

IN THE DISTRICT COURT OF PHILLIPS COUNTY, KANSAS

KELLY ROE,)		
)	Plaintiff	
Vs.)		Case No. 2019-CV-11
)		
PHILLIPS COUNTY HOSPITAL a/k/a)		
PHILLIPS COUNTY HEALTH SYSTEMS,)		
)	Defendant	

ORDER GRANTING PLAINTIFF PARTIAL SUMMARY JUDGMENT

This Order is effective as of the date and time shown on the electronic file stamp.

This case comes before the Court, in chambers, on “Plaintiff’s Motion for Summary Judgment” filed 12/2/2019. Plaintiff (Roe) is self-represented. Defendant (Hospital) is represented by John F. McClymont, Norton, Kansas. Pursuant to Supreme Court Rule 133 the Court finds oral argument will not materially aid the Court, therefore the motion may be ruled on immediately.

This is a case in which Roe requested to buy an apple, but Hospital responded it will sell her an orange if she first pays for the orange. Roe’s petition is based on alleged KORA violations because she requested copies of public records in their native-based electronic format (the apple), but Hospital refused to provide electronic copies and insisted that only hard copies (the orange) be provided by printing the records and the standard photocopy charges being paid.

The question is whether the public may require information in computerized public records be made available in a particular format. The answer is that the public records must be provided in the format requested if the public agency has the capability of providing the records in that format. The Court finds Hospital is capable of providing the records in electronic format, therefore partial summary judgment is granted on Plaintiff’s motion.

UNCONTROVERTED FACTS:

The admitted facts from the amended and supplemental petition are as follows:

1. Roe petitions this Court under the Kansas Open Records Act, K.S.A. 45-215 et seq. (“KORA”).
3. Roe requested copies of records maintained by Hospital relating to its operations and decision-making process of its elected Board of Trustees.
4. Hospital refuses to provide Roe with copies of the records she requested in their native-based electronic (i.e., computer file) format.
13. Venue is proper in this judicial district under K.S.A. 45-222(a) because the requested records are in this district.
14. Venue is also proper under K.S.A. 60-203 because Hospital resides in this district and Roe’s cause of action arose in this district.
15. This Court is vested with jurisdiction under K.S.A. 20-301 and 45-222(a) (“The district court of any county in which public records are located shall have jurisdiction to enforce the purposes of [KORA] with respect to such records, by injunction, mandamus, declaratory judgment or other appropriate order, in an action brought by any person.”)
18. Roe was a member of Hospital’s Board of Trustees for approximately two years until her resignation on 2/15/2019.
- 19 & 23 & 27 & 34 & 39 & 63. On various dates Roe submitted written requests under KORA to Hospital for copies of electronic records in their native format and hard copies if not available in electronic format. Hospital received the requests.

20 & 24 & 28 & 36 & 40 & 64. Hospital responded that KORA does not allow for native-based electronic production of documents. Hospital offered to provide hard copies or allow Roe to view the records at the hospital.

21 & 25 & 32 & 37 & 49. Hospital refuses to produce copies of the requested records in their native electronic format.

50. Regular meetings of Hospital's Board of Trustees are generally held the fourth Thursday of every month at 6:00 p.m.

51. At the 3/14/2019 Board meeting, the Board changed the 3/28/2019 meeting to 12:00 p.m. This is reflected in the official, approved meeting minutes.

52. Hospital's CEO and designated KORA information officer was present at the 3/14/2019 meeting.

56. The 3/28/2019 meeting was moved from noon to the usual 6:00 p.m. start time.

57. On 5/22/2019 Roe requested clarification of whether the inspection would be of hard copy printouts or if a computer terminal would be provided so she could inspect the requested electronic computer files. Hospital received the request.

58. Hospital's Open Records Policy clearly specifies that Hospital's information officer is the CEO (i.e., Administrator) or the CEO's designee and that access/inspection costs are \$60/hour for the information officer and \$30/hour for staff.

62. On 5/28/2019 Hospital responded that it will provide hard copy documents to review in person, not a computer terminal.

63. On 6/4/2019 Roe submitted a written request to Hospital which included a request for the entirety of the audio recording of the 5/23/2019 board meeting and that if the record was created,

filed, maintained, and/or stored by Hospital in any electronic format that it be provided in the format in which it was created, filed, maintained, and/or stored.

66. On 6/11/2019 Hospital responded that the request for the audio file was denied pursuant to K.S.A. 45-219(a).

67.1 In 2017 Hospital hired John McClymont to conduct an investigation of allegations of a Kansas Open Meetings Act (KOMA) violation.

67.6 On 7/8/2019 Roe made a KORA request to Hospital for the document provided by McClymont to Hospital Board at the 11/16/2017 Board meeting. Hospital received the request.

67.7 On 7/11/2019 Hospital responded that there is no public record as defined by K.S.A. 45-217(g)(1).

80. Hospital has not claimed that the records requested by Roe were not available in an electronic format. Nor did Hospital claim any KORA exemptions for its refusal to produce any record except for the audio file requested by Roe on 6/4/2019.

81. The audio file requested by Roe was recorded on a conspicuous recording device by Hospital's staff member (a/k/a "Board recorder") during the 5/23/2019 open meeting of Hospital's Board of Trustees. The audio file is used to help create the minutes of the meeting, which approved version is published in the local newspaper and on Defendant's website.

96. Hospital's KORA policy specifies "access/inspection costs" for the time of the Information Officer (\$60/hour) and Staff (\$30/hour).

The uncontroverted facts from the motion for summary judgment are as follows:

1. Hospital is a “public agency” within the meaning of K.S.A. 45-217 and is therefore subject to KORA.
2. On 2/18/2019; 2/28/2019; 3/1/2019; 3/14/2019; 4/29/2019; 6/4/2019; and 7/8/2019 Roe made written requests under KORA for copies of records made, maintained, kept, or in the possession of Hospital, including copies of existing electronic records in their native format.
3. Various records were requested.
4. Hospital’s employees use computer programs, such as Microsoft Word, PowerPoint, and Excel to create (i.e., make) electronic files.
5. Except for any purported final report by Mr. McClymont, Hospital does not claim it is incapable of producing the requested electronic records in the format(s) in which each was made, maintained, kept, or in the possession of Hospital.
6. Hospital regularly sends its Trustees emails containing electronic files, including Excel spreadsheets, PowerPoint presentations, Word documents, and Adobe Acrobat.pdfs.
7. On 4/10/2018 Hospital emailed its Trustees, including Plaintiff, a copy of the 149-page board-approved 2019 budget as an Adobe.pdf file.
8. Hospital regularly shows PowerPoint presentations and Excel spreadsheets, including those emailed to its Trustees and requested under KORA by Roe, at open public meetings of its Board of Trustees.
9. Individual cells in the Excel spreadsheets Hospital creates may include formulas.

11. On 2/20/2019 Hospital stated it refused to provide Roe with the requested electronic records because “[n]either the Kansas Open Records Act nor [Defendant’s Open Records] Policy allow for native-based electronic production of documents . . . as you requested.”

12. Except for any purported final report by Mr. McClymont or the audio recording, in subsequent refusal letters, Hospital stated only that it refused to provide Roe with the requested electronic records because “[Hospital’s Open Records] Policy does not allow for native-based electronic production . . . of documents” or that Roe was already “well aware of [Hospital’s] policy.”

13. Except for the audio file requested by Roe on 6/4/2019, Hospital did not cite any exemption under KORA to justify its refusal to provide the electronic records.

14. Roe specifically requested Hospital provide the KORA exemption(s) justifying its refusal to produce the electronic records requested of Roe.

15. Except for the McClymont report, Hospital does not claim that the records requested by Roe do not exist and does not deny that it made, maintained, kept, or has possession of the records in the format requested by Roe.

16. Hospital claims to have the discretion to refuse to provide Roe with the electronic versions of the requested records.

18. The “Board Packet” for the 2/28/2019 meeting of Hospital’s Board of Trustees included the 2/14/2019 meeting minutes of Hospital’s Human Resource (“HR”) Committee meeting. The minutes stated on pages 2-3 when discussing the CEO evaluation: “A draft version will be sent to Board members after the HR meeting to submit any changes or additions.”

20. Hospital stated Roe's access to the requested audio file of the 5/23/2019 open meeting of Defendant's Board of Trustees was denied under K.S.A. 45-219(a).
21. Hospital made a digital audio recording of its 5/23/2019 open meeting of its Board of Trustees.
22. Hospital hired John McClymont of McClymont Law Office, P.A. to investigate the alleged Kansas Open Meetings Act (KOMA) violation discussed in the 11/8/2017 article of *The Phillips County Review*.
26. Hospital's minutes of the 11/16/2017 meeting reference a fifteen (15) minute long executive session involving "special counsel" John McClymont beginning at 8:30 p.m. Those present during the executive session included Hospital's Trustees (including Roe), "special counsel" John McClymont, board attorney Frankie Forbes, attorney Richelle Marting, Les Lacy, and Administrator Rex Walk.
27. Hospital's minutes of the 11/16/2017 meeting reflect that in open session following the executive session involving "special counsel" John McClymont, "Jayne Holle moved that the Board waive attorney client privilege with special counsel John McClymont." This motion carried by a vote of 8-0.
29. Hospital's minutes of the 11/16/2017 meeting reflect that "Vicki Constable moved that the Board authorize attorney Frankie Forbes to disclose the findings of the special counsel inquiry and the newspaper article implying breach of the Kansas Open Meetings Law to the Kansas Attorney General." This motion carried by a vote of 8-0.

31. Hospital refused to disclose to Roe the document containing the findings of “special counsel” John McClymont (i.e., “investigation report”) stating only that it is not a public record as that term is defined by KORA (i.e., that it does not exist).

The uncontroverted facts from “Hospital’s Memorandum in Opposition to Roe’s [Partial] Motion for Summary Judgment” are as follows:

4. Roe filed and the Kansas Attorney General investigated a complaint regarding her 2/18/2019; 2/28/2019; 3/1/2019; 3/14/2019; and 4/29/2019 requests.

5. The Kansas Attorney General’s findings conclude “KORA contains no language requiring records be provided in their native format,” and “a public agency retains the discretion to determine the format in which the records are produced.”

11. Hospital hired Mr. McClymont to investigate an alleged KOMA violation.

20. The Board of Trustees meetings are recorded by a hospital staff member via a recording device for the sole purpose of assisting in the drafting of the minutes for the Board Trustees.

CONCLUSIONS OF LAW:

LEGAL STANDARD:

The standard for summary judgment has been stated in numerous cases and is as follows:

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the

dispute must be material to the conclusive issues in the case.” Bergstrom v. Noah, 266 Kan. 847, 871 (1999).

Whether or not a disputed fact is material has also been stated in numerous cases and is as follows:

“An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.” Bergstrom at 872.

The manifest purpose of summary judgment is to avoid trial where there is no real issue of fact. Ebert v. Mussett, 214 Kan. 62, 65 (1974).

AMENDED PETITION COUNT ONE: Violation of the KORA Denial of Requests for

Copies of Public Records:

The Court finds Hospital is required to provide Roe electronic copies of the requested records.

Pursuant to admitted facts from the amended and supplemental petition #19, 23, 27, 34, 39 & 63, on various dates Roe submitted written KORA requests to Hospital for copies of electronic records in their native format and hard copies if not available in electronic format. Pursuant to admitted facts #20, 24, 28, 36, 40 & 64, Hospital responded that KORA does not allow for native-based electronic production of documents, instead Hospital offered to provide hard copies or allow Roe to view the records at the hospital. Pursuant to admitted facts #21, 25, 32, 37 & 49, Hospital refuses to produce copies of the requested records in their native electronic format.

Hospital argues that nothing within the plain language of KORA enables the requester to select the format in which records are produced or require production in native-based format. Hospital also argues the requestor need only be given “full access” to the public records. Hospital also argues that its policy to produce non-electronic versions of public records is intended to protect electronic records from damage, disorganization, or disruption to operations that would occur if the Hospital were required to provide native-based electronic records that contain non-public metadata.

While true that KORA does not specifically say copies must be produced in electronic format, that is implied. Not only is it the declared public policy of the state that public records shall be open for inspection by any person unless otherwise provided by KORA, but also KORA shall be liberally construed and applied to promote such policy. *K.S.A. 45-216*. Hospital is construing KORA narrowly instead of liberally.

Public record means any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of any public agency. *K.S.A. 45-217(g)(1)(A)*. All public records shall be open for inspection by any person. *K.S.A. 45-218(a)*. Any person may make abstracts or obtain copies of any public record to which such person has access under this act. *K.S.A. 45-219(a)*. KORA provides that persons not only have the right to inspect, but also the right to obtain copies of public records. *Att’y Gen. Op. 88-152*. This includes the right to obtain copies in computer format if the public agency has the capability of providing the record in that format. *Id.*

Even though *K.S.A. 45-219(f)* states that nothing in the open records act shall require a public agency to electronically make copies of public records by allowing a person to obtain

copies of a public record by inserting, connecting or otherwise attaching an electronic device provided by such person to the computer or other electronic device of the public agency, K.S.A. 45-221(a)(16) requires the public agency to maintain a register, open to the public, that describes the information which the agency maintains on computer facilities, and the form in which the information can be made available using existing computer programs. By implication, the public agency is required to produce the public information in the format requested, if the agency is presently capable of producing that format. *Att'y Gen. Op. 89-106*. If the records are mandatorily open and already available in database format, the public agency must provide those records in such format upon request. *Att'y Gen. Op. 94-104*. If a public record is not permissibly closed and is available in either computer or hard copy, the requestor is entitled to obtain the record in either form, subject only to the fees and procedures allowed by the KORA and law. *Att'y Gen. Op. 95-64*. Once the agency has chosen to input public records into a computerized form, from which software can more quickly find a record or even produce a new record, it has created, maintained and is in possession of a record which thus becomes subject to the KORA. *Id.* Previous attorney general opinions have determined that KORA requires, by implication, providing records that are kept or created upon computers in their electronic format. *Att'y Gen. Op. 2009-14*.

Hospital's employees use computer programs, such as Microsoft Word, PowerPoint, and Excel to create (i.e., make) electronic files (*uncontroverted fact #4*). Hospital regularly sends its Trustees emails containing electronic files, including Excel spreadsheets, PowerPoint presentations, Word documents, and Adobe Acrobat.pdfs (*uncontroverted fact #6*). Hospital regularly shows PowerPoint presentations and Excel spreadsheets, including those emailed to its

Trustees and requested by Roe, at open public meetings of its Board of Trustees (*uncontroverted fact #8*). Except for the purported final report by Mr. McClymont, Hospital does not claim that the records requested by Roe do not exist and does not deny that it made, maintained, kept, or has possession of the records in the format requested by Roe (*uncontroverted fact #15*). Except for the McClymont report, Hospital does not claim it is incapable of producing the requested electronic records in the format(s) in which each was made, maintained, kept, or in the possession of Hospital; instead Hospital claims to have the discretion to refuse to provide Roe with the electronic versions of the requested records because “[n]either the Kansas Open Records Act nor [Defendant’s Open Records] Policy allow for native-based electronic production of documents . . . as you requested.” (*uncontroverted facts #5, 16 & 11*).

It is also uncontroverted that individual cells in the Excel spreadsheets Hospital creates may include formulas (*uncontroverted fact #9*). These formulas within the Excel spreadsheets are recorded information made, maintained or kept by or in the possession of Hospital, therefore regardless of their form, characteristics or location they are part of the public record. *K.S.A. 45-217(g)(1)(A)*.

Hospital’s open records policy cannot be more restrictive than KORA. *See Att’y Gen. Op. 95-64* (“*If the specific record requested is not permissibly closed pursuant to some legal authority, there is no committee or record custodian decision that can override the requirements of the KORA.*”)

Roe is not asking that she install a thumb-drive or other electronic device into Hospital’s computer, nor is she asking for permission to log into Hospital’s computer. She is simply asking that open records, which are already electronically stored on Hospital’s computer, be e-mailed to

her by a Hospital employee. This simple request poses no more risk of damage or disorganization to Hospital's records, nor does it pose more of a risk of excessive disruption to Hospital's essential functions, than does Hospital printing hard copies of the electronic records. Except for the alleged McClymont report, it is undisputed that Hospital does not claim it is incapable of producing the requested electronic records in an electronic format (*uncontroverted fact #5*), leading to the logical conclusion that Hospital has the requested records in electronic format and has the ability to provide those documents to Roe in the electronic format she requested.

The Court finds that Hospital is required to provide Roe with electronic copies of the documents requested, including the draft version of the CEO evaluation form, but excluding the alleged McClymont report, and excluding the audio recording. Those three records (the draft version of the CEO evaluation form, the audio recording, and the McClymont report) will be discussed in more detail below.

Draft CEO evaluation form:

The Court finds Hospital is required to provide Roe a copy of the draft CEO evaluation form.

On 3/1/2019 Roe submitted a KORA request to Hospital for both the draft and final versions of the CEO evaluation forms (*Amended Petition Exhibit E*). Hospital refused to provide an electronic version but did quote a cost of \$2.65 for a hard copy (*Amended Petition Exhibit F*). Roe paid that cost but received only the final version of the evaluation form, not the draft version (*Hospital response to summary judgment Exhibits 1 & 2B*). Hospital argues it is not required to

disclose the draft version pursuant to K.S.A. 45-221(a)(20). Roe argues that statute does not apply because the draft version was cited or identified in an open meeting or in an agenda of an open meeting. The Court agrees that statute does not apply but for a different reason.

K.S.A. 45-221(a)(20) states that a public agency is not required to disclose, “Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records *in which opinions are expressed or policies or actions are proposed . . .*” (emphasis added). This subsection applies only if the note or preliminary draft or other record expresses an opinion or proposes a policy or action. Conversely, if the note or preliminary draft or other record does not express an opinion or does not propose a policy or action then this subsection does not apply.

In our case, the requested draft CEO evaluation form is simply a form to be used to evaluate the CEO’s performance. The form itself, whether the draft or the final version, does not express an opinion or propose a policy or action, therefore K.S.A. 45-221(a)(20) does not apply to the draft CEO evaluation form.

The Court finds Hospital is required to provide Roe a copy of the draft CEO evaluation form.

Audio Recording:

The Court finds Hospital is not required to provide Roe a copy of the audio recording.

On 6/4/2019 Roe sent a request to Hospital which states in part, “I request that if the public record requested was created, filed, maintained, and/or stored by [Hospital] in any electronic format (i.e., computer file), that it be provided in the format(s) in which it was created,

filed, maintained, and/or stored (e.g., .pdf, .doc, .pptx, etc.) I request each file in its entirety . . . The public records I request are: A. Audio Recording – May 23, 2019 Board Meeting. I request the audio recording made of the May 23, 2019 PCHS Board of Trustees (“Board”) regular meeting. . .” (*Amended Petition Exhibit T*). On 6/11/2019 Hospital responded in part, “First, your request for ‘the audio recording made of the May 23, 2019 [Board] regular meeting’ is denied pursuant to K.S.A. 45-219(a).” (*Amended Petition Exhibit V*).

The uncontroverted facts are that the audio file requested by Roe was recorded on a conspicuous recording device by Hospital’s staff member (a/k/a “Board recorder”) during the 5/23/2019 open meeting of Hospital’s Board of Trustees. The audio file is used to help create the minutes of the meeting, which approved version is published in the local newspaper and on Defendant’s website (*admitted fact #81*). Hospital made a digital audio recording of its 5/23/2019 open meeting of its Board of Trustees (*uncontroverted fact #21*). The Board of Trustees meetings are recorded by a hospital staff member via a recording device for the sole purpose of assisting in the drafting of the minutes for the Board Trustees (*Hospital’s response uncontroverted fact #20*).

In her motion for summary judgment Roe argues that Hospital violated KORA when it refused to provide her with access to the audio recording (emphasis added) and that Hospital should be ordered to produce the recording. In its response Hospital accurately argues that Roe never requested access to inspect the recording; she asked for a copy. (emphasis added).

The right to inspect and the right to copy are separate; the right to inspect falls under K.S.A. 45-218(a) whereas the right to copy falls under K.S.A. 45-219(a). Under K.S.A. 45-219(a) any person may obtain a copy of a public record, but the public agency is not required to

provide a copy of a recording unless it was shown or played at a public meeting. In our case, the uncontroverted facts are that the recording of the 5/23/2019 meeting was for the sole purpose of assisting in drafting the minutes (*Hospital's response uncontroverted fact #20*), meaning it was not shown or played at a public meeting, therefore Roe is not entitled to a copy.

The Court finds Hospital is not required to provide Roe a copy of the audio recording.

McClymont report:

The Court finds there is a dispute of material fact which precludes summary judgment.

It is uncontroverted that in 2017 Hospital hired John McClymont to conduct an investigation of allegations of a Kansas Open Meetings Act (KOMA) violation (*admitted fact #67.1*). On 7/8/2019 Roe made a KORA request to Hospital for the document provided by McClymont to the hospital board at the 11/16/2017 board meeting. Hospital received the request (*admitted fact #67.6*). On 7/11/2019 Hospital responded that there is no public record as defined by K.S.A. 45-217(g)(1) (*admitted fact 67.7*). Hospital refused to disclose to Roe the document containing the findings of "special counsel" John McClymont (i.e., "investigation report") stating only that it is not a public record as that term is defined by KORA (i.e., that it does not exist) (*uncontroverted fact #31*).

Roe claims that McClymont prepared a written report and during the executive session handed the written report to the Hospital's board chairman. Hospital denies Roe's claim and submitted affidavits from Rex Walk (Hospital's CEO) and Stanley Katz (Hospital's Board of Trustees Chairman) that McClymont did not provide a written report to Hospital, but instead

provided only an oral report. This is a disputed material fact which precludes summary judgment.

The Court finds there is a dispute of material fact which precludes summary judgment.

AMENDED PETITION COUNT TWO; Violation of the KORA for Failure to Provide
Written Statement of Grounds for Denial of Requests:

The Court finds summary judgment should be denied because Roe has failed to convince the Court: 1) there is no genuine issue as to any material fact; and 2) she is entitled to judgment as a matter of law.

In Count Two of her amended petition Roe claims that on 5/14/2019 she requested Hospital provide the grounds for denying her public records requests. She also claims that Hospital did not provide a written statement of the grounds for denial as required by K.S.A. 45-218(d). In its answer Hospital denies all allegations regarding Count Two.

In its response to Roe's motion for summary judgment, Hospital claims that Roe did not substantively address this issue in her motion for summary judgment therefore Hospital did not address this issue in its response. In her reply Roe states that she disagrees and believes her motion for summary judgment is dispositive on all counts.

It is uncontroverted that Roe specifically requested Hospital provide the KORA exemptions justifying Hospital's refusal to produce the records (*uncontroverted fact #14*). It is also uncontroverted that Hospital did respond but, except for any purported final report by Mr. McClymont and the audio recording, did not cite any exemption under KORA (*uncontroverted facts #15 & 13*). Instead its reply was that it did not have to provide Roe with the requested

electronic records because “[Hospital’s Open Records] Policy does not allow for native-based electronic production . . . of documents” or that Roe was already “well aware of [Hospital’s] policy.” (*uncontroverted fact #12*).

K.S.A. 45-218(d) states in part, “If the request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester not later than the end of the third business day following the date that the request for the statement is received.” The Court is unsure whether Roe’s claim on count two is based upon Hospital failing to timely provide a response to her 5/14/2019 letter, or whether the claim is based on Hospital failing to cite a specific provision of law, or both.

The Court finds summary judgment should be denied because Roe has failed to convince the Court: 1) there is no genuine issue as to any material fact; and 2) she is entitled to judgment as a matter of law.

AMENDED PETITION COUNT THREE; Violation of the KORA for Failure to Charge a Reasonable Fee:

The Court finds that Roe’s request for summary judgment should be denied.

In Count Three of her amended petition Roe claims that Hospital quoted “production costs” even though Hospital would not provide her with the records she requested. She also claims that the quoted “production costs” was an attempt to obfuscate its refusal to provide her with the records she requested. She also claims Hospital did not act in good faith and did not have a reasonable basis in fact or law when it quoted a fee for records not requested. In its

answer Hospital denies all allegations regarding Count Three except that Hospital's KORA policy specifies "access/inspection costs" for the time of the information officer (\$60/hour) and staff (\$30/hour) (*admitted fact #96*).

In its response to Roe's motion for summary judgment, Hospital claims that Roe did not substantively address this issue in her motion for summary judgment therefore Hospital did not address this issue in its response. In her reply Roe states that she disagrees and believes her motion for summary judgment is dispositive on all counts.

Roe's petition alleges that Hospital did not act in good faith and did not have a reasonable basis in fact or law when it quoted fees for hard copies instead of the electronic records she requested. To be granted summary judgment Roe has to convince the Court of two things: 1) there is no genuine issue as to any material fact; and 2) she is entitled to judgment as a matter of law. Even though the Court has determined under Count 1 that Hospital must provide Roe with electronic copies, that is not clearly stated within KORA. Also, this Court's determination that Hospital must provide Roe with electronic copies is contrary to the Kansas Attorney General's letter to Roe dated 9/26/2019 regarding Roe's KORA complaints made to the Attorney General. The Court finds there is not a sufficient factual or legal basis to grant Roe summary judgment based upon Hospital not acting in good faith or Hospital not having a reasonable basis to quote fees for hard copies instead of electronic copies.

The Court finds that Roe's request for summary judgment should be denied.

This still leaves use, however, in the situation where Roe requested to buy an apple (electronic copies) but Hospital has not told her the price of the apple; Hospital has only told her the price of an orange (hard copies). Although this Court has now ordered that Hospital is

required to provide Roe with electronic copies, Hospital is allowed to charge a reasonable fee for providing the electronic copies and Hospital can require advance payment of the fee. *K.S.A. 45-219(c)* (“ . . . each public agency may prescribe reasonable fees for providing access to or furnishing copies of public records, subject to the following: (1) In the case of fees for copies of records, the fees shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available. (2) In the case of fees for providing access to records maintained on computer facilities, the fees shall include only the cost of any compute services, including staff time required. . . ”); and *K.S.A. 45-218(f)* (“A public agency may charge and require advance payment of a fee for providing access to or furnishing copies of public records, subject to *K.S.A. 45-219.*”)

K.S.A. 45-222 grants the district court jurisdiction to enforce the purposes of KORA by injunction, mandamus, declaratory judgment or other appropriate order. It would be against the purposes of KORA if Hospital were required to provide electronic copies without payment of a reasonable fee, but it would also be against the purposes of KORA if Roe is not given an estimate for the electronic copies she requested instead of photocopies she did not request. The Court therefore finds that Roe should submit to Hospital new written requests for documents, and that those new requests should clearly specify whether she is asking for an electronic copy, a paper copy, or access to inspect the document. The Court also finds that Hospital should then proceed to respond to those new requests according to KORA and this order.

SUMMARY OF FINDINGS:

Regarding Count One of Roe's amended petition, the Court finds Hospital should be, and is hereby, required to provide electronic copies to Roe, except for the McClymont report and the audio recording.

Regarding the McClymont report, there is a dispute of fact about whether McClymont prepared a written report and handed the written report to the Hospital's board chairman, or whether McClymont provided only an oral report. The Court finds summary judgment should be, and is hereby, denied regarding the McClymont report.

Regarding the audio recording, Roe is not entitled to a copy of the recording and she did not ask for access to the recording. The Court finds summary judgment should be, and is hereby, denied regarding the audio recording.

Regarding Count Two of Roe's amended petition, the Court finds summary judgment should be, and is hereby, denied.

Regarding Count Three of Roe's amended petition, the Court finds summary judgment should be, and is hereby, denied. However, pursuant to K.S.A. 45-222 and to enforce the purposes of KORA, the Court further finds Roe should be given a certain amount of time to file new written requests to Hospital for any records requested, and that those new requests should clearly specify whether she is asking for an electronic copy, a paper copy, or access to inspect, and that upon receipt of the new requests Hospital should then respond according to KORA and this order.

The Court further finds that pursuant to K.S.A. 60-2102(c), when a district judge makes an order that is not otherwise appealable but the district judge is of the opinion that such order

involves a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. This Court does find that those conditions apply to this order and that if such appeal is timely requested then all proceedings in the district court shall be stayed pending the appeal. The parties therefore have 14 days from today's date to file a notice of appeal with the district court. The parties further have any additional time to perfect their appeal pursuant to K.S.A. 60-2102(c) and Supreme Court Rule 4.01 and as may be allowed by the appellate courts.

The Court further finds that if a notice of appeal is not filed with the district court within 14 days of today's date, then Roe shall have 28 days from today's date to file new written requests to Hospital for all records requested. The new request for each record shall specify whether she is asking for an electronic copy, a paper copy, or access to inspect. Hospital shall then respond to those new requests according to KORA and this order.

IT IS SO ORDERED.

Hon. Preston A. Pratt, Chief Judge
17th Judicial District
P.O. Box 70
Norton KS 67654
785-877-5770

CERTIFICATE OF SERVICE

I do hereby certify that on 4/7/2020, a true and correct copy of the above and foregoing

ORDER was served to:

Kelly Roe
P.O. Box 474
Logan KS 67646
(by first class mail)

John F. McClymont
Attorney at Law
(by e-filing)

and the original was electronically filed with the Clerk of the District Court.

Hon. Preston A. Pratt, Chief Judge
17th Judicial District