S.A. 25-2320(b).

⁶ This actual provision relates to election tampering not the maintenance of voter registration lists. The Court assumes defendant meant K.S.A. 25-2320 (Supp. 2017).

Likewise, election officials are required to write down next to the voter's name in the registration or poll books if a vote is considered provisional. K.S.A. 25-409(b) (Supp. 2017). Accordingly, upon a mandated inspection under K.S.A. 25-2320(a), the provisional voter's name and any lists maintained that list all provisional voters, must be revealed. K.S.A. 25-2319 (2000) requires that as each person votes, one of the judges must enter on "the registration book the word 'voted,' or **some other distinguishing mark** ...on the line where such person's name appears." (Emphasis added.) That means, if a vote is not counted but considered provisional, it must be noted next to the person's name.

At oral argument, the defendant failed to provide any justification for an alleged prohibition in K.S.A. 25-2422(a)(1) that makes any voter's name, regular or provisional, off limits when considered in light with the entire statute, much less the entire election law scheme. His only answer is that if the legislature states otherwise, then the Court may not question the same. But the Court concludes any reasonable and plain interpretation of this statute cannot mean what defendant contends.

Even an examination of a change in the law from the 2013 version of the statute makes clear that the legislature never intended to permanently hide the names of provisional voters. At one point, the only concern was one of timing. It provided:

(b) ***The name*** of any voter who has cast a ballot ***shall not be disclosed*** from the time the ballot is cast ***until*** the final canvass of the election by the county board or canvassers.

(Emphasis added). But even this provision was removed by the July 1, 2018, amendment.

B. Legislative History of Amendments to K.S.A. 25-2422

If there could be any ambiguity in K.S.A. 25-2422 as to subsection (a)(1), the 2013 legislature's "election to canvass" restriction on the release of names of regular and provisional voters would be superfluous if subsection (a)(1) was intended to create a permanent restriction on

the release of any such voter's name. *See State v. Fisher*, 304 Kan. 242, 268, 373 P.3d 781 (2016) (“we do not interpret statutes in such a manner as to render portions superfluous or meaningless.”) (citing *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004)).

K.S.A. 25-2422 has been amended twice in recent years. First, in 2013 by SB 122 and later in 2018 by SB 336. Even the history of these enactments reflects changes that have allowed greater public access to provisional voter names.

Following an unsuccessful attempt to block the pre-canvass release of names of provisional ballot voters during the 2012 election, Secretary of State Kris Kobach urged the legislature to amend the nondisclosure law to limit access to voter names. He testified at a hearing on SB122 (initially titled SB177) that lists of provisional ballot voters should not be publicly accessible until after an election canvass to ensure an “orderly process for preparing for the county canvass and to protect voters from an unnecessary extension of the campaign season.” *See* Hearing on SB 177 Before the S. Comm. on Ethics, Elections and Local Gov't, 85th Leg., 2013 Sess. (Kan. 2013) (statement of Kris Kobach, Sec. of State). He suggested this was because “providing provisional voters' names to candidates effectively extends the campaign period for six to ten days after the election.” *Id.* As such, SB122 amended K.S.A. 25-2422(b) to state “[t]he name of any voter who has cast a ballot shall not be disclosed from the time the ballot is cast until the final canvass of the election by the county board of canvassers.” 2013 Kan. Sess. Laws 504, L. 2013, ch. 101, § 1.

But, by 2018, the 89th Kansas Legislature further amended K.S.A. 25-2422 through SB 336. The only change removed this temporal restriction that had been added for the first time by SB122. It then deleted K.S.A. 25-2422(b). 2018 Kan. Sess. Laws 732, L. 2018, ch. 87, § 2. By doing so, the legislature made all voter lists, provisional and regular ballot voters, available to the public even before the final canvass for an election.

SB 336 was part of an omnibus bill.⁷ The House Judiciary Committee introduced the amendment to K.S.A. 25-2422 during a hearing held on SB 336 on March 20, 2018. Towards the end of the hearing, the Judiciary Committee voted to add the contents of SB 295, a bill titled “Legislative Review of Exceptions to Disclosure of Public Records,” to SB 336. When Committee Chairman Blaine Finch called for amendments to the contents of SB 295, Representative Vic Miller from Topeka introduced an amendment that would “remove the closure enacted” to restrict public access to records relative to voting.⁸ *See* Ex. 4, Hearing on SB 336 Before the H. Comm. on Judiciary, 87th Leg., 2018 Sess. (Kan. 2018), at 1:52:52. Specifically, Rep. Miller explained the difficulties in restricting public access to voter lists in close elections.

In response to Rep. Miller’s proposal, Committee Chairman Blaine Finch stated “if I understand this correctly based on the strike in the balloon, current law would be that the name of the voter who cast a ballot should not be disclosed and by striking that, it can be disclosed? At any time between the vote and the canvass?” *Id.* at 1:55:06-1:55:23. Representative Miller responded “when you’re contesting an election and you have information that someone was a convicted felon and may have voted in an election, it is kind of nice to know whether they had impact on the election and actually voted. And you have a very short time frame to discover those things and prove them up and if you don’t even have access to the names of the people who voted, which aren’t going to already be public, that makes it very difficult to do in honest

⁷ SB 336 is an omnibus sunshine bill that was principally drafted to remove public access restrictions to information maintained by DCF and police departments regarding child deaths and body cam footage, respectively. *See* Laura Bauer and Hunter Woodall, *Kansas Passes Bill to Open State Secrets on Child Deaths, Police Shootings*, KANSAS CITY STAR, May 1, 2018 (<https://www.kansascity.com/news/politics-government/article209883924.html>).

⁸ Kansas courts have long recognized that statements made during committee meetings reveal legislative intent. *Manhattan v. Eriksen*, 204 Kan. 150 (1969); *State v. Quested*, 302 Kan. 262, 282, 352 P.3d 553, 565 (2013) (citing the house and senate judiciary committee minutes as evidence of the legislature’s clear intent to curtail judicial discretion in sentencing when passing the sentencing guidelines).

contest.” *Id.* at 1:55:23-1:55:66.

Ranking minority member Representative John Carmichael voiced his support for the amendment, reciting a history of SB 122 and explaining that “it’s not a secret who votes in elections in America and it shouldn’t be a secret who votes, the secret is *how* did you vote?” *Id.* at 1:58:07. Representative Carmichael concluded his remarks by summarizing the proposed amendment for the committee as “this reopens so that *all of us know* who participated in the election. That is what it’s about.” *Id.* at 1:58:16. Two days after the hearing, the committee recommended that the bill, including its amendments to K.S.A. 25-2422, be passed. After passage by the House, SB 336 underwent minor changes in conference committee with no other amendments. The conference committee reported this as an amendment to the KORA exceptions, noting “the language was modified to remove, rather than continue, an exception regarding certain voter information.” H. Conf. Comm. Rep. Brief on H. Sub. for SB336 (Kan. 2018).⁹

After passage, the Legislative Research Department Summary of Legislation described SB 336’s amendment to K.S.A. 25-2422(a)(1) as follows: “[T]he bill removes an exception preventing the disclosure of the name of any voter who has cast a ballot from the time the ballot is cast until the final canvass of the election by the county board of canvassers.” 2018 Summary of Legislation at 147, KAN. LEG. RESEARCH DEP’T (2018).

⁹ It is also clear that federal law encourages greater openness in how states determine voter eligibility. The National Voter Registration Act’s public disclosure provision, Section 8(i), provides that “public access to a broad scope of information [] shows how a state makes voter eligibility determinations” and includes records that “show the results of the [registration and list maintenance] process and activities put into place.” *Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1336-40 (N.D. Ga. 2016). In order to cast a provisional ballot, a voter must first complete a registration form. K.S.A. 25-409(b); K.A.R. 7-46-2(D). Accordingly, county election officials would be required to disclose the names of all voters casting a provisional ballot. *Project Vote/Vote for Am. Inc. v. Long*, 682 F.2d 331, 336 (4th Cir. 2012) (the NVRA mandates disclosure of registration applications). A list of names of purged voters who cast a provisional ballot after being removed from voter rolls would also be open to inspection. *See Truth the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014) (purged voter information open under the public disclosure provision). Accordingly, plaintiff argues that the legislature would not criminalize what federal law requires to be open. Indeed, it would be preempted by federal law if that were the case.

Although it is not evidence, plaintiff points out that a number of other county election officials have concluded that the election crimes provision does not prevent revelation of provisional voters' names. In August 2018, Barton, Dickinson, and Douglas county election officials all shared their lists of provisional ballot voters in response to open records requests. *See* Ex. 1 to Doc. 7 [collecting emails and lists from such relevant counties]. Similarly, Kiowa, Smith, Phillips, and Thomas counties have taken the position that the type of ballot cast by voters is open to the public and have shared those lists. *See* Ex. 2 to Doc. 7 [attaching computer generated provisional ballot lists].

Based on the foregoing, the Court concludes that defendant's refusal to produce a list of names of provisional ballot voters violates KORA and is not subject to any cited exemption. Accordingly, the Court denies defendant's motion for summary judgment, grants plaintiff's motion for summary judgment and grants plaintiff the relief requested in his prayer for relief.

IT IS SO ORDERED.

1/31/19
Date

/s/David W. Hauber
DAVID W. HAUBER
District Court Judge, Div. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH