

ELECTRONICALLY FILED
2023 Apr 10 PM 3:05
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2022-MV-000131
PII COMPLIANT



Court: Shawnee County District Court
Case Number: 2022-MV-000131
Case Title: Kansas Governmental Ethics Commission vs. Fabian Shepard
Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

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

/s/ Honorable Teresa L Watson, District Court Judge

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

KANSAS GOVERNMENTAL ETHICS
COMMISSION,

Plaintiff

2022-MV-131

FABIAN SHEPARD,

Defendant

MEMORANDUM DECISION AND ORDER

The Kansas Governmental Ethics Commission (“KGEC”) issued a subpoena duces tecum to Fabian Shepard as part of that agency’s investigation of alleged violations of Kansas governmental ethics laws. See K.S.A. 25-4158(d)(1). Shepard did not respond as directed. KGEC filed the instant action to enforce its administrative subpoena pursuant to K.S.A. 25-4158(d)(2). Shepard filed a motion to strike the application to enforce the subpoena under the Public Speech Protection Act (“PSPA”), K.S.A. 60-5320, asserting that it is based on, relates to, or is in response to Shepard’s exercise of certain First Amendment rights. This is one of four cases before this Court with similar facts and issues. Each case will be addressed in a separate opinion, though the facts and analysis are similar in all four cases.

KGEC's motion to seal or close the hearing.

As an initial matter, this Court set Shepard's motion to strike for hearing. The KGEC moved to seal or close the hearing, citing K.S.A. 25-4165 and K.A.R. 19-6-1, which deal only with the KGEC's duty to keep certain information confidential. The statute and the regulation do not address court proceedings. Shepard opposed the motion in part, mostly based on his observation that some of the information was already public, but said he would agree to closing the hearing provided there was no "gag order" preventing him from speaking freely about arguments and evidence referenced at the hearing.

At the hearing on January 26, 2023, the Court first considered the KGEC's request under the framework of K.S.A. 60-2617. That statute says if a party moves to seal or close a court proceeding, the Court may grant the motion only if it makes a written finding of good cause. K.S.A. 60-2617(b). "In granting the order, the court shall recognize that the public has a paramount interest in all that occurs in a case, whether at trial or during discovery and in understanding disputes that are presented to a public forum for resolution." K.S.A. 60-2617(c). There is no good cause "unless the court makes a finding on the record that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings." K.S.A. 60-2617(d). "Agreement of the parties shall be considered by the court but shall not constitute the sole basis for the sealing or redaction of court records or for closing the court proceeding." K.S.A. 60-2617(e).

At the hearing, this Court recognized the paramount public interest in the instant case, even in the context of enforcement of an administrative subpoena, notably given the important issues of

free speech, government ethics, and government regulation of political contributions, candidates, and organizations. This Court concluded that there had been no showing of good cause to close the hearing based on a safety, property, or privacy interest of a litigant, or public or private harm, that outweighed the strong public interest in the case. Shepard's position on the motion to close the proceedings does not change the analysis and he did not object to an open proceeding. Thus, the Court denied the KGEC's motion to close the proceedings and the motion to strike was argued in an open hearing.

STATEMENT OF FACTS ON THE MOTION TO STRIKE

Because this matter is before the Court on a motion to strike the KGEC's application to enforce its administrative subpoena under the PSPA, the facts are drawn from the parties' pleadings and supporting and opposing affidavits offered in conjunction with the motion. K.S.A. 60-5320(d).

Shepard was the chair of the Johnson County Republican Central Committee from September 2020 through October 2021. Sometime thereafter, the KGEC began investigating possible violations of the Kansas Campaign Finance Act, K.S.A. 25-4142 *et seq.* ("KCFA"). After preliminary investigation, the KGEC believed that some campaign contributions from political committees to party committees and ultimately to candidates during the 2020 election cycle were "earmarked" for certain recipients in violation of state law.

In February 2022, the KGEC met as a body to make the written findings of fact and conclusions of law required by K.S.A. 25-4158(d)(1) to issue subpoenas to gather further evidence of KCFA violations. The findings of fact and conclusions of law, dated February 23, 2022, said:

FINDINGS:

1. Jared Suhn is a political consultant, the owner of Gamechanger Strategies, and the contracted consultant for the Republican House Campaign Committee.
2. Michael Pirner is a political consultant, the owner of Bold Lines Grassroots, and the current communications director for Senate President Ty Masterson.
3. At all relevant times, Ty Masterson was a candidate for office as defined by K.S.A. 25-4143(a) and a state Senator.
4. H. J. Swender is the chairperson of The Right Way PAC for Economic Growth since the initial appointment of treasurer filed July 1, 2020.
5. Matthew Billingsley is the chairperson of Lift Up Kansas PAC since the initial appointment of treasurer filed February 13, 2019.
6. Fabian Shepard was the chairperson of the Johnson County Republican Central Committee on or about September 15, 2020 through October 2021.
7. Dustin Morris is the treasurer of the Johnson County Republican Central Committee beginning on or about January 3, 2020 and signed the July and October 2020 campaign finance reports for the Committee.
8. Dave Myres was the chairperson of the Johnson County Republican Central Committee on or about October 14, 2018 through September 15, 2020.
9. Cheryl Reynolds is the chairperson and treasurer of the Shawnee County Republican Central Committee beginning on or about October 24, 2020 and signed the October 25, 2020 campaign finance report for the Committee.
10. Michael Patton was the treasurer of the Shawnee County Republican Central Committee on or about October 7, 2018 through October 24, 2020 and signed the July 27, 2020 campaign finance report for the Committee.
11. Craig McCullah was the treasurer of the Shawnee County Republican Central Committee on or about December 15, 2016 through October 7, 2018, whereupon he became the chairperson until October 24, 2020.
12. David Thorne is the chairperson of the Sedgwick County Republican Central Committee beginning on or about November 15, 2020.
13. Scott Bishop is the treasurer of the Sedgwick County Republican Central Committee beginning on or about November 15, 2020.

14. Dalton Glasscock was the chairperson of the Sedgwick County Republican Central Committee on or about November 25, 2018 through November 15, 2020.
15. Sheila Tigert was the treasurer of the Sedgwick County Republican Central Committee on or about October 8, 2019 through November 15, 2020 and signed the July and October 2020 campaign finance reports for the Committee.
16. Shannon Golden is the Executive Director of the Kansas Republican Party beginning on or about July 1, 2019.
17. At all relevant times, Beverly Gossage was a candidate for office as defined by K.S.A. 25-4143(a) and is currently a state Senator.
18. At all relevant times, Julia Lynn was a candidate for office as defined by K.S.A. 25-4143(a) and was a state Senator.
19. R. Curtis Mullen is the chairperson of the Olathe Republican Central Committee PAC beginning on or about February 14, 2019.
20. Lift Up Kansas PAC and The Right Way PAC for Economic Growth are registered political action committees pursuant to K.S.A. 25-4143(k)(l) and K.S.A. 25-4145.
21. Lift Up Kansas PAC filed an appointment of treasurer with the Secretary of State on or about February 13, 2019. The Right Way PAC for Economic Growth filed an appointment of treasurer with the Secretary of State on or about July 1, 2020.
22. On August 31, 2020, the Republican State Leadership Committee (RSLC), headquartered in Washington, D.C., contributed \$37,500 to Lift Up Kansas PAC.
23. On September 1, 2020, The Republican State Leadership Committee contributed \$37,500 to KS Right Way PAC for Economic Growth.
24. On September 10, 2020, Lift Up Kansas PAC contributed \$5,000 to the Republican House Campaign Committee.
25. On September 13, 2020, KS Right Way PAC for Economic Growth contributed \$5,000 to the Republican House Campaign Committee.
26. On September 23, 2020, Lift Up Kansas PAC contributed \$5,000 each to the Kansas Republican Party, the Johnson County Republican Central Committee,

- the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee. These contributions were preconditioned upon the committees giving it to the Kansas Republican Party should the party request it.
27. On September 25, 2020, Right Way PAC for Economic Growth contributed \$5,000 each to the Kansas Republican Party, the Johnson County Republican Central Committee, the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee. These contributions were preconditioned upon the committees giving it to the Kansas Republican Party if requested.
 28. On September 28, 2020, the Sedgwick County Republican Central Committee contributed \$10,000 to the Kansas Republican Party.
 29. On September 29, 2020, the Johnson County Republican Central Committee contributed \$9,000 to the Kansas Republican Party.
 30. During September 30-October 2, 2020, the Shawnee County Republican Central Committee contributed a total of \$5,000 to the Kansas Republican Party.
 31. On October 12, 2020, Ty Masterson for Kansas Senate contributed \$5,000 to the Johnson County Republican Central Committee.
 32. On October 14, 2020, Dan Hawkins for Kansas House contributed \$5,000 to the Johnson County Republican Central Committee.
 33. On October 14, 2020, the Johnson County Republican Central Committee contributed \$5,000 to Mike Thompson for Kansas Senate.
 34. On October 14, 2020, the Johnson County Republican Central Committee contributed \$4,000 to Beverly Gossage for Kansas Senate.
 35. A total of \$34,000 was contributed to the Kansas Republican Party which originated from the Kansas State Leadership Committee and passed through the Lift Up Kansas PAC and Right Way PAC for Economic Growth and the Republican central committees in Johnson, Shawnee, and Sedgwick County. These contributions were earmarked to be used for the benefit of candidates in specific legislative races at the discretion of an individual who coordinated the expenditure of the contributions with while working as a volunteer for the candidates' campaigns.

CONCLUSIONS:

1. Pursuant to K.S.A. 25-4143(a)(1), individual candidates for Kansas elective office are subject to the Kansas campaign finance act by virtue of announcing their candidacy and/or appointing treasurers for their campaigns.
2. Pursuant to K.S.A. 25-4143 (i)(1), the state committee of a political party is a party committee.
3. Pursuant to K.S.A. 25-4143(i)(2) the county central committee of a political party is a party committee.
4. Pursuant to K.S.A. 25-4153, the aggregate amount contributed to a candidate by any political committee, or any person except a party committee, the candidate, or the candidate's spouse, shall not exceed the specified contribution limits for the office sought.
5. Pursuant to K.S.A. 25-4153 (a)(3), the contribution limit for the office of state senator is \$1,000 for each primary election and an equal amount for each general election.
6. Pursuant to K.S.A. 25-4153(d), the aggregate amount contributed to a state party committee by a person other than a national party committee or a political committee shall not exceed \$15,000 in each calendar year; and the aggregate amount contributed to any other party committee by a person other than a national party committee or a political committee shall not exceed \$5,000 in each calendar year. The aggregate amount contributed to a party committee by a political committee shall not exceed \$5,000 in any calendar year.
7. Pursuant to K.S.A. 25-4154(a), "[n]o person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another."
8. Pursuant to K.S.A. 25-4148c(c)(2), "'[i]ndependent expenditure' means an expenditure that is made without the cooperation or consent of the candidate or agent of such candidate intended to be benefited and which expressly advocates the election or defeat of a clearly identified candidate."
9. Pursuant to K.A.R. 19-20-2(b), "'[i]n kind contribution' means a contribution of goods, services, or anything of value to a candidate, [...] or any representative of them without charge or provision of such items at a charge to the recipient of less than the fair market value. 'In-kind contribution' also means the use of any goods, services, or anything of value or the spending of any money for the benefit of any candidate, [...] when the use or expenditure is made in

cooperation with or with the consent of the candidate, committee, or representative of them."

10. Pursuant to K.S.A. 25-4157a(a), "[n]o moneys received by any candidate [...] as a contribution under this act [...] shall be used by such candidate or the candidate committee of such candidate except for: (1) Legitimate campaign purposes; (2) expenses of holding political office; (3) contributions to the party committees of the political party of which such candidate is a member, (4) any membership dues related to the candidate's campaign paid to a community service or civic organization in the name of the candidate; (5) any donations paid to any organization which is recognized as a 501(c)(3) tax exempt organization or any religious organization, community service or civic organization in the name of the candidate [...]; (6) expenses incurred in the purchase of tickets to meals and special events [...]; (7) expenses incurred in the purchase and mailing of greeting cards to voters and constituents."
11. Pursuant to K.S.A. 25-4181, violation of K.S.A. 25-4153(a) is punishable by assessment of a civil fine in an amount not to exceed \$5,000 for a first violation, \$10,000 for the second violation and \$15,000 for the third violation and for each subsequent violation.
12. Pursuant to K.S.A. 25-4158(c), "[t]he commission may investigate, or cause to be investigated, any matter required to be reported upon by any person under the provisions of the campaign finance act, or any matter to which the campaign finance act applies irrespective of whether a complaint has been filed in relation thereto."

On February 23, 2022, the KGEC issued a subpoena duces tecum to Shepard, commanding Shepard to produce certain documents to the KGEC on or before March 18, 2022. A copy of the findings and conclusions were attached to the subpoena. The subpoena said, in pertinent part:

Pursuant to K.S.A. 25-4158(d), the Kansas Governmental Ethics Commission directs you to produce to the Commission and its staff documents regarding the following:

1. From June 1, 2020, to December 31, 2020, all communications and shared documents, including but not limited to email, text, and social media messages, that are to, from, carbon copying, or shared with any of the following individuals: [naming 19 individuals and the following categories of individuals]

- Any other known representative or individual known to be associated with the Johnson County Republican Central Committee;
...
 - Any other known representative or individual known to be associated with the Shawnee County Republican Central Committee;
...
 - Any other known representative or individual known to be associated with the Sedgwick County Republican Central Committee;
...
 - Any other known representative or officer of the Kansas GOP or the Republican House Campaign Committee;
...
 - Any other known representative or individual known to be associated with the Republican State Leadership Committee (RSLC).
2. At any time, all communications and shared documents, including but not limited to email, text, and social media messages, not otherwise produced that discuss or concern any of the following:
- Any and all transfers/contributions to The Right Way Kansas PAC for Economic Growth or Lift Up Kansas PAC from the Republican State Leadership Committee;
 - Transfers/contributions of \$5,000 each to the Johnson County Republican Central Committee, Shawnee County Republican Central Committee, Sedgwick County Republican Central Committee, Kansas Republican Party, and Republican House Campaign Committee, from The Right Way Kansas PAC for Economic Growth and Lift Up Kansas PAC, occurring on or about September 2020;
 - Transfers/contributions to the Johnson County Republican Central Committee of \$5,000 from Ty Masterson for Kansas Senate on or about October 12, 2020, and \$5,000 from Dan Hawkins for Kansas House on or about October 14, 2020;
 - Transfers/contributions from the Johnson County Republican Central Committee of \$4,500 to the Republican House Campaign Committee on or about October 19, 2020, and \$9,000 to the Kansas Republican Party on or about September 29, 2020;
 - Transfers/contributions from the Johnson County Republican Central Committee of \$5,000 to Mike Thompson for Kansas Senate on or about October 14, 2020, \$4,000 to Beverly Gossage for Kansas Senate on or about October 14, 2020, and \$1,000 to Beverly Gossage for Kansas Senate on or about October 17, 2020;
 - Any other transfers/contributions or expenditure, known to be provided to the Johnson County Republican Central Committee with the intention or

communicated desire for the funds to be subsequently given to another specific person, committee, or entity.

Shepard received the subpoena duces tecum by certified mail on or about March 25, 2022. Shepard did not respond to the subpoena duces tecum. On August 29, 2022, the KGEC filed the instant action asking the Court to enforce the administrative subpoena. On October 28, 2022, Shepard moved to strike the subpoena.

CONCLUSIONS OF LAW

Shepard moves to strike the KGEC’s application to enforce its administrative subpoena under the PSPA. This requires interpretation of statutes, which is a question of law. The Court follows these guidelines when considering the meaning of a statute:

When interpreting a statute, a court first attempts to discern legislative intent through the statutory language, giving common words their ordinary meanings. When the language is plain and unambiguous, the court must give effect to its express language, rather than determine what the law should be. The court will not speculate about legislative intent and will not read the statute to add something not readily found in it. It is only when the statute's language is unclear or ambiguous that the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain its meaning. *Nauheim v. City of Topeka*, 309 Kan. 145, 149–50, 432 P.3d 647 (2019) (quotation marks and citations omitted).

THE POLITICAL SPEECH PROTECTION ACT.

The PSPA was adopted by the Kansas Legislature in 2016. Its purpose is “to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury.” K.S.A. 60-5320(b). Its provisions “shall be applied and construed liberally to effectuate its general purposes.” K.S.A. 60-5320(k). It is an anti-SLAPP statute, a name for laws

intended to prevent meritless lawsuits that chill free speech, known as SLAPPs, or strategic lawsuits against public participation. *T & T Financial of Kansas City, LLC v. Taylor*, 2017 WL 6546634, at *3 (Kan. App. 2017) (unpublished).

K.S.A. 60-5320(d) allows a party to bring a motion to strike a claim “if a claim is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association.” A claim is defined as “any lawsuit, cause of action, claim, cross-claim, counterclaim or other judicial pleading or filing requesting relief.” K.S.A. 60-5320(c)(1). The KGEC’s application to enforce its administrative subpoena is a judicial pleading or filing requesting relief, thus it meets the definition of “claim,” and it is subject to a motion to strike under the PSPA.

The KGEC, to the contrary, argues that the PSPA only applies in the context of defamation claims or other non-meritorious civil suits, pointing to written testimony submitted to the Kansas Legislature before the bill became law and other authorities beyond the statutory language. That argument flies in the face of the plain language definition of “claim” in K.S.A. 60-5320(c)(1). Because there is no ambiguity in the definition of “claim” in the PSPA, the Court will not consider legislative history or other outside interpretations.

Evaluating a motion to strike under the PSPA requires a burden-shifting approach:

A party bringing the motion to strike has the initial burden of making a prima facie case showing the claim against which the motion is based concerns a party's exercise of the right of free speech, right to petition or right of association. If the moving party meets the burden, the burden shifts to the responding party to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case. If the responding party meets the burden, the court shall deny the motion. In making its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. K.S.A. 60-5320(d).

“While the court should examine the pleadings to determine the nature of the claims asserted and should also consider well-pled facts in a petition and any answer . . . it is not required to accept the facts asserted in the plaintiff's petition as true. Otherwise, no defendant could ever prevail on an anti-SLAPP motion.” *Doe v. Kansas State Univ.*, 61 Kan. App. 2d 128, 148, 499 P.3d 1136 (2021).

SHEPARD’S INITIAL BURDEN.

Shepard’s initial burden is to make a prima facie case showing that the KGEC’s application to enforce its administrative subpoena, and thus the subpoena itself, concerns Shepard’s exercise of the right to free speech, right to petition, or right of association. “None of these definitions address the motive or merits of a communication; they simply address its content.” *Doe*, 61 Kan. App. at 142.

The subpoena in paragraph 1 directs Shepard to produce from June 1, 2020, to December 31, 2020, without limit to subject matter, “all communications and shared documents, including but not limited to email, text, and social media messages, that are to, from, carbon copying, or shared with any of the following individuals” The named individuals, and the unnamed individuals identified only by their group affiliations, are associated with various political committees at the state and local levels in Kansas. The subpoena in paragraph 2 directs Shepard to produce, without limit to timeframe, “all communications and shared documents, including but not limited to email, text, and social media messages, not otherwise produced that discuss or concern” certain transfers or contributions to or from various political committees or campaigns at the state and local levels in Kansas.

The PSPA defines exercise of the right to free speech as “a communication made in connection with a public issue or issue of public interest.” K.S.A. 60-5320(c)(4). Communication is defined as “the making or submitting of a statement or document in any form or medium, including oral, visual, written or electronic.” K.S.A. 60-5320(c)(2). A public issue or issue of public interest includes in pertinent part an issue related to the government, or a public official or public figure. K.S.A. 60-5320(c)(7)(C) and (D).

The subpoena’s call for “all communications and shared documents, including but not limited to email, text, and social media messages, that are to, from, carbon copying, or shared with” numerous named and unnamed persons clearly seeks communications as defined by statute. Paragraph 1 of the subpoena does not limit its scope to any particular topic; rather, it seeks all communications between Shepard and a number of people, all apparently connected by a political thread. Paragraph 2 defines the scope of communications it seeks to include communications regarding transfers or contributions to or from various political committees or campaigns. These communications involve issues related to government and public officials, thus concern public issues or issues of public interest. The subpoena concerns Shepard’s exercise of the right of free speech as defined by the PSPA.

The PSPA defines exercise of the right of association as “a communication between individuals who join together to collectively express, promote, pursue or defend common interests.” K.S.A. 60-5320(c)(3). Again, the subpoena seeks communications, as defined by the statute, among individuals connected by common political interests – namely, supporting certain political candidates for government office. Thus, the subpoena concerns Shepard’s exercise of the right of association as defined by the PSPA.

The PSPA defines exercise of the right to petition to include communications on several specific topics, including:

- communication in or pertaining to a judicial, executive, or legislative proceeding or before a local governing body; K.S.A. 60-5320(c)(5)(A)
- “communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(B)
- communication that is “reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(C)
- communication “reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(D) and
- “any other communication or conduct that falls within the protection of the right to petition the government under the constitution of the United States or the constitution of the state of Kansas.” K.S.A. 60-5320(c)(5)(E).

Shepard was chair of the Johnson County Republican Central Committee (“JCRCC”). The parties do not dispute that the JCRCC is a group of people joined together to promote public initiatives and candidates for public office as part of a larger effort to petition the government on certain issues. On the facts before this Court, including the statements in Shepard’s declaration, the subpoena concerns Shepard’s right to petition the government.

The KGEC argues nonetheless that Shepard cannot make his prima facie case because “the weighty interests served by restricting the size of financial contributions to political candidates,” key to the alleged violations subject to investigation here, “are sufficient to justify the limited effect upon First Amendment freedoms,” *Nichols v. Kansas Political Action Committee*, 270 Kan. 37, 43, 11 P.3d 1134 (2000), citing *Buckley v. Valeo*, 424 U.S. 1 (1976). This does not affect the

analysis of whether Shepard met his initial burden under K.S.A. 60-5320(d). In fact, it supports the notion that communications about financial contributions to political candidates – one of the targets of the KGEC subpoena here – implicate the First Amendment. At this first stage of the analysis, the Court considers only the content of the communication.

The Kansas Court of Appeals has rejected an argument like the one made here by the KGEC:

Our Legislature did not limit the scope of the Kansas anti-SLAPP statute to activity protected by constitutional law. Instead . . . the Kansas Act spelled out the kinds of activity it meant to protect, then mandated that its statutory language be liberally construed. Thus, when examining KSU and Reed's prima facie case, the district court did not need to address Doe's argument that constitutional rights to free speech, petition, and association do not protect defamatory communication. It needed only address whether Reed's e-mail fell within the statutory definitions of the Act. *Doe*, 61 Kan. App. 2d at 144.

Whether limits on political contributions have been held constitutional based on a government interest in preventing corruption of political officials, *Buckley*, 424 U.S. at 29, matters not at all at this stage of the analysis. The content of the subpoena sought to be enforced here concerns the exercise of First Amendment rights. Shepard has met his initial burden.

THE BURDEN SHIFTS TO THE KGEC.

The burden then shifts to the KGEC to establish a likelihood of “prevailing on the claim” by presenting substantial competent evidence to support “a prima facie case.” If the responding party meets the burden, the court shall deny the motion. K.S.A. 60-5320(d). “Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion.” *Fisher v. Kansas Dept. of Revenue*, 58 Kan. App. 2d 421, 423, 471 P.3d 710 (2020).

The threshold question is what does “prevailing on the claim” mean in this context? Here, it means that the KGEC must establish a likelihood that the Court would grant its application to enforce the administrative subpoena directed at Shepard, supported by substantial competent evidence of the elements necessary to compel enforcement of the subpoena. It does not, as Shepard suggests, require the KGEC to establish a likelihood that it can successfully prosecute Shepard for campaign finance violations. The limited scope of this action is whether Shepard must respond to the subpoena, not whether the KGEC can prove violations on his part.

Thus defined, this second stage of the analysis requires some background regarding the investigatory powers of the KGEC. K.A.R. 19-3-3 says:

Whenever any matter is brought to the attention of a member of the commission or the executive director which appears to raise an issue of a violation of the relevant law, the executive director is authorized to conduct a preliminary inquiry on the issue of whether there are facts sufficient to support the appearance of a violation. At the conclusion of a preliminary inquiry, the executive director shall report to the commission. The commission shall thereafter determine whether further investigation is required.

K.S.A. 25-4158(c) says that the KGEC “may investigate, or cause to be investigated, any matter required to be reported upon by any person under the provisions of the campaign finance act, or any matter to which the campaign finance act applies irrespective of whether a complaint has been filed in relation thereto.”

K.S.A. 25-4158(d)(1) says:

After a preliminary investigation of any matter reported to the commission pursuant to subsection (c), and **upon specific written findings of fact and conclusions of law by the commission that there is a reasonable suspicion that a violation of the campaign finance act has occurred**, the commission or any officer designated by the commission may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the commission deems relevant or material to the

investigation. The commission shall reimburse the reasonable costs of production of documents subject to subpoena. All subpoenas and subpoenas duces tecum issued under this section shall be authorized by the affirmative vote of not less than $\frac{3}{4}$ of the members of the commission. Any vote authorizing the issuance of a subpoena or subpoena duces tecum shall be taken at a meeting where the commissioners are in physical presence. **Subpoenas duces tecum shall be limited to items reasonably relevant to such alleged violations.** Upon the request of any person subpoenaed to appear and give testimony or to produce books, papers or documents, the commission shall provide a copy of the written findings of facts and conclusions of laws relating to the alleged violation committed by such person. (Emphasis added.)

Relevant here is that to issue a subpoena duces tecum such as the one directed to Shepard, the KGEC must make specific findings of fact and conclusions of law articulating a reasonable suspicion that a campaign finance violation has occurred, and the subpoena shall be limited to items reasonably relevant to the alleged violations. The plain language of the statute does not, as Shepard suggests, require that the KGEC have a reasonable suspicion that the recipient of the subpoena committed a violation.

Shepard points to the last sentence of K.S.A. 25-4158(d)(1): “Upon the request of any person subpoenaed to appear and give testimony or to produce books, papers or documents, the commission shall provide a copy of the written findings of facts and conclusions of laws relating to the alleged violation committed by such person.” The plain language does not require that the KGEC have a reasonable suspicion that the recipient of the subpoena committed a violation, only that if the recipient of the subpoena asks to see a copy of any written findings of facts and conclusions of law relating to an alleged violation committed by that person, then the KGEC must provide them. Here, the KGEC’s findings and conclusions were simply provided to Shepard along with the subpoena. This does not necessarily mean that Shepard is accused of a violation, only that the KGEC gave him a copy of the findings and conclusions without a request from him.

After all, as the KGEC points out, it may investigate any matter to which the campaign finance act applies regardless of whether a complaint has been filed. K.S.A. 25-4158(c). Without a complaint, no one is accused. In the course of an investigation, the KGEC has the power to subpoena witnesses and compel production of documents. Witnesses are simply those who give testimony. Given those truisms, nothing in the statutes suggest that subpoenas may only issue to a person accused of a violation and only upon facts and conclusions demonstrating reasonable suspicion of a violation by that person.

The next question is whether the KGEC's findings of fact and conclusions of law articulate a reasonable suspicion that a campaign finance violation has occurred. Reasonable suspicion has been called a "low burden" in the criminal context. *State v. Glover*, 308 Kan. 590, 601, 422 P.3d 64 (2018), *rev'd and remanded*, 140 S. Ct. 1183 (2020).

Reasonable suspicion means a particularized and objective basis for suspecting the person stopped is involved in criminal activity. Something more than an unparticularized suspicion or hunch must be articulated. Reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Both reasonable suspicion and probable cause are dependent upon the content of information possessed by the detaining authority and the information's degree of reliability. Quantity and quality are considered in the totality of the circumstances—the whole picture that must be taken into account when evaluating whether there is reasonable suspicion. *City of Wichita v. Molitor*, 301 Kan. 251, 257–58, 341 P.3d 1275 (2015) (internal quotation marks omitted).

KGEC asserts that its findings of fact and conclusions of law articulate a reasonable suspicion that a campaign finance violation occurred. KGEC's explanation, as set forth in its brief in opposition to the motion to strike, is as follows:

There are two underlying suspected violations. The first is that contributions were given and accepted in the name of another contrary to K.S.A. 25-4154 which provides, "[n]o person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another." The commission has construed earmarking contributions to give to a

subsequent entity may constitute giving in the name of another in KGEC Adv. Op. 1997-45: “if A gives money to B with the understanding that the money will then be contributed to C, and B then contributes the money to C, this would be a violation of the law.” The second suspected violation is contributions were made and accepted in excess of contribution limits as provided in K.S.A. 25-4153(d), “[t]he aggregate amount contributed to a party committee by a political committee shall not exceed \$5,000 in any calendar year.”, and K.S.A. 25-4170: “[e]xcessive campaign contribution is: (a) intentionally making any contribution in violation of any provision of K.S.A. 25-4153, or (b) intentionally accepting any contribution made in violation of any provision of K.S.A. 25-4153.”

The KGEC’s findings and conclusions assert that the Republican State Leadership Committee (“RSLC”) in Washington, D.C., gave \$37,500 apiece to Lift Up Kansas PAC and The Right Way PAC for Economic Growth on August 31 and September 1, 2020. The findings and conclusions thereafter detail an alleged distribution of those funds to other political organizations. KGEC explained further that:

On September 23, 2020, and September 25, 2020, two nearly inactive PACs (Lift Up Kansas PAC and The Right Way PAC for Economic Growth, collectively “the passthrough PACs”) gave \$10,000 each to three central committees: the Johnson County Republican Central Committee, the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee, (collectively “the central committees”). Within days most or all of these funds were contributed to the state Republican Party. On the same day the passthrough PACs gave to the central committees, the passthrough PACs also gave \$5,000 to the state Republican Party. The statutory limit was \$5,000. K.S.A. [25-]4153(d).

Given the consistency of the timing of all contributions at each stage including the nearly identical timing of funds passing through the central committees, the similar funding for both PACs, the substantial inactivity of the PACs, the quick turnaround of assets from one fund to the next, and the ultimate disposition of the assets in the state party committee that would have been an illegal overcontribution if directly contributed by the RSLC or the PACs individually, the scheme is apparent.

Keeping in mind the nature of the standard to be applied, the Court agrees that the existence, amounts, and timing of the contributions set forth in the KGEC’s findings and conclusions give rise to a reasonable suspicion that a campaign finance violation occurred. This

alone is enough, and it is reinforced by additional information submitted in the KGEC's brief. The KGEC included an affidavit detailing a September 22, 2020, text from Jared Suhn, contract consultant for the Republican House Campaign Committee, to the then-treasurer of the JCRCC: "If I have some PACs interested in contributing to the JCRP would JCRP then be willing to contribute most of those resources to the KSGOP if asked." The response was: "I'll have you get in contact with Fabian to work that out. [phone number] I don't have as much discretion on decisions any more." At the time the texts were sent, Shepard had just become chair of the JCRCC.

Shepard does not take issue with the existence or timing of the contributions as set forth in the findings and conclusions. Rather, he focuses on three arguments: 1) the findings and conclusions do not give rise to a reasonable suspicion that Shepard in particular violated campaign finance laws; 2) the existence or timing of the contributions do not violate campaign finance laws; and 3) Shepard is entitled to assert a First Amendment privilege relieving him of the obligation to respond to the subpoena.

The first argument was rejected above – there need only be a reasonable suspicion that a campaign violation occurred, not necessarily that Shepard committed it, to justify the subpoena. The second argument is based on Shepard's theory that the KGEC wrongly believes that earmarking contributions from one entity to pass along through a contribution to a subsequent entity may constitute "giving in the name of another" under K.S.A. 25-4154, as set forth in KGEC Adv. Op. 1997-45. There is no Kansas case law to illuminate this topic. At this stage, Shepard does not make any compelling legal argument regarding the statutory interpretation of K.S.A. 25-4154, and his theories here, in the context of the motion to strike, are not enough to counter his obligation to respond to the subpoena.

Shepard's third argument about a First Amendment privilege relies upon *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987). There, plaintiff, director of an organization espousing negative views of the federal income tax system, filed a civil suit against agents of the Internal Revenue Service. Plaintiff responded to defendants' discovery requests in part but refused to respond to other requests based on a First Amendment privilege. Ultimately, plaintiff refused to obey the court's order to compel his answers and the suit was dismissed.

Plaintiff appealed. The Tenth Circuit applied the test set forth in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

In *Silkwood*, this court announced that when the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure. *Silkwood*, 563 F.2d at 438. Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. See *id.* The trial court must also determine the validity of the claimed First Amendment privilege. Only after examining all of these factors should the court decide whether the privilege must be overborne by the need for the requested information. *Grandbouche*, 825 F.2d at 1466-67.

First, Shepard never asserted a First Amendment privilege in response to the subpoena. Shepard did not respond to the subpoena, let alone with specific objections. He chose instead to seek relief under the PSPA. The parties did not confer about any objections, and specific objections (other than those based on the PSPA) have yet to be properly presented to this Court. Thus, the Court has not at this point ordered Shepard to comply with the subpoena. The *Silkwood* test, therefore, cannot be easily applied in the instant context.

At oral argument, the Court asked the parties if they had conferred at all, even informally, about the language of the requests set forth in the subpoena. The answer was no. This is so despite the significant passage of time between the issuance of the subpoena and the filing of this

enforcement action (approximately six months), and the amount of time between the filing of the action and oral argument in this case (approximately five months). Shepard indicated that he chose instead to simply file the motion to strike.

The Court returns to the ultimate question at this stage of the burden-shifting process. The KGEC must establish a likelihood of “prevailing on the claim.” Here, it means that the KGEC must establish a likelihood that the Court would grant its application to enforce the administrative subpoena directed at Shepard. If the KGEC meets the burden, the motion to strike shall be denied. K.S.A. 60-5320(d). The Court has concluded that KGEC’s findings of fact and conclusions of law articulate a reasonable suspicion of campaign finance violations. The remaining question is whether the subpoena was limited to items reasonably relevant to the alleged violations. K.S.A. 25-4158(d)(1).

There were two categories of information sought in the subpoena:

1. “From June 1, 2020, to December 31, 2020, all communications and shared documents, including but not limited to email, text, and social media messages, that are to, from, carbon copying or shared with” a number of individuals, named and unnamed, without limitation on the subject of the communication.

This is an unacceptably overbroad request for information because, while it is limited in time, there is no limit on the subject matter of the communications. It would certainly encompass information far beyond what is reasonably relevant to the violations alleged. If Shepard raised such an objection to this request, and if the KGEC asked this Court to compel a response, Shepard’s objection would be sustained, and the Court would not compel a response to request number 1 as written.

The second category is more specific:

2. At any time, all communications and shared documents, including but not limited to email, text, and social media messages, not otherwise produced that discuss or concern any of the following:
 - Any and all transfers/contributions to The Right Way Kansas PAC for Economic Growth or Lift Up Kansas PAC from the Republican State Leadership Committee;
 - Transfers/contributions of \$5,000 each to the Johnson County Republican Central Committee, Shawnee County Republican Central Committee, Sedgwick County Republican Central Committee, Kansas Republican Party, and Republican House Campaign Committee, from The Right Way Kansas PAC for Economic Growth and Lift Up Kansas PAC, occurring on or about September 2020;
 - Transfers/contributions to the Johnson County Republican Central Committee of \$5,000 from Ty Masterson for Kansas Senate on or about October 12, 2020, and \$5,000 from Dan Hawkins for Kansas House on or about October 14, 2020;
 - Transfers/contributions from the Johnson County Republican Central Committee of \$4,500 to the Republican House Campaign Committee on or about October 19, 2020, and \$9,000 to the Kansas Republican Party on or about September 29, 2020;
 - Transfers/contributions from the Johnson County Republican Central Committee of \$5,000 to Mike Thompson for Kansas Senate on or about October 14, 2020, \$4,000 to Beverly Gossage for Kansas Senate on or about October 14, 2020, and \$1,000 to Beverly Gossage for Kansas Senate on or about October 17, 2020;
 - Any other transfers/contributions or expenditure, known to be provided to the Johnson County Republican Central Committee with the intention or communicated desire for the funds to be subsequently given to another specific person, committee, or entity.

The second category of information sought in the subpoena is much more tailored to information that is reasonably relevant to the violations alleged. The requests are, directly or indirectly, limited as to time and subject matter, except for the last bullet point item, which is not limited as to time and may be subject to an objection on that basis. But for the most part, the second category of information contains requests for information that, at least on their face, appear to be

enforceable and would likely be enforced by this Court based on information available at this time. Thus, the KGEC has established a likelihood that the Court would grant its application to enforce at least a portion of the subpoena duces tecum directed at Shepard. Because the KGEC met its burden, the motion to strike the KGEC's application to enforce the administrative subpoena is denied.

ATTORNEY FEES.

Finally, there is the matter of the KGEC's request for attorney fees under the PSPA. K.S.A. 60-5320(g) says in pertinent part: "If the court finds that the motion to strike is frivolous or solely intended to cause delay, the court shall award to the responding party reasonable attorney fees and costs related to the motion."

The KGEC asserts that Shepard's "weaponization of the PSPA" was used to flush out "important investigatory details" heretofore unknown outside the KGEC, and "[a] signal must be sent to other similarly situated entities that the PSPA cannot be used without risk to attempt to evade investigation, delay matters, or to force disclosure of significant investigatory facts." The Court disagrees with this characterization and the notion of a need for a "signal." First Amendment rights are among the most fundamental, this is recognized in the PSPA, and there is little or no Kansas case law to be applied to most of the legal arguments at play in the motion to strike. There has been no showing here that Shepard's motion to strike is frivolous or solely intended to cause delay. The KGEC's motion for attorney fees and costs is denied.

CONCLUSION

For the reasons set forth above, Shepard's motion to strike is denied. The KGEC's motion for attorney fees and costs is likewise denied. The parties are directed to contact the Court within 10 days of the date of this order to schedule a status hearing.

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

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically providing notice to counsel of record.

/s Angela Cox
Administrative Assistant