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CASE NUMBER: WY-2024-CV-000836
PII COMPLIANT

IN THE TWENTY NINTH JUDICIAL DISTRICT
DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

Roc Nation, LLC; Midwest Innocence Project, Plaintiffs, v. United Government of Wyandotte County Kansas City, Kansas; Kansas City, Kansas Police Department, Defendants.	)	CASE NO: WY-2024-CV-000836

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Roc Nation, LLC and Midwest Innocence Project (together, "Plaintiffs"), by and through their undersigned counsel, hereby submit their Opposition to the Motion to Dismiss and Deny Plaintiffs' Request for Declaratory Judgment filed by Defendants the Unified Government of Wyandotte County/Kansas City, Kansas ("Unified Government") and the Kansas City, Kansas Police Department ("KCKPD") (together, "Defendants").

Respectfully submitted,

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INTRODUCTION

This lawsuit arises out of Defendants' persistent failure to comply with their obligations under the Kansas Open Records Act ("KORA") with respect to the KORA requests Plaintiffs issued more than a year ago, in November 2023 ("Requests"). Defendants' response to the Requests consisted of demanding advance payment of an exorbitant fee, producing a small set of ancillary documents, and otherwise interposing sweeping, unsubstantiated boilerplate objections to avoid compliance. Defendants' failure to comply necessitated the filing of the Petition, to which Defendants responded by moving to dismiss based on the same improper boilerplate objections.

As explained below, Defendants' motion should be denied in its entirety because Plaintiffs have alleged facts sufficient to support the KORA claims asserted in the Petition. At best, Defendants' motion merely illuminates factual disputes that necessarily make dismissal improper.

BACKGROUND

As alleged in the Petition, the most vulnerable residents of Kansas City, Kansas—particularly members of poor, minority, immigrant, and other historically marginalized communities—have suffered for decades from abuse and other serious misconduct by the KCKPD and its members. Pet. ¶¶ 2-3. Such misconduct has been the subject of press and other media attention. *Id.* ¶¶ 33-35. But, adding insult to injury, the offenders have rarely been held accountable. *Id.* ¶ 4. And the KCKPD's long history of ignoring and even covering up abusive and corrupt conduct by its members has encouraged further abuses and further eroded the public trust in law enforcement. *Id.* ¶¶ 5-7.

Plaintiffs seek to restore the public trust and foster accountability by shedding light on the abuse and other misconduct committed by KCKPD officers, identifying root problems within the

KCKPD, and thereby encouraging much-needed reform. *Id.* ¶¶ 8-9. Plaintiffs' mission is indisputably within the public interest, as Kansas City's Mayor, Chief of Police, and District Attorney have all expressed interest in "bring[ing] greater transparency and accountability to all aspects of local government, including public safety." *See id.* ¶ 10 & n.1.

To that end, in November 2023, Plaintiffs issued the Requests to Defendants to obtain disclosure of the records Plaintiffs believe will further the public mission of "bringing greater transparency and accountability" to the conduct of the KCKPD and its members. *Id.* ¶ 9; Pet. Ex. C. As their initial response to Plaintiff's Requests, Defendants demanded advance payment of $2,202.48 for their purported costs, indicating that the responsive production would be "voluminous" and "extensive." Pet. ¶¶ 12, 42. But the promised production never came. *Passim*. Instead, Defendants stonewalled Plaintiffs, relying on improper, unsubstantiated boilerplate objections to avoid production of the requested documents. *Id.* ¶ 11.

Defendants have failed to produce *any* documents in response to Plaintiffs' requests for documents relating to (i) complaints and investigations into misconduct by any member of the KCKPD (Request Nos. 1-4 and 6), (ii) disciplinary actions against members of the KCKPD for such misconduct (Request No. 5), and (iii) misconduct by former KCKPD detective Roger Golubski (Request Nos. 8-9). *See id.* ¶¶ 14-17; Pet. Ex. C. Instead, Defendants asserted naked boilerplate objections citing the following KORA exemptions: K.S.A. § 45-221(a)(4) (personnel records, performance ratings, or individually identifiable records pertaining to employees); § 45-221(a)(10) (criminal investigation records); § 45-221(a)(11) (records of agencies involved in administrative adjudication or civil litigation); § 45-221(a)(30) (public records containing information of a personal nature where disclosure would constitute a "clearly unwarranted

invasion of personal privacy"); and § 45-219(a) (audio and visual records, including video tapes or films, unless they were shown or played to a public meeting of the public agency's governing body). Pet. ¶¶ 45-47. As to Request No. 6 (records relating to FBI investigations and complaints to the FBI and/or DOJ relating to misconduct by members of the KCKPD), Defendants claimed (after previously acknowledging that their self-selected ESI search terms had returned more than 23,000 responsive emails) that the searches caused unspecified and unquantified "technical issues that impacted the [KCKPD's] email system" and, thus, denied the request in its entirety as imposing an "unreasonable burden on the department" under K.S.A. § 45-218(e). *Id*. ¶¶ 62-63.

On November 19, 2024, more than a year after Plaintiffs issued the Requests, Plaintiffs filed this action to address Defendants' near-total failure to comply with their KORA obligations with respect to the Requests.[1]

LEGAL STANDARD

"When a defendant files a motion to dismiss [a] plaintiff's claim" on the grounds that it "fails to state any viable claim for legal relief, the district court must accept the facts included in the plaintiff's petition as true." *Green v. Unified Gov't of Wyandotte Cnty./Kansas City*, 54 Kan. App. 2d 118, 120, 397 P.3d 1211, 1212 (2017). Because the court cannot resolve factual disputes at the pleading stage, any doubt about the facts must be resolved in plaintiff's favor. *Id.* (citing

[1] Request Nos. 8-9 seek records relating to former KCKPD Detective Roger Golubski, who allegedly committed suicide on December 2, 2024, this first day of his federal trial on claims relating to his history of coercing women to perform sex acts. Golubski's death on December 2 post-dated the filing of the Petition, but the Court may properly take judicial notice of it.

K.S.A. 2016 Supp. 60-212(b)(6); *Steckline Communications, Inc. v. Journal Broadcast Group of Kansas, Inc.*, 305 Kan. 761, Syl. ¶ 2, 388 P.3d 84 (2017)).

Under KORA, "[i]t is . . . the public policy of the state that public records shall be open for public inspection by any person" and the Act "shall be liberally construed and applied to promote such policy." K.S.A. § 45-216(a). "This policy means that public officials and agencies must reveal public records and not conceal them, unless there is a legal reason that prevents disclosure of the information." *Hammet v. Schwab*, 62 Kan. App. 2d 406, 411, 518 P.3d 48, 53 (2022). While there are exceptions to this open records' policy, those "'exceptions are to be narrowly interpreted,' and the burden of proving that an exception applies is on the agency opposing disclosure." *Id.* (quoting *Data Tree v. Meek*, 279 Kan. 445, 454-55, 109 P.3d 1225 (2005)). To meet its burden, the public agency must provide "more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." *Sw. Anesthesia Serv., P.A. v. Sw. Med. Ctr.*, 23 Kan. App. 2d 950, 953, 937 P.2d 1257, 1260 (1997) (internal quotations omitted).

ARGUMENT

The facts alleged in the Petition are sufficient to support Plaintiff's KORA claims, including that Defendants relied on naked boilerplate objections in failing to comply with their obligations under KORA and, in so doing, have failed to substantiate the applicability of any claimed exception to any single requested record or group of records. In moving to dismiss the Petition, Defendants merely reiterate those same legally insufficient objections and, thus, continue to fail to meet *their burden* to show with specificity *why* each claimed exemption applies to each of the requested records. *See id*. Further, to the extent any material in any of the requested records

is actually subject to an exemption under KORA—which Defendants have not shown—Defendants are required to "separate or delete such [exempted] material and make available to the requester that material in the public record that is subject to disclosure," K.S.A. § 45-221(d)—which Defendants have not done. Put simply, KORA favors public disclosure, and a respondent cannot meet its burden through blanket, unsubstantiated invocations of KORA's exemptions, as Defendants have done here. *See Hammet*, 62 Kan. App. 2d at 411; *see also Sw. Anesthesia Serv., P.A.*, 23 Kan. App. 2d at 953.

I. Defendants' Invocation of the KORA's "Personnel Records" Exemption Is Legally Insufficient.

In response to Plaintiffs' Requests Nos. 1-5 and 8-9 (described, *supra*, at pp. 2-3), Defendants asserted a boilerplate objection that the requested records (apparently in their entirety) are "personnel records" and, thus, exempt from disclosure under K.S.A. § 45-221(a)(4) ("personnel records exemption"). *See* Mot. at 15, 17, 19, 32. In their motion, Defendants rely on that same legally insufficient objection.

To successfully invoke the personnel records exemption, the public agency respondent must establish as a threshold matter that the requested records: (1) concern personnel records, performance ratings, or individually identifiable information; (2) belong to a public agency; and (3) pertain to employees or applicants for employment. *Salina Journal v. Brownback,* 54 Kan. App. 2d 1, 1, 394 P.3d 134, 136 (2017). Here, it is undisputed that the KCKPD is a public agency and that the records relate to current and former KCKPD employees. Mot. at 20. But what Defendants have failed to establish as to any *specific* record, let alone all requested records, is that the requested records actually concern personnel records, performance ratings, or individually identifiable information. *Salina Journal,* 54 Kan. App. 2d at 1. Defendants have offered nothing

but their own unsubstantiated, conclusory, *en masse* assertion that the requested records are exempt "personnel records." Defendants' response is insufficient, including because a public agency relying on KORA's personnel records exemption must, as a threshold matter, answer the "fact specific question" of "[w]hether a *specific* record meets this definition" of "personnel records." Kans. Att'y Gen. Op. 91-127, at 3 (1991) (emphasis added). Defendants have not done so.

Moreover, while there is a dearth of Kansas case law on what constitutes a "personnel record" under K.S.A. § 45-221(a)(4), courts have emphasized that any constitutionally-based privacy interests that police officers may have in their police files only extend to "*personal* matters" that are so "highly personal and sensitive in nature that [they] should be safeguarded." *See e.g.*, *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489, 495 (D. Kan. 2001) (quoting *Mason v. Stock,* 869 F. Supp. 828, 833 (D. Kan. 1994)). "In addition, the police officer's privacy interests 'should be especially limited in view of the role played by the police officer as a public servant who must be accountable to public review.'" *Id.*

The *Beach* case was an action under 42 U.S.C. § 1983 against the City of Olathe, Kansas, its officials, and the former police chief where, similar to here, the plaintiffs requested information relating to (i) "identification of police officers who were subject to an internal affairs investigation, whether the officer was placed on administrative leave, the dates of any administrative leave, whether the officer was disciplined and a description of any discipline imposed;" (ii) "identification of police officers who received an investigation notification for various violations, the date the officer was notified, the disposition of the investigation, the amount of discipline imposed, and the name of the person responsible for imposing the discipline;" and (iii) the "identity of officers who were subjected to an internal affairs investigation based upon a complaint made

more than 30 days after the alleged incident." *Id.* The defendants in *Beach* objected to disclosure, citing "various provisions of the Kansas Open Records Act, K.S.A. 45–221(a)(4), (11), and (30), and the Olathe Police Department Rules deeming personnel records and internal affairs files confidential." *Id.* at 494. The court properly overruled the defendants' objections, finding that the information sought was not "sufficiently personal or sensitive enough" to preclude disclosure. *Id.* at 495. In so doing, the court relied on *Mason v. Stock*, 869 F. Supp. 828 (D. Kan. 1994), in which the court overruled the police department's objections to producing the personnel files of various police officers *except* as to psychological evaluations, which the court deemed so "highly personal and sensitive in nature that [they] should be safeguarded as privileged." *Id.* (citing *Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994)).

Like the records in *Beach*, the records requested here—even if some might be construed as "personnel records" (which Defendants have not shown)—"do not seek highly personal or sensitive information." *Id.* Notably, Defendants do not assert otherwise. Instead, they attempt to bolster their bare-bones invocation of the personal records exemption with "mere arguments of counsel" that, as explained below, fail on their face and do nothing to satisfy Defendants' burden to show with *specificity* why each of the requested records is, in whole or in part, covered by the personnel records exemption. *See Sw. Anesthesia Serv., P.A.,* 23 Kan. App. 2d at 953.

First, Defendants rely on the purportedly "plain language of the personnel records exception" to shield "all records associated with" Request Nos. 1-5 and 8-9 from disclosure. *See, e.g.*, Mot. at 22 (citing *Salina Journal*, 54 Kan. App. 2d at 23). But Defendants' "plain language" argument is based on a misreading of the statutory interpretation holding in *Salina Journal*. In that case, the question was whether the *third* prong of the personnel records exemption (*i.e.*, that

records must "pertain to . . . applicants for employment") includes two "unstated statutory conditions" pressed by the plaintiffs. *Salina Journal*, 54 Kan. App. 2d at 16. The court concluded that it did not, stating that K.S.A. § 45-221(a)(4) is "clear and unambiguous as to the legislature's intent" with respect to the term "applicants for employment." *Id.* But *Salina Journal* does not define the term "personnel records" or suggest that it should be construed so broadly as to shield broad categories of documents concerning the work, conduct, and performance (for better or worse) of public employees from disclosure, especially where such documents are not "highly personal and sensitive in nature" (*e.g.*, psychiatric evaluation records). Again, Defendants have made no such showing.

Second, Defendants mine other Kansas statutes to come up with a self-serving definition of "personnel records." *See* Mot. at 22-24. Specifically, they cite K.S.A. § 74-5611a, which codifies the rules associated with maintaining a central registry of Kansas law enforcement officers, and K.S.A. § 75-4379, which governs file sharing between law enforcement agencies, in support of their claim that it was the "legislature's intent to . . . include 'disciplinary actions' and 'internal investigation files' as personnel files." *Id.* at 24. From there, Defendants assert that "it's clear that the records at issue here, constitute 'personnel records.'" *Id.* But neither the Kansas courts, which are responsible for interpreting KORA (*see Cypress Media*, *Inc. v. City of Overland Park,* 268 Kan. 407, 416, 997 P.2d 681, 688 (2000)), nor the Kansas Legislature have indicated that these unrelated statutes are relevant to the definition of "personnel records" in K.S.A. § 45-221(a)(4). In fact, K.S.A. § 74-5611a(3) explicitly states that police registry records are "confidential and shall not be disclosed pursuant to [KORA], except such records *may be disclosed as provided in subsections(a)(4) and (a)(5)*" (emphasis added).

Third, Defendants refer to discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), as evidence of the "confidential nature" of the records requested. *See* Mot. at 25. This argument fails because Defendants have not identified any of the documents, let alone shown that they are confidential in whole or in part.

Fourth, Defendants assert—again, without reference to any particular documents—that the requested records "pertain to a limited group of individuals," so, according to Defendants, the documents cannot be redacted under K.S.A. § 45-221(d) because the individuals' identities would still be "reasonably ascertainable." *Id.* But contrary to Defendants' assertion, Request No. 1 does not pertain to specific individuals; it seeks any complaints of misconduct within the relevant timeframe (2013-present) against "*any* member of the investigative division of the KCKPD." Pet. Ex. A. (emphasis added). And Request Nos. 2 and 8-9 seek records pertaining to complaints against *more than 30* current and former KCKPD officers. Given that documents responsive to these Requests could relate to complaints against virtually any current or former member of the KCKPD during the relevant time period, Defendants' blanket assertion that the identity of the subject individual(s) would be "reasonably ascertainable" is not credible.

Last, Defendants offer their take on the supposed public policy supporting non-disclosure of personnel records. *See* Mot. at 27. But Defendants offer nothing to establish that *any*—again, let alone all—of the requested records are even "personnel records" for purposes of the statute and, thus, exempt from disclosure. In this regard, Plaintiffs emphasize that a public entity must not be permitted to avoid its KORA obligations by artfully characterizing the requested documents as "personnel records." Moreover, the case Defendants cite—*State v. Bd. of Education,* 13 Kan. App. 2d 117 (1988) (addressing a similar exemption in the Kansas Open Meetings Act)—confirms that

questions relating to public disclosure "are, of necessity, so fact sensitive" that they cannot be resolved through general attestations of privacy rights. *State v. Bd. of Education,* 13 Kan. App. 2d at 119. Accordingly, Defendants' own cited authority spotlights the legal insufficiency of Defendants' general invocation of privacy rights in connection with personnel records.

II. Defendant's Invocation of the "Criminal Investigation Records" Exemption Is Legally Insufficient.

Here, the Requests seek records relating to the long history of members of the KCKPD preying upon and abusing some of the most vulnerable members of the Kansas City community and the KCKPD's complicity in the misconduct of its members. Plaintiffs issued the Requests to shed light on abuse and corruption within the KCKPD to promote accountability and foster overdue reforms for the benefit of the Kansas City community the KCKPD is supposed to serve.

In response to Request Nos. 1-5 and 8-9, Defendants again asserted a generic boilerplate objection—this time, that all of the requested documents are "criminal investigation records" and, thus, exempt from disclosure under K.S.A. § 45-221(a)(10) ("criminal investigation records exemption"). Defendants rely on that same legally insufficient objection in their motion to dismiss. *See* Mot. at 15, 17, 18, 32.

Although criminal investigation records are not presumptively subject to disclosure under KORA, there is a public interest exception. Specifically, a court "may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:

> (A) Is in the public interest;
> (B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;
> (C) would not reveal the identity of any confidential source or undercover agent;
> (D) would not reveal confidential investigative techniques or procedures not known to the general public; and
> (E) would not endanger the life or physical safety of any person."

See K.S.A. § 45-221(a)(10).

"The first requirement is that disclosure be in the public interest," which "the person seeking disclosure" has the burden of establishing. *Harris Enter., Inc. v. Moore*, 241 Kan. 59, 65, 734 P.2d 1083, 1088 (1987). Once that threshold showing is made, "the burden of proof for the other four findings must rest with the governmental agency (custodian)"—*i.e.*, the custodian must then show "that disclosure would interfere with some prospective law enforcement action, would reveal the identity of a confidential source or undercover agent, would reveal confidential investigation techniques or procedures not known to the general public, or would endanger the life or safety of some person." *Id.* "[I]f the court finds disclosure would be 'in the public interest' and none of the harms listed in K.S.A. [] 45-221(a)(10)(A)-(F) would arise on disclosure, then the records should be disclosed." *Green*, 54 Kan. App. 2d at 119.

As explained below, even putting aside that all favorable inferences must be granted to Plaintiffs on a motion to dismiss, Defendants have not provided the Court anything from which the Court could reasonably determine *on the pleadings* that Defendants have met their burden as to *any* requested record, let alone *all* requested records.

A. Plaintiffs Have Adequately Pled That Disclosure of the Requested Records Is in the Public Interest.

As the Kansas Supreme Court has held, for a matter to be of "public interest," it "must be a matter which affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute." *Harris Enter.*, 241 Kan. at 66. And "[w]here public officials thrust controversy concerning their official actions into the public spotlight and attention, this court must conclude that a definable public interest arises to investigate that controversy and to seek a resolution of it." *Id; see also Green*, 54 Kan. App. 2d at 120.

In *Green*, the petitioner submitted records requests to the Wyandotte County Sheriff's Department and the KCKPD seeking disclosure of records relating to the shooting of her son by law enforcement. *Green,* 54 Kan. App. 2d at 119. In finding that the petitioner had adequately alleged public interest in the requested documents, the court noted the allegations that there had been media coverage of the shooting. *Id.* at 120. The Sheriff's Department and the KCKPD denied the records requests, claiming the records were exempt criminal investigation records under K.S.A. § 45-221(a)(10). *Id.* at 119. But they failed to explain how the release of the records would interfere with their investigations. *Id.* at 120. The court reversed the lower court's ruling, emphasizing that the standard is not that "disclosure shall not be made whenever a law-enforcement agency objects," and remanded the case for application of the appropriate balancing test. *Id.* at 120-21.

Here, the Kansas City community has been subjected to serious abuse by members of the KCKPD (including threats, assaults, false arrests, and a wide variety of other abusive, coercive and/or corrupt conduct) for decades. *See* Pet. ¶¶ 27-30, 33-35, and 85. The Requests seek records pertaining to complaints and investigations of misconduct against KCKPD members and any related investigative or disciplinary action taken by the KCKPD. Disclosure of these records will promote greater transparency and accountability with respect to the operations of the KCKPD and the conduct of its members, a mission Kansas City's Mayor, Chief of Police, and District Attorney have already acknowledged is in the public interest. *See id*. ¶ 10 & n.1; *see also id*. ¶¶ 78, 87, 123, 129, and 134.

B. Defendants Have Not Met Their Burden to Show the Requested Records Should Not Be Disclosed.

As Plaintiffs have adequately pled that disclosure of the requested criminal investigation

records is in the public interest, the burden is on Defendants to show that the records should not be disclosed despite the public interest. But Defendants have offered nothing from which this Court could reasonably determine—least of all, *on the pleadings*—that the requested records should not be disclosed. They offer only generalized conclusory assertions, which are plainly insufficient to meet their burden. *See Green*, 54 Kan. App. 2d at 121 (reversing order granting motion to dismiss where, as here, "petition had alleged, with factual support, that disclosure was in the public interest and the responding agencies hadn't offered an explanation as to how release of the records would interfere with their investigations."); *see also* Pet. ¶¶ 68, 70, 72, 77, 135-37.

Here, as explained above, in refusing Plaintiffs' requests, Defendants made a blanket conclusory assertion (notably, disconnected from even a single document) that the requested records are all criminal investigation records exempt from disclosure, but failed to explain the basis for the claim. In their motion to dismiss, Defendants again fail to explain *how* the requested disclosure would interfere with any actual investigations or reveal the identity of a confidential source or undercover agent (again, as to *any* requested document, let alone *all* requested documents). Instead, Defendants offer only the same unsubstantiated, conclusory assertions that "disclosing such information . . . could *potentially* interfere with prospective law enforcement action, criminal investigation or prosecution." Mot. at 33 (emphasis added). Defendants do not even assert that disclosure would interfere with any investigation or "reveal the identity of any confidential source or undercover agent." Instead, Defendants offer only unsubstantiated speculation that disclosure could *potentially* interfere or *possibly* reveal the identity of a confidential source or undercover agent. *Id*. at 35. This is insufficient, including because any legitimate concern could be rectified through appropriate redactions, as required by KORA.

In short, as in *Green*, Defendants have failed to respond to the factual allegations in the Petition (which, notably, are supported by declarations) by explaining in any substantial way how the disclosure of the requested records would interfere with prospective law enforcement action, criminal investigations, or prosecution or reveal the identity of any confidential source or undercover agent.[2] Moreover, with regards to the only two criminal indictments specifically referenced by Defendants, both are no longer pending against KCKPD Detective Roger Golubski due to his death,[3] underscoring the deficiency of Defendants' response with respect to Request Nos. 8-9. As such, Defendants have failed to meet their burden; so, at a minimum, their motion to dismiss must be denied.

III. Defendants' Invocation of the "Administrative Adjudication or Civil Litigation" Exemption Is Legally Insufficient.

In response to Request Nos. 1-5 and 8-9, Defendants again asserted a naked boilerplate exemption—*i.e*., that the requested records are "subject to administrative adjudication or civil litigation" and, thus, exempt from disclosure under K.S.A. § 45-221(a)(11). Defendants rely on that same legally insufficient boilerplate objection in their motion. *See* Mot. at 15, 17, 32.

K.S.A. § 45–221(a)(11) exempts records that "were involved or compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent." *Stauffer Commc'ns, Inc. v. Bd. of Cnty. Comm'rs*, No. 00-C-561, 2001 WL 34117818, at *16 (Kan. Dist. Ct. Jan. 12, 2001)

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[2] Defendants do not invoke the other two findings under K.S.A. § 45-221(a)(10), so also do not carry their burden with respect to those elements.

[3] *United States v. Golubski*, No. 5:22-CR-40055-TC (D. Kan. Dec. 2, 2024).

(emphasis added). "The burden [is] on the agency to show how disclosure would impair . . . administrative or civil litigation." *Id.* The relevant considerations here are similar to those under K.S.A. § 45-221(a)(10), as discussed *supra*.

While there is a dearth of case law addressing this exemption under KORA, there is case law addressing a similar exemption under the Freedom of Information Act ("FOIA"), the federal analogue to KORA. Specifically, FOIA Exemption 7(B) applies when the disclosure of law enforcement records "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). The exemption "is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding." Dep't of Justice, *Guide to the Freedom of Information Act* (2004), https://www.justice.gov/oip/media/1144276/dl. For the exemption to apply, the respondent must show "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 295 (D.C. Cir. 2015) (quoting *Wash. Post v. U.S. Dept't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988)).

Chiquita Brands is illustrative. In that case, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's holding that Exemption 7(B) does not bar the disclosure of investigative materials sought under FOIA because the party opposing disclosure "had not met its burden of showing how releasing the law enforcement records . . . would deprive the company or its officers of a fair trial." *See id.* at 298. The respondent "did not explain how any temporary head start conferred on the [plaintiffs in pending litigation] could render any trial in that litigation unfair by depriving [the party] of the full and fair opportunity to present its case." *Id.* "Nor did [the respondent] distinguish any momentary upper hand at fact-gathering gained . . .

from any other situation in which one party obtains valuable information from witnesses and other third parties outside the formal discovery process while under no obligation to produce similar information to its adversaries." *Id.* at 298-99. As such, the court found that the respondent had failed to meet its burden, so the exemption did not apply. *Id.* at 299-300.

Here, as alleged in the Petition and like the respondent in *Chiquita Brands*, Defendants have failed to show how disclosure of the records requested in Request Nos. 1-5 and 8-9 would impair any administrative adjudication or civil litigation. Instead, Defendants rely on generalized invocation of K.S.A. § 45-221(a)(11) to deny Plaintiffs' requests in their entirety. Defendants have not established—with respect to *any* of the requested documents relating to *any* complaint, investigation, or disciplinary proceeding—that "a trial or adjudication is pending or truly imminent" or that it is "more probable that not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Id.* at 295 (quoting *Wash. Post*, 863 F.2d at 102). Nor have Defendants otherwise explained how the requested disclosure would impair any related administrative adjudication or civil litigation. *See* Mot. at 15, 17, 32.

Instead, Defendants offer only a conclusory assertion that "several of the parties listed in Plaintiff's [R]equest [No. 2] are named Defendants in pending civil litigation, and release of associated records *could* interfere with those matters." Mot. at 17 (emphasis added). Even as to those individuals, Defendants fail to explain *how* the disclosure of the requested documents would likely interfere with the pending civil litigation. But more broadly, Defendants' response mentions only three civil lawsuits--one of which is no longer pending[4]--involving seven of the thirty officers

[4] *Houcks v. Unified Gov't of Wyandotte Cnty. & Kansas City, Kansas*, No. 23-cv-02489-TC (D. Kan. Jan. 30, 2025).

listed in Request No. 2. Mot. at 10. Defendants' response therefore offers no excuse for their failure to produce responsive records relating to the other 23 officers listed in Request No. 2 or the unlimited number of officers listed in Plaintiffs' other Requests.

Moreover, Defendants' mere speculation that disclosure of the requested records "*could* interfere" with the pending civil litigation involving those particular individuals cannot satisfy Defendants' burden to show "*how* disclosure *would* impair" that lawsuit, let alone any other administrative adjudication or civil litigation. *Stauffer Commc'ns, Inc.*, No. 00-C-561, 2001 WL 34117818, at *16. The deficiency of Defendants' response is amplified with respect to Request Nos. 8-9, which relate to former KCKPD Detective Roger Golubski, who died in December 2024 on the morning his federal civil rights violation trial was scheduled to begin (*see, supra*, n.1) and, thus, cannot possibly be the target of any pending administrative adjudication or civil litigation.

IV. Defendants' Invocation of the "Personal Privacy Exemption" Is Legally Insufficient.

In response to Request Nos. 1-5, Defendants assert yet another boilerplate objection—this time, that the requested records contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" and are, thus, exempt from disclosure under K.S.A. § 45-221(a)(30). Defendants rely on the same legally insufficient boilerplate objection in their motion. *See* Mot. at 15, 17, 28-29.

In assessing the potential applicability of the personal privacy exemption, the court must first determine whether the information is of a "personal nature." *Data Tree, LLC*, 279 Kan. at 460. This includes "information in government records that relates to the intimate details of a person's private life." *Id.* at 445. The court then considers "whether the public disclosure would constitute a clearly unwarranted invasion of personal privacy," by balancing the privacy interest

in nondisclosure "against the general rule of inspection and its underlying policy of openness for the public good." *Id.* "The public's right to have access to information contained in government records is thus qualified by the protection of an individual's right to maintain the privacy of personal information having no bearing on matters of public interest." *Id.* at 445.

Courts interpreting the personal privacy exemption have found the following types of information to be of a "personal nature": social security numbers, mother's maiden names, dates of birth, information relating to personal relationships among co-workers, and information about casual employee gatherings off duty. *See, e.g.*, *Data Tree*, 279 Kan. at 461-62; *Stauffer Communications, Inc.*, 2001 WL 34117818, at *17. But the Requests do not seek this sort of information. Rather, they seek information about misconduct (including corruption, coercion, harassment, battery, and sexual assaults against Kansas City residents) by members of the KCKPD, including formal and informal complaints about such conduct and investigations into such conduct. By definition, information relating to police misconduct is not of a purely "personal nature." It relates to "under color of law" conduct by KCKPD that directly affects the public; as such, it is squarely within the public interest.

Further, to the extent the requested records incidentally contain information of a purely personal nature, any legitimate concern about the affected individuals' privacy interest can be addressed through appropriate redaction under K.S.A. § 45-221(d). And, as stated above, Defendants' assertion that "redacting personal identifiers would be irrelevant in complying with K.S.A. 45-221(a)(30)" because "any record released . . . would automatically be associated with the listed employee" is not credible. Plaintiffs submit that the redacted documents could relate to *any* current or former member of the KCKPD, and the individual's identity would not be

"reasonably ascertainable." *See supra* at 9. And even if there are some documents for which redaction would not be a practical solution, Defendants have failed to identify them and, thus, have denied both Plaintiffs and the Court the opportunity to review and address them.

V. Defendants' Invocation of the "Unreasonable Burden" Exemption Is Legally Insufficient.

In response to Request No. 6 (which seeks records relating to FBI investigations and complaints submitted to the FBI and/or DOJ relating to misconduct by members of the KCKPD), Defendants initially asserted the boilerplate objections discussed above. Notwithstanding those objections, it seems that Defendants took preliminary steps toward identifying responsive documents. Those steps included (and may have been limited to) running an initial search for responsive emails using terms self-selected by Defendants. *See* Pet. ¶ 57. According to Defendants, that initial search yielded more than 23,000 potentially responsive emails. *Id.* But after what Defendants themselves described as a "cursory" review of 30 randomly selected emails (approximately 1/100th of a percent of the document set), Defendants declared that the emails were not sufficiently responsive and refused to proceed unless Plaintiffs agreed to narrow their Requests. *Id.* ¶ 58.

Because the burden is not on the requesting party to instruct the responding party on how to locate its own responsive documents, Plaintiffs initially declined to narrow their Request. But, as set forth in the Petition, in a last-ditch effort to avoid the need to file suit, Plaintiffs proposed modified search terms to Defendants. *Id.* ¶ 62 n.7. Plaintiffs' proposed modified terms were not complex; Plaintiffs simply proposed "adding the terms 'and complaint or investigation or violation' (or some good faith construction thereof)" to the search terms selected by Defendants. *Id.*

In responding to Plaintiffs' proposal, Defendants did not deny having responsive documents. *Id.* ¶ 62. Instead, Defendants they stated that the modified search terms caused some unspecified and unquantified "technical issues that impacted the [KCKPD's] email system." *Id.* On this unsubstantiated basis, Defendants denied Request No. 6 in its entirety, flatly refusing to run further searches and/or review any documents for responsiveness, claiming that the request imposed an "unreasonable burden" under K.S.A. § 45-218(e). Mot. at 31. Defendants rely on the same legal insufficient objection in their motion.

Put simply, Defendants' unsubstantiated assertion that running the searches necessary to identify responsive documents caused some unspecified and unquantified technical issues is plainly insufficient. Even if it were a potential basis for an exemption, it, like Plaintiffs' other claimed exemptions, raises fact-specific issues on which Plaintiffs are entitled to discovery.

But fatal to Defendants' position is that the Kansas Court of Appeals has rejected reliance on purported "technical issues" to avoid disclosure under KORA:

> We see no functionality exception to KORA. In truth, we categorically disagree with the district court's holding to the contrary. That ruling would allow all computer records of public information to become inaccessible through the simple manipulation of what the computer system is asked to do. If we hold that the recorded information of public records is limited to just the data that is collected and not the programs that make it useful, there is no other means to access that data—that public record—other than the computer's software. That effectively seals computer records.

Hammet, 62 Kan. App. 2d at 416.

As the *Hammet* court recognized, refusing to look for existing data or information due to "functionality" problems would effectively "nullif[y] KORA in this age of computer records." *Id.* at 415-16. Thus, any burden asserted by Defendants is "self-imposed and does not arise from the

KORA request." *Id.* at 414. As such Defendants' reliance on K.S.A. § 45-218(e) to avoid its compliance obligations under KORA fails as a matter of law.

VI. Defendants Imposed Unreasonable Fees in Violation of KORA.

As alleged in the Petition, Defendants refused to provide any responsive documents unless Plaintiffs agreed to pay in advance an exorbitant fee, $2,202.48. Pet. ¶ 12. Defendants impliedly justified the fee by stating that the production would be "voluminous" and "extensive" given the nature of the Requests. *See id.* ¶ 42. But Defendants failed to explain how they determined the amount of the fee (which Plaintiffs submit was high enough to deter most parties from pursuing their KORA requests). Nevertheless, understanding that Defendants would make a meaningful production of responsive documents, Plaintiffs paid the fee. *See id.* ¶ 43. The anticipated "voluminous" and "extensive" production never came, and Defendants eventually refunded part of the fee, leaving a net fee of $1,487.40 for the production of 225 documents (totaling 1,851 pages), almost all of which are just personnel locators for KCKPD officers. *See id.* ¶ 159.

Defendants' own authorities are illustrative. For example, in the Attorney General's Finding of Violation by the City of Frontenac (Mot. at 39) the Attorney General found that the City violated KORA when it required advance payment of $3,500 to respond to a KORA request. *Finding of Violation, In re City of Frontenac, A public agency pursuant to K.S.A. 2019 Supp. 45-217(f)(l) and 45-251(a)(2),* Case No. 2020-0G-0001 (Off. of the Kan. Att'y Gen. Feb. 11, 2020). While the City advised the requester of its charge per hour for staff time and its charge per page for copies, the City "did not explain how it calculated the requested fee or how the amount it requested was equivalent to the actual costs necessary to provide" the records. *See id.* ¶¶ 6, 17. As here, the City "did not state the number of hours or employees that would be required to search

for records, or the number of pages that it anticipated would be responsive." *Id.* ¶ 17. Put simply, the City "never actually provided [the requester] with a breakdown of or explanation for the estimated costs," as required. *Id.* Ex. A at 8.

While Defendants now attempt to justify the fee by claiming vaguely that it included staff time to "(1) conduct a search for and gather potentially responsive records, (2) review all records and email communications to determine what, if any exceptions apply, (3) and redact when appropriate," that explanation is both too little and too late. *See* Mot. at 37-38. The time for Defendants to provide information regarding the basis for the fee was when Defendants demanded advance payment. Further, Defendants have still not provided the required breakdown of "the classification of each employee who would search for and prepare responsive records for production and the hourly rate for each employee; the amount of time necessary to review and redact records; or the total number of hours it would take to respond to the request." *See In re City of Frontenac*, at ¶ 17. Nor have Defendants otherwise justified the net fee of $1,487.40 that Plaintiffs were charged for the production of 225 ancillary documents.

As such Defendants' fee practices are unreasonable and violate KORA.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied and Plaintiffs should be granted such further relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March 2025, I electronically filed the foregoing with the Clerk of the Court using the Kansas e-Flex system which will send a notice of electronic filing and a copy of the filing to all counsel of record.

/s/ Lindsay J. Runnels
Lindsay J. Runnels