

**IN THE DISTRICT COURT OF MARION COUNTY, KANSAS**

<b>THE HOCH PUBLISHING CO., INC.,</b>	)	
<i>d/b/a the Marion County Record,</i>	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. MN-2024-CV-000036</b>
	)	
<b>CITY OF MARION, KANSAS,</b>	)	
<b>Defendant.</b>	)	

**MEMORANDUM DECISION**

This matter comes on before the Court on the Plaintiff's Motion for Partial Summary Judgment and the Defendant's Motion for Summary Judgment. A hearing was held in this matter on March 6, 2025. The Plaintiff appeared by and through Bernard J. Rhodes, of Lathrop GPM, LLP. The Defendant appeared by and through Jennifer M. Hill, of McDonald Tinker, PA. At the conclusion of the hearing, the Court took the matter under advisement.

The Court having reviewed the file, hearing arguments of the parties, and being fully advised herein, finds that the Plaintiff's Motion for Partial Summary Judgment shall be granted, and the Defendant's Motion for Summary Judgment shall be denied.

The Court makes the following Findings of Fact:

1. The Plaintiff, The Hoch Publishing Co., Inc., is a Kansas Corporation in good standing and it owns and operates the Marion County Record, (the newspaper of record in Marion County, hereinafter referred to as "The Record").

2. The Defendant, City of Marion, is a Municipal Corporation in the State of Kansas. The Defendant is a public agency as defined by K.S.A. 45-217(k)(1).
3. David Mayfield, (hereinafter referred to as Mayfield), was Mayor for the Defendant from January 2020 to January 2024.
4. Gideon Cody, (hereafter referred to as Cody), was Police Chief for the Defendant between August of 2023 through October 2, 2023.
5. Brogan Jones, (hereinafter referred to as Jones), was City Administrator for the Defendant from May 2023 through January 2024.
6. On August 11, 2023, the City of Marion Police Department, with assistance of Marion County Sheriff's Department, executed search warrants on three (3) different locations in the City of Marion, including the offices of The Record.
7. It is the City of Marion's Police Department policy:

“Each police officer shall have their City-issued cell phone on them while on duty and answer calls and messages accordingly. The City cell phone is at all times the property of the City. By accessing the City cell phone you acknowledge that the City has the right to monitor its cell phone from time to time to ensure that employees are using them for their intended purposes.

. . . City-issued cell phones shall be used to conducted (SIC) official Police Department business.”
8. On August 11, 2023, the Defendant had not issued any cell phones to any police officer, including Cody, and Cody was using his personal cell phone to conduct official police business.

9. Jones used a City of Marion-issued cell phone to conduct business on behalf of Defendant and exchanged texts with both Mayfield and Cody.
10. Cody used his personal cell phone to conduct official police business and used his cell phone on matters concerning the execution of the search warrants on August 11, 2023.
11. The City of Marion City Code, 1-503, designates the Police Chief for records “kept and maintained in the City Police Department”.
12. The City Administrator, pursuant to the code for the City of Marion, is the local Freedom of Information Officer under the Kansas Open Records Act. It is uncontroverted that all KORA requests were passed on to counsel for the Defendant and counsel served as the Freedom of Information officer.
13. On August 30, 2023, Deb Gruver, (hereinafter referred to as Gruver), filed suit in Federal Court against Cody. Counsel, Jennifer Hill, entered her appearance on behalf of Cody in the Federal suit.
14. In the Gruver suit, Cody identified electronically stored information on his personal phone regarding the criminal investigation and the August 11, 2023 search warrants.
15. On September 28, 2023, Kansas City Television Station aired an interview with Kari Newell, (hereinafter referred to as Newell), a local City of Marion businessperson, in which Newell alleges Cody had requested Newell to destroy text messages between herself and Cody. Newell was an alleged victim resulting in the search warrants executed on August 11, 2023.
16. On October 2, 2023, Cody resigned as Police Chief for the City of Marion.

17. On October 19, 2023, Phyllis Zorn, (hereinafter referred to as Zorn), a reporter for The Record, made a Kansas Open Records Act request to the Defendant for all text messages – whether from City-issued phones or privately owned phones – sent to or from Cody, Jones, Mayfield, and the members of the City Council, between August 1, 2023 to August 18, 2023 that related to the Marion County Record, Eric Meyer, (owner of The Record), Ruth Herbel, Newell, Zorn, Gruver, Pam Maag or that mentioned or related to the search warrants or investigation.
18. On October 24, 2023, the Defendant through counsel, Jennifer Hill, notified The Record that the law firm, McDonald Tinker, PA, is responding to all KORA requests on behalf of the Defendant. Counsel further informed The Record that the Defendant was not aware of any responsive texts sent on City-issued property. Counsel further informed The Record that the Defendant did not have custody over personal cellphones and that obtaining text messages from personal cell phones, not City-issued property, placed an unreasonable burden on the City.
19. On October 30, 2023, KSHB made a similar KORA request to the City. On October 31, 2023, Counsel for the Defendant, declined KSHB's KORA's request citing the unreasonable burden. However, the Defendant also responded to KSHB as follows:

“Finally, the City did locate text messages sent on a City-issued cell phone between Jones and Mayfield that is during the relevant

time frame related to your request. It is attached to the e-mail sent with this correspondence.”

20. On December 6, 2023, Jones was interviewed by the Colorado Bureau of Investigations (CBI). Jones informed the CBI that between August 8, 2023 and August 14, 2023, he texted Cody on his City-issued phone, twice about the investigation of The Record.
21. Mayfield provided to the CBI text messages with Cody between August 1, 2023 and August 18, 2023 concerning investigation of The Record.
22. On July 12, 2024, the Plaintiff filed this suit against the Defendant for refusing to provide Cody’s and Jones’ texts.
23. The Plaintiff, after suit was filed, served discovery requests on the Defendant in part request for text messages of Jones. The Defendant responded they did not have any in their possession.
24. The Plaintiff, also after suit filed, made a discovery request for Cody’s texts. The Defendant produced 69 pages of texts to and from Cody’s personal cell phone. Of the 69 pages, 51 pages were from Cody’s personal phone. The other 18 pages were from Mayfield’s and Police Officer for the City, Zach Hudlin’s, (hereinafter referred to as Hudlin), personal phones.
25. Marion County Detective, Aaron Christner, made a sworn declaration that he texted Cody between August 8, 2023 and August 15, 2023, which have not been produced by the Defendant.
26. On December 16, 2024, Jones testified in a deposition with the parties that Cody twice texted Jones’ City-issued phone about the investigation of The

Record between August 8, 2023 and August 14, 2023, and that he did not delete these messages. The messages were still on his phone that he left with the Defendant after his employment ended in January, 2024.

27. Jones stated he was the City's Freedom Information Officer.

28. Jones received Zorn's KORA request directly and indicates he searched his City-issued phone but did not believe it contained any responsive texts.

29. On January 3, 2025, the Defendant produced texts from Jones' City-issued cell phone.

30. The texts provided from Jones' City-issued phone included a text from Mayfield that stated:

"I went and visited with Cody and the Sheriff, and I told Cody I was behind him and his investigation 100 percent. Can't wait to see how this plays out."

31. On December 18, 2024, Mayfield was deposed and testified no one from the City of Marion asked if he had texts with Cody or Jones.

32. On December 20, 2024, Hudlin, the interim Police Chief for the Defendant was deposed, and he testified that he exchanged texts with Cody. Hudlin also testified he has not been questioned about texts during the relevant time period. Hudlin provided five (5) pages of texts from his personal phone during August 1, 2023 and August 18, 2023 that were relevant to the execution of August 11, 2023 search warrants.

## LEGAL ANALYSIS

“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 judgement as a matter of law.” *Cady v. Schroll*, 298 Kan 731, 734 317 P.3d 90 (2014). The parties both acknowledge that the material facts are not at issue in this case and this matter is ripe for Summary Judgment for both parties. A brief history concerning the Open Record Act would be appropriate.

Prior to 2016, the Kansas Open Record Act defined the “public record” as any recorded information, regardless of the form characteristics, which is **made, maintained, or kept** by or is in the possession of any public agency. K.S.A.45-217(g)(1) (2015).

The Attorney General of the State of Kansas issued a formal opinion concluding that e-mails sent by State employees using personal accounts were not subject to KORA because they were not **made, maintained, or kept** by public agency.

The Kansas Legislature in 2016 responded by expanding the definition of the public record.

“Public record” means any recorded information, regardless of form, characteristics or location that is **made, maintained, or kept** by or in the possession of:

(A) “Any public agency”: or

(B) “Any officer or employee of a public agency pursuant to the officer’s or employer’s official duties that is related to the functions, activities, programs or operations, any public agency...”). K.S.A. 45-217(l)(1).

The Public Policy of the Kansas Open Records Act is set forth in KSA 45-216

that states:

(a) It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this Act, and this Act shall be liberally construed and applied to promote such policy.

(b) Nothing in this Act shall be construed to require the retention of a public record nor to authorize the discard of a public record. (K.S.A. 45-216).

“Public Records” in Kansas are held in trust for the public by our elected officials and the State Agencies.” Hammet v. Schwab” 62 Kan. App 2d 406, 407, 518 P.3d 48, 50 (2022).

Public Agency is defined as set forth in K.S.A. 45-217 (k)(1) as follows:

“Public Agency” means the State or any political or taxing sub-division of the State or any office, agency, or instrumentality thereof, or any other entity receiving or expending and supported in the whole or in part by the public funds appropriated by the State or by public funds of any political or tax sub-division of the State.” (K.S.A. 45-217(k)(1). Both parties acknowledge that the Defendant, the City of Marion, is a public agency as defined by K.S.A. 45-217.

There are records that are not subject to KORA. K.S.A. 45-217(l)(3) lists what records are not subject to KORA.

“Notwithstanding the provisions of paragraph (1), “public record” does not include:

(A) records that are owned by private person or entity and are not related to functions, activities, programs, or operations funded by public funds. As used in this sub-paragraph, “private persons” does not include an officer or employee of a public agency who is acting pursuant to the officer’s or employee’s official duties;



(B) records that are **made, maintained, or kept** by an individual who is a member of a legislature or governing body of any political or taxing subdivision of the State; . . . K.S.A. 45-217(l)(3).

“All public records shall be open for inspection by any person, except as otherwise provided in this Act, and suitable facility shall be made available by each public agency this purpose. . . .” K.S.A. 45-218(a).

“Each request for access to a public record shall be acted upon as soon as possible, “but not later than the end of the third business day following the date that the request is received.”

If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and the earliest date and time that the record will be available for inspection. If for 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 the 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. K.S.A. 45-218(d).

The public agency has the ability to refuse providing public records if the request places “an unreasonable burden on the public agency”. Refusal pursuant to the unreasonable burden standard must be sustained by the public agency by a preponderance of the evidence. K.S.A. 45-218(e).

The open records request in the case at hand was authored by a reporter for the Plaintiff, Zorn, on October 19, 2023. It made a request pursuant to the Kansas Open Records Act for all text messages – “whether from City-issued phones or privately owned phones - sent to or from Cody, Jones, Mayfield, and members of the City Council between August 1, 2023 and August 18, 2023, that related to The Record, Eric Meyer,

Ruth Herbel, Newell, Zorn, Gruver, Pam Maag, or that mentioned or related to the search warrants or investigation”. This was a request made in response to search warrants being executed on August 11, 2023 by the Defendant. The Plaintiff acknowledges that the request in regard to Mayfield and members of the City Council are not being pursued due to the fact the public record does not include records “**made, maintained or kept** by an individual who is a member of a legislative or of the governing body of any political or taxing sub-division of the State.” K.S.A. 45-217(l)(3)(B).

The focus of this decision of the KORA request made by the Plaintiff will be on the former Police Chief, Cody, and the City Administrator, Jones.

#### **BROGAN JONES’ TEXTS**

Jones was the City Administrator from May, 2023 through January, 2024. He was issued a City-issued cell phone to conduct business on behalf of the Defendant. Jones, pursuant to the code of Marion is the local Freedom of Information Officer charged with responding to Kansas Open Record requests. Again, there is no question that the Defendant is a public agency as defined by K.S.A. 45-217(k)(1). There is no question that Jones is not exempt under K.S.A. 45-217(l)(3).

The Defendant responded on October 24, 2023 by and through counsel for the Defendant. The Plaintiff was informed that the law firm of McDonald Tinker PA would be responding to all KORA requests on behalf of the Defendant. Jones testified at a later deposition that he forwarded all KORA requests to the McDonald Tinker PA firm. On October 24, 2023, the Defendant informed the Plaintiff that the Defendant was not aware of any responsive texts sent on the City-issued property.

This is absolutely contradicted by the Defendant's response to an October 30, 2023 KORA request made by KSHB, a television station out of Kansas City. On October 31, 2023, the Defendant responded to KSHB, stating "Finally the City did locate text messages sent on a City-issued cell phone between Jones and Mayfield that is during the relevant time frame related to your request. It is attached in the e-mail with this correspondence. The Defendant did not provide the Plaintiff with any texts from Jones' City-issued phone.

On July 12, 2024, the Plaintiff filed suit in the above-captioned matter against the Defendant for refusing to provide the texts from Cody and Jones.

On December 16, 2024, well over a year after the initial KORA request was made by reporter Zorn, Jones testified in a deposition that he had texted Cody twice from his City-issued cell phone about the investigation of The Record between August 8, 2023 and August 14, 2023. Jones further stated that he did not delete these texts and the messages were still on the City-issued phone that he left with the Defendant after he terminated his employment in January of 2024.

The Defendant was in possession of the cell phone and had provided some texts from that cell phone to KSHB on October 31, 2023. Further, the Defendant was in possession of that cell phone throughout the entirety of this matter. It wasn't until January 3, 2025 that the Defendant supplied the Plaintiff with the texts from Jones' City-issued cell phone. It should be noted one of those texts was from Mayfield as stated as follows: "I went and visited with Cody and the Sheriff, and I told Cody I was behind him and his investigation 100 percent. Can't wait to see how this plays out." It is important

to note that the KORA request was made for any and all texts received or sent from Jones' City-issued cellphone.

The Court notes that Mayfield is an exempt individual as described in K.S.A. 45-217(l)(3)(B) as he is the Mayor of a governing body. However, the texts were discoverable as they existed on a non-exempt individual's phone, to-wit: Jones.

Jones further testified that he received the KORA request and forwarded the KORA request directly to Defendant's counsel. It is uncontroverted that the texts on Jones' City-issued phone were a public record and were recorded information maintained by the Defendant. In fact, this public record was both a public record under the expanded 2016 definition of a public record, but it would also be a public record under the prior definition. The response from the Defendant on October 24, 2023 is simply that the texts did not exist.

The Defendant argues that the KORA request by Zorn was served on Jones personally. It does not matter whether Jones was a Freedom of Information Officer, or the duty was transferred to counsel for the Defendant, both failed. The Defendant failed to provide the texts off of Jones' phone without reasonable basis in fact or law. That the fact that the Defendant had the phone, had provided texts off that phone to KSHB on October 31, 2023, and had failed for over one (1) year to provide those texts, and certainly well beyond the three (3) business days as required by statute, shows that this was not in good faith.

The Court finds in regard to Jones' texts, that the Defendant failed in its duties to respond to Zorn's request and the Plaintiff is entitled for partial Summary Judgment.

### **GIDEON CODY'S TEXTS**

The texts from Cody present a different issue. Cody was Chief of Police during the execution of the search warrants on August 11, 2023 and maintained that employment until October 2, 2023, when Cody resigned. It was the Marion City's Police Department policy:

“that each officer shall have their City-issued cell phone on them while on duty and answer calls and messages accordingly. The City's cell phone is at all times the property of the City. By accessing the City's cell phone, you acknowledge that the City has the right to monitor its cell phone from time to time to ensure that employees are using them for their intended purposes.” ... City-issued cell phones shall be used to conducted (SIC) official police department business.”

That at no time did the City issue cell phones to either Cody or any of the officers. It is uncontroverted that Cody used his personal cell phone to conduct official police business.

On August 30, 2023, while Cody was still employed as Police Chief for the Defendant, Gruver, filed suit in Federal Court against Cody. Counsel for Cody in the Gruver suit is the counsel that has represented Cody from October 19, 2023 to present. In the Gruver lawsuit, Cody identified electronically stored information on his personal phone regarding criminal investigations surrounding the August 11, 2023 search warrants. It is not clear what type of electronic information was stored on Cody's phone. However, it is important to note that counsel for Cody in 2023, has remained the same counsel the Defendant has had since October 19, 2023.

On September 28, 2023, Kansas Television Station aired an interview with Kari Newell, a local City of Marion businessperson in which Newell alleged that Cody had requested her to destroy text messages between herself and Cody. It is important to note

that Newell was the alleged victim resulting in the search warrants executed on August 11, 2023.

In response to Zorn's request of October 19, 2024, the Defendant responded in regard to the Jones' texts, that they simply said they did not exist. However, the Defendant in regard to the Cody's texts stated that it would create an unreasonable burden obtaining the text messages off of Cody's phone inasmuch as his employment was terminated on October 2, 2023, and there was no mechanism set forth in the Kansas Statute's of the Kansas Open Records Act to obtain personal texts off of a personal cell of a former employee.

The Defendant's policy required all law enforcement to use a City-issued cell phone to conduct official business. Now the Defendant, is attempting to hide behind that failed policy by refusing to at least request the texts from Cody. It is uncontroverted that the Defendant made no request on Cody for his personal cell phone texts, all the while acknowledging the Gruver Federal lawsuit that they had electronically stored information on his cell phone that was relevant to the August 11, 2023 search warrant. Pursuant to discovery filed in this case by the Plaintiff, the Defendant finally provided 69 pages of texts to and from Cody. Fifty-one of these pages were directly from Cody's cell phone, the other 18 pages were texts from Mayfield and interim Police Chief, Hudlin, then a police officer for the City of Herington's personal cell phone. The Defendant still did not produce any text messages between Cody and Jones. Those text messages weren't provided until after the deposition occurring on Jones in December of 2024.

The Defendant attempts to shield itself by stating that Cody was not an employee at the time these requests were made and that the KORA Statutes do not provide a

mechanism for the Defendant to obtain text messages from Cody, as he was no longer an employee. All the while, the Defendant's counsel was representing Cody in a previous Federal lawsuit that indicated that they had electronically stored information on Cody's cell phone related to August 11, 2023. There is no indication that the Defendant attempted to request the information from Cody. The use of the personal cell phone by the Defendant's law enforcement was the exact purpose that the Kansas Legislature expanded the definition of a public record in 2016.

The Defendant attempts to mitigate their responsibility by arguing that they offered Cody's texts to the Plaintiff to resolve this lawsuit. The Defendant offered Cody's texts from his personal phone in return for dismissal of this case. The Defendant had an affirmative duty to provide Cody's texts. Attempting to use texts as a bargaining chip would render KORA useless.

The Court finds that the Defendant has failed to show by preponderance of evidence that the KORA request from Zorn placed an unreasonable burden on the Defendant. The Court finds that the Defendant acknowledged it had access to Cody's phone pursuant to the Gruver Federal lawsuit. It was not until after this suit was filed that they provided 69 pages of texts pursuant to the Zorn's KORA request. It is uncontroverted that there was no attempt to obtain the texts from Cody. The City's policy was for police to have City-issued phones to conduct official business. The Defendant does not get to hide behind their failure to issue phones to police. Texts on personal phones is the major reason the Kansas Legislative broadened the definition of what is a public record.

As stated earlier our elected officials are entrusted to hold and keep public records. The Defendant failed to hold Cody's texts or at a bare minimum request them from Cody. The Defendant, through its counsel, had access to Cody's phone and still made no attempt to comply with Zorn's request. The Defendant fails to sustain their burden of proof. The Court finds it was not an unreasonable burden to comply with Zorn's request in regard to Cody's texts on his personal phone.


The Court further finds, based upon the facts in this case, that the Defendant's waiting so long to comply with the Zorn request and forcing The Record to file suit illustrates bad faith.

Therefore, the Court finds that the Plaintiff shall be granted Summary Judgement in regard to the KORA request for Cody's texts.

The Court directs the parties to confer as to the amount of attorney fees. If the parties are unable to reach an agreement in regard to the same, this matter will come back before the Court on June 12, 2025 at 10:00 AM.

**IT IS SO ORDERED.**

Done in Chambers on the 21<sup>st</sup> day of April, 2025.

  
BEN J. SEXTON  
DISTRICT JUDGE



# CERTIFICATE OF SERVICE

I, Connie J. Franklin, do hereby certify that a true and correct copy of the above and foregoing Memorandum Decision was forwarded by: ( ) placing the same in the U.S. Mail, first-class postage prepaid; ( ) in the Court Mailbox; ( ) facsimile transmission; ( ) hand delivery; (X) e-mail; or (X) electronically served via eFlex filing system, on the 4th day of April, 2025 to:

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Connie J. Franklin  
Connie J. Franklin, Deputy Clerk