IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
CIVIL COURT DEPARTMENT

ARTHUR HALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2014-CV-464**
	)	
THE UNIVERSITY OF KANSAS,	)	**Division 4**
	)	
Defendant,	)	
and	)	
	)	
SCHUYLER KRAUS,	)	
	)	
Intervenor.	)	

UNIVERSITY'S RESPONSE REGARDING INTERVENOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

In this declaratory judgment action, Dr. Arthur Hall, the Director of the "KU Center for Applied Economics," sued KU because it intended to produce documents in response to a request under the Kansas Open Records Act (KORA or the "Act"). The University student who filed the KORA request, Schuyler Kraus, has now intervened in this action. Both she and the University have answered. Kraus has moved for judgment on the pleadings, and the plaintiff has filed an opposition. This memorandum responds to both the Intervenor's and the plaintiff's arguments. Both go too far. As explained below, the University agrees that it is entitled to judgment in this matter and that the records should be produced.

I. Legal Standard for the Motion

The student Intervenor's motion seeks judgment on the pleadings pursuant to K.S.A. 60-212(c). The Kansas Supreme Court has stated the standard as follows:

> A motion for judgment on the pleadings requires the trial court to determine whether, upon the admitted facts, the plaintiff has stated a cause of action. If

> successful, the motion can dispose of the case without a trial because the pleadings frame the issues in such a way that the disposition of the case is a matter of law on the facts alleged or admitted, leaving no real triable issue. The motion operates as an admission by movant of all fact allegations in the opposing party's pleadings.

Purvis v. Williams, 276 Kan. 182, 186-87, 73 P.3d 740, 745 (2003) (citations omitted). Nevertheless, the court is not required to accept conclusory allegations as to the legal effects of the events if the allegations are not supported or are contradicted by the description of events. *Halley v. Barnabe,* 271 Kan. 652, 656, 24 P.3d 140 (2001).

II. The Records in Question are Public Records

The starting point in addressing any dispute about open records is the clear public policy embodied in the Kansas Open Records Act. It is state public policy that public records shall be open for inspection by any person, and the Kansas Open Records Act shall be liberally construed and applied to promote such policy. *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681, 268 Kan. 407 (2000). Every public employee knows that his or her records (and emails) could be the subject of a request for records under the Act. Plaintiff is such an employee, and his records are no different. He nevertheless makes conclusory allegations that his KU emails are private, while the Intervenor argues that those records are public. The Intervenor's conclusion is sound, but her logic is flawed. Contrary to Intervenor's arguments, the key to this conclusion is three undisputed facts: (1) Dr. Hall is an employee of the University of Kansas as the Director of the KU Center of Applied Economics (Petition, ¶¶ 3 and 39); (2) the records are emails existing in University electronic mail (Petition, ¶¶ 30-33); and (3) the records relate to Dr. Halls' work as the Director (Petition, ¶¶ 5 and 44, Hall Memo at 5-8).

A. Records Are Not Public Just Because The Government Has Them

On the basis that Dr. Hall created[1] all of the relevant records and their presence on KU servers, the Intervenor argues that all of the records are therefore public records. Here, the Intervenor goes too far. The mere creation and location of these records is not dispositive on the question of whether records are "public records." Records are not public just because they sit in a public office or on a government's email server. If a state employee sends (or receives) a "Happy Birthday" email (or card) to or from his or her spouse, it doesn't become "public" just because it was sent to the state email account or sits on her desk in an agency office. Rather, as K.S.A. 45-217 makes clear, it also must relate to public functions. As the Wisconsin Supreme Court has noted, "the strong consensus is that personal e-mails do not become public records merely because they were sent during a public employee's workday or using government computers and e-mail accounts." *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177 (Wis. 2010). These cases demonstrate the developing national consensus:

- *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007) (the nature and purpose of the document determine records' status; "mere possession of a document by a public officer or agency does not by itself make that document a public record");
- *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 260 S.W.3d 718, 725 (Ark. 2007) ("not all e-mails on Pulaski County computers are public records");
- *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190, 195 (Colo. 2005) ("The simple possession, creation, or receipt of an e-mail record by a public official or employee is not dispositive as to whether the record is a 'public record'.");

[1] Intervenor Memo at 5-8. As Dr. Hall explains in his memo, his petition says nothing about "creating" the records; it makes the conclusory allegation that he "owns" them. See Pl. Mem. at 7. Notably, however, his memo two pages earlier admitted creation of the records. His memo states, "Dr. Hall has alleged ample facts to establish that he created and owns the records at issue …." Pl. Mem. at 5. He goes on to say that he has he has "established that … the documents were ***created by him***…." *Id.* Dr. Hall cannot have it both ways – he either created them or he didn't. His repeated statements in his Memorandum to this Court make clear that Intervenor is correct in stating as a fact that he did. See Landmark Nat. Bank v. Kesler, 289 Kan. 528, 541, 216 P.3d 158, 167-68 (2009) ("Parties are bound by the formal admissions of their counsel in an action.").

- *State v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003) (e-mails not "made or received pursuant to law or ordinance or in connection with the transaction of official business" were not "public records" – even when located on a government-owned computer system);
- *Cowles Publ'g Co. v. Kootenai County Bd.*, 159 P.3d 896, 901 (Idaho 2007) ("it is not simply the fact that the emails were sent and received while the employees were at work . . . that makes them a public record. Rather, it is their relation to legitimate public interest that makes them a public record");
- *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, 789 N.W.2d 495 (Mich. Ct. App. 2010) ("Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA.");

Dr. Hall cites several of these cases, but he distorts their meaning. He uses the words "personal" and "private" with his own personal definitions, and he repeats the term "self-funded" like its meaning is self-evident. The court should be wary. For Dr. Hall, "personal" and "private" do not mean that it relates to non-University activities. They do not mean they are matters solely related to his family or non-University life. Rather, Dr. Hall uses "personal" and "private" to mean "a donation to the University paid for my time making it," and he ignores the fact that it was sent or received in the course and scope of his University employment as part of the duties identified in his 2004 job description. And Dr. Hall cannot seriously suggest that he pays for his own employment. But his petition artfully avoids identifying who actually pays him for his work (the University pays him). Indeed, with selective quoting, he ignores that part of his job description that explains what "self-funded" means. Again, the University will be more transparent:

> The Director is responsible for ensuring the financial viability and growth of the Center by building a fundraising network and implementing fundraising strategies. Fundraising includes obtaining funds for research projects from granting agencies, such stakeholders as KTEC and the Kansas Department of Commerce, and identifying and soliciting support from foundations and other potential donors.

Petition, Exhibit 3, page 2. Thus, when fully examined, the job description makes clear that the Director raises money – including public money – that the University can use to pay him, but the University does pay him, and he is a public employee.

Dr. Hall also makes the conclusory allegation that the "KU Center for Applied Economics" – a phrase that repeatedly appears in plaintiff's verified petition (*see* Petition ¶¶ 10-15) – is "independent and distinct from the University." Pl. Mem. at 8. Amazingly, this claim appears on the same page of plaintiff's brief where he identifies himself as the Director of the "KU Center for the Center [sic] of Applied Economics." *Id.* at 8 (emphasis added). As plaintiff correctly states, the Center is a KU center. KU is "the University." Dr. Hall's conclusory allegation of "independence" is starkly contradicted by the simple fact that the KU Center "is located in Summerfield Hall and the School of Business." Petition ¶ 3. Allegations and arguments like those being made by Dr. Hall are exactly why, when ruling on a motion for judgment on the pleadings, conclusory allegations must be disregarded. *See Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 278, 275 P.3d 869, 883 (2012). The court need not, and should not, accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself. *Stark v. Mercantile Bank, N.A.*, 29 Kan. App. 2d 717, 721, 33 P.3d 609, 613 (2000).

Here, Dr. Hall's conclusions and unique use of language are repeatedly contradicted by real facts. Among many examples, on page 6 of his brief he claims his petition "establishes" that his emails "are private records," and to support the claim, he quotes an Attorney General's opinion dealing with memoranda a school superintendent sent to School board members – documents the Attorney General had no difficulty concluding "fit within the definition of a public record." *See* Kansas Attorney General Op. 90-14. Like his legal authorities, Dr. Hall's conclusions are

contradicted by the description in his own petition – he is the director of the KU Center for Applied Economics. The Center is at the University in the School of Business in Summerfield Hall. He is sending and receiving emails on the University's email system. As the University's policy on "Acceptable Use of Electronic Information Resources" makes clear, "University electronic information resources are state-owned and maintained." *See Exhibit A.* On these facts, one cannot reasonably infer that Dr. Hall's activities as Director of the "KU Center" are not "related to functions, activities, program or operations funded by public funds."

B. Companies Cannot Buy State Employees – And Then Keep Their Work Secret

As the United States Supreme Court has noted about the federal Freedom of Information Act,[2] the central purpose of an open records act "is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 774 (1989). Here, the University of Kansas is a state agency, *see* K.S.A. 76-711-12, and Dr. Hall is the Director of the "KU Center for Applied Economics." Petition, ¶¶ 3, 10-15 (emphasis added).

Thus, Dr. Hall is part of the government, and KORA grants citizens the right to know "what their government is up to." *Reporters Comm.,* 489 U.S. at 773. Part of his job at the University is to raise money so the University can pay for his public employment. Doing his job at the University does not make him a private individual – it subjects him to public scrutiny. That is especially true given his stated, very-public job-related activities of testifying at legislative hearings (Petition, ¶13) and conveying relevant information to decision-makers in the public policy community. Petition, ¶10. His conclusory allegation to the contrary should be disregarded.

[2] The Kansas Attorney General has looked to the federal act for guidance when interpreting KORA. See Kansas Attorney General Op. 2006-8.

Dr. Hall, however, goes further: he claims that because the University email policy gives all employees permission to discuss politics using email and defines such use as "incidental personal use," all of his emails are "personal", and not public. It is important for the court to understand what Dr. Hall is attempting to do here: he is attempting to define his entire employment for the University of Kansas as "personal." Thus, to Dr. Hall, his work – performing the functions specifically described in his University job description – is "personal" and "private." Specifically, Dr. Hall argues, "[A]ny documents created by Dr. Hall in his role as Director are private." Pl. Mem. at 8. The Court should observe this semantic sleight of hand with great suspicion.

This court is obliged to interpret state statutes to avoid absurd and unreasonable results. *State v. Walker*, 280 Kan. 513, 525, 124 P.3d 39, 48 (2005). Dr. Hall's argument leads to precisely those results. Dr. Hall is a University employee. If, as he claims, a private company can buy an entire state employee with a simple contribution to the state government, and thereby protect from scrutiny all of the records the employee creates in the course and scope of that employment, the notion of open government is threatened. Wealthy individuals and corporations will be able to buy our elected and appointed public officials – and close their government records – simply by making a direct contribution to the government to pay for their salary. The result may be great for those who may want to secretly run our government, but our democracy will be eroded by those with the means to pay for public officials and litigate every request for records related to that employee's work. Increasingly cash-strapped agencies in Kansas will be thrilled to take donors' money and get the side – or perhaps primary – benefit of hiding their actions from the voters.

The University is not so presumptuous. As a public university partially funded with taxpayer money and the institution that houses "the KU Center for Applied Economics" and writes Dr. Hall's bi-weekly paychecks, KU understands that the public expects reasonable transparency.

Here, the University considered those expectations when it evaluated Ms. Kraus's KORA request. Dr. Hall's suggestion that a private company can buy the secrecy of his University employment and an exemption from those expectations is dangerous to our system of government and inconsistent with the purposes of the Open Records Act.

III. KORA Authorizes Records Custodians to Determine KORA Exemptions

The Intervenor argues that application of the KORA exemptions is not an issue plaintiff can raise. The University agrees with that position. KORA makes clear that the University, not each affected agency employee, is authorized to make the discretionary decision about what records it will disclose. This issue is simply a legal matter and can appropriately be reached at this time – and would substantially narrow the scope of this litigation.

KORA declares that government agencies are responsible for complying with the Act. The Act states:

> Each public agency shall adopt procedures to be followed in requesting access to and obtaining copies of public records, which procedures shall provide full access to public records, protect public records from damage and disorganization, prevent excessive disruption of the agency's essential functions, provide assistance and information upon request and insure efficient and timely action in response to applications for inspection of public records.

K.S.A. § 45-220(a). Accordingly, the Act imposes obligations on an agency's custodian of records to maintain records and respond to requests for records and produce the records accordingly:

> 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 earliest time and date that the record will be available for inspection. If the request for access is denied, ***the custodian*** shall provide, upon request, a written statement of the grounds for denial.

K.S.A. § 45-218 (a) and (d). The Custodian also has the discretion to release the records listed in the applicable exceptions. As the Supreme Court has noted, documents falling within an

exemption in K.S.A. 45-221 "may be, but are not required to be, released ***at the discretion of the records custodian***." *Wichita Eagle & Beacon Pub. Co. v. Simmons*, 274 Kan. 194, 215, 50 P.3d 66, 82 (2002) (emphasis added).

Nowhere under the Act is any other agency employee given responsibility – or even contemplated – for interpreting the Act or producing requested records for inspection. Nevertheless, Dr. Hall contends – without citation to any authority – that the University "cannot unilaterally determine whether a document or certain information is or is not a 'public record." Pl. Mem. at 1-2. The lack of cited legal authority is telling. In the face of a statute that repeatedly imposes obligations on the "agency" to produce the records, *see, e.g.*, K.S.A. 45-218, and the Supreme Court's recognition that the records custodian has the discretion to not produce – or to produce – records that fall within exemptions, *Wichita Eagle*, 274 Kan. at 215, who does Dr. Hall contend has ultimate responsibility for making that determination? It is of course the agency and its records custodian, and while the University may – and did – seek Dr. Hall's input in the exercise of that discretion, ultimately the decision is the University's as the agency subject to the Act. Neither the First Amendment nor any claimed right of "academic freedom" gives Dr. Hall any further say in that decision. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking.").

In this case, after closely reviewing the emails on the University email system for materials that fall within the KORA exemptions, consulting with Dr. Hall, balancing its relationships with students like the Intervenor against the privacy interests of the faculty and the need for reasonable transparency, and fully mindful of the statute's necessary protections for research work in process,

K.S.A. 45-221(a)(20), the University decided to produce certain records. The University is not embarrassed about, ashamed of, or interested in hiding the relationship between the School of Business, Dr. Hall and Koch, and it believes the public has the right to know about it. Thus, even if this court found one or more documents to technically fall within an exemption, the University has the right to favor transparency and to choose disclosure over the risk of litigation with those seeking records. The University does not need Dr. Hall's permission to be transparent, and neither the Act nor the First Amendment give him the right to second guess the exercise of discretion granted to the University by law.

IV. Records Policy

Both the Intervenor and Dr. Hall make much of the University's email policy. It is difficult to understand why. The University cannot, by policy, limit the reach of state statute except where authorized by law. The legislature has given state agencies no such authority.

Dr. Hall's arguments on this issue are particularly dubious. He argues that his emails are protected under the University's email policy because the policy allows discussion of political topics and describes those discussions as "incidental personal use." Because the policy describes "political" use as "incidental personal use," argues Hall, his political emails are "personal."[3] In short, then, Hall argues that everything he does as Center Director is private because someone else pays for it and his Center work is political. As explained above, this theory has dangerous long-term implications.

It also distorts the policy, which makes clear that personal use is permitted "provided that such use does not interfere with KU operations." In other words, by its very terms, the Email Policy makes clear that "personal use" is different than use for "KU operations." Dr. Hall ignores

[3] The policy states, "Individuals may use email to exchange ideas and opinions, including those dealing with political issues."

that distinction and tries to make a policy intended to apply to those without job functions "dealing with political issues" into a blanket protecting every email he sends or receives while doing his job as Director of the "KU Center."

In contrast, the Intervenor is correct that the Email Policy does not guarantee privacy of emails. It provides some general assurances, but it makes very clear that with proper approval, employees' emails may be viewed and produced. Importantly, nowhere does the Email Policy say that emails of "incidental use" or "personal use" will receive special protection or will not be produced under KORA.

Here, of course, Dr. Hall argues that all of his emails are "personal" because he is paid for by someone outside of KU. As he well knows, the evidence will not support that argument, because KU writes his paycheck, and part of his work is paid for by student fees. But leaving the facts aside briefly, the law does not support his theory either. The fact that a private company makes a contribution that pays for a government employee's salary does not take the employee off the government payroll and shield the employee's functions from public scrutiny.

V. Intervenor's Academic Freedom Argument Has No Basis

In her most creative argument, the student Intervenor claims that she is entitled to the relevant documents as a matter of her own academic freedom as a student. While creative, this argument lacks foundation in fact or law. The Intervenor is a student, but her request for documents was not made pursuant to any student rights. The student's rights to the documents she seeks come only from the Kansas Open Records Act. Her status as a student is irrelevant to that inquiry, and the entitlement would be the same if she had made the request as the president of Greenpeace. Tellingly, Intervenor cites no case applying any alleged right of academic freedom held by a University student, much less explaining how that right would be applied to compel the

production of documents from the University she attends. The Intervenor's claim to the records on the basis of a student right to academic freedom should be summarily denied.

However, the Court should also ignore the improper *ad hominem* attacks that Dr. Hall has made on Ms. Kraus – a KU student. The University apologizes for his attacks, and Dr. Hall should too. Dr. Hall's brief rambles on with grand conspiracy theories that 22 year-old college student Schuyler Kraus and her "well-funded" backers are going to use the information they obtain for "political attack" in an attempt "to cause personal and professional damage to Dr. Hall." (Pl. Mem. at 3.) True or not, these claims are completely irrelevant. Since the passage of KORA, the Supreme Court has repeatedly made clear that the reasons for a records request are irrelevant:

> The Kansas act places no burden on the public to show a need to inspect, and requires no particular motives or reasons for inspection. It declares that all legally required records "shall ... be open for a personal inspection by any citizen ...." It gives the custodian no discretion and no choice; it imposes a duty upon the custodian, and subjects him or her to stringent penalties for noncompliance.

State ex rel. Stephan v. Harder, 230 Kan. 573, 585, 641 P.2d 366, 375 (1982).

Whatever reason she wants these records, and whomever she plans to share them with, are absolutely irrelevant to the University's obligation to produce the requested records, and people who participate in the political process and make themselves public figures – faculty members or not – should expect that their actions may be held up to the "anti-septic rays of sunshine" the Legislature intended when passing KORA. *See Harder*, 230 Kan. at 581. *See also Cowles Pub. Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 159 P.3d 896, 900 (Idaho 2007) (holding that certain otherwise "private" records became public because of the legitimate interest in knowing whether the employee, who had publicly defended another employee's job performance, did so as her supervisor or instead because of an allegedly inappropriate relationship).

VI. Production would not violate Hall's Alleged Academic Freedom Rights

Dr. Hall claims that the University's disclosure of records in response to the student's KORA request "would violate his First Amendment rights afforded to him under principles of academic freedom, as recognized by the United States Supreme Court." Pl. Brief at 17. Like Ms. Kraus, Dr. Hall's claim lacks merit. The Supreme Court has never recognized the right Dr. Hall would have this Court create, and Plaintiff's claim and petition should be dismissed.

As recognized by United States District Judge Eric Melgren in a case involving a dispute between a faculty member and another state university, the term "academic freedom" is "often used, but little explained." *Heublein v. Wefald*, 784 F. Supp. 2d 1186, 1199 (D. Kan. 2011) (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc). Granting a motion to dismiss the faculty member's academic freedom claim, Judge Melgren reviewed the primary cases cited by Dr. Hall's attorneys and concluded, "it seems unlikely that such a claim even exists." 784 F. Supp. 2d at 1199, n. 43.[4]

The claim does not exist because the Supreme Court has recognized institutional, not individual, rights to academic freedom, and "has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc). "[O]ur precedent has consistently demonstrated that it is the educational institution that has a right to academic freedom, not the individual teacher." *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 (3d Cir. 2008). Notably, the *Urofsky* decision, which fully explores the Supreme Court's history of academic freedom decisions, post-

[4] *See also* Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, Kan. J.L. & Pub. Pol'y, Fall 2014, at 78, 95 (noting the "uncertain relationship between academic freedom and the First Amendment").

dates all of the cases cited by Dr. Hall, and it specifically rejected a claim for academic freedom by university faculty members.[5]

Plaintiff first cites *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 270, 77 S. Ct. 1203, 1222 (1957) as the basis for his academic freedom claim. This case is a shaky foundation, because it was not decided on First Amendment grounds. Sweezy was being investigated by a state attorney general looking into allegedly "subversive" activities, and he was jailed for contempt after refusing to answer questions about a guest lecture he gave at a university. 354 U.S. at 238, 243-44. The Court vacated the contempt conviction, but as Justice Clark properly observed in his dissent at the time, the majority decision "is not predicated on the First Amendment questions presented." 354 U.S. at 270. The Fourth Circuit made the same observation about the flowery language Dr. Hall relies upon in his brief, writing, "This paean to academic freedom notwithstanding, the plurality did not vacate Sweezy's contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process." *Urofsky*, 216 F.3d at 412. Notably, Dr. Hall's brief ignores any details of the *Sweezy* case or its reasoning.

Plaintiff next invokes *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 604, 87 S.Ct. 675, 684 (1967). In that case faculty members challenged state laws that conditioned the University's employment of them upon their compliance with a New York plan to prevent employment of 'subversive' persons in state employment – a plan requiring them to certify that they were not Communists or otherwise swear to their activities outside the workplace. 385 U.S. at 591-93. Dr. Hall again claims this case demonstrates the Supreme Court's recognition of

[5] *See also Westbrook v. Teton Cnty. Sch. Dist. No. 1*, 918 F. Supp. 1475, 1492 (D. Wyo. 1996) ("In the end, this Court is unable to discern any distinct First Amendment doctrine that affords heightened protection to academic or "school speech.").

an individual right to academic freedom, but again, federal courts reject that claim. As noted in *Urofsky*, "The vice of the New York provisions was that they impinged upon the freedom of the university as an institution," not the individual employees. 216 F.3d at 414 (emphasis added).

Plaintiff next cites *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 269-70, 98 S. Ct. 2733, 2737 (1978). But that case did not involve a faculty member at all. Instead, it was a challenge to a medical school's admissions program designed to assure the admission of minority students. There, in the next sentence after the one Dr. Hall selectively cites, Pl. Mem. at 18, the Court notes that the academic freedom at issue was "The freedom *of a university* to make its own judgments as to education." *Bakke*, 438 U.S. at 312 (emphasis added).

Here, quite simply, the cases do not create the right that Dr. Hall alleges. The academic freedom here belongs to the University, and it is the "freedom of a university to make its own judgments as to education" and the disclosure of information that balances the rights of students, faculty, and the taxpaying public that expects transparency.

In addition to soundly and conclusively rejecting the legal theory advanced by Dr. Hall, the *Urofsky* case is instructive for its factual similarity. In that case, like this one, instructors challenged an alleged intrusion into their use of University computers. There, it was a Virginia law restricting state employees from accessing sexually explicit material on computers owned or leased by the state. *Urofsky*, 216 F.3d at 404. The statute contained an exception for research projects approved by the University. *Id*. at 405. The faculty claimed the statute interfered with their academic freedom to access sexually explicit materials to conduct research. The court rejected the faculty members' challenge:

> Taking all of the cases together, the best that can be said for (the faculty members') claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing

> in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. *Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy*. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.

Urofsky, 216 F.3d at 415 (emphasis added).

Likewise, the Kansas Open Records Act applies to all state employees, and the University as a state agency is given the responsibility for producing appropriate records upon proper request. Those records include records related to agency employees like "KU Center" Director Dr. Hall. Dr. Hall has no special rights under the First Amendment that other state employees do not have. The right of academic freedom is an institutional right, which the University exercised in deciding to produce the records that are ready for production. Like Judge Melgren, this court should therefore reject Dr. Hall's claims of an individual right to academic freedom.

VII. Dr. Hall Did Not Need to Exhaust Administrative Remedies

Finally, Intervenor contends that plaintiff's lawsuit is premature and that it is barred by the University's administrative procedures for disputes between the University and faculty members. Intervenor's Memo at 27. While a seemingly attractive argument, the University disagrees that it may unilaterally thwart KORA by creating a policy giving faculty members grievance rights before their public records may be produced.

As noted above, KORA provides that state agencies are required to promptly respond to record requests. "*Each request for access to a public record shall be acted upon as soon as possible*, …." K.S.A. 45-218(d) (emphasis added). Furthermore the agency must adopt procedures that "insure efficient and timely action in response to applications for inspection of public records." K.S.A. 45-220(a). When agencies are challenged for failing to produce records,

courts are instructed, "Except as otherwise provided by law, proceedings arising under this section shall be assigned for hearing and trial at the earliest practicable date." K.S.A. 45-222(e).

The student Intervenor's theory would allow the University – or any other state agency – to create internal policies for adjudication of employee rights and input into the University's decision-making that would dramatically interfere with the public's rights to records – all in violation of K.S.A. 45-220(a). Internal grievance procedures can take months to resolve, potentially delaying the production of records far beyond the statute's expectations. There is no basis in the law for agencies having the ability to create such proceedings. Rather, the Act gives the University and its records custodian the authority to make decisions about records production and requires the University to implement procedures that "insure efficient and timely action in response to applications for inspection of public records." K.S.A. 45-220(a). Dr. Hall's case is legally flawed, but he did not need to pursue a University grievance procedure before filing it.

CONCLUSION

Dr. Hall is a University employee at the "KU Center," and his emails don't become "private" or "personal" simply because a private company donates money the University then uses to pay him. The University, not Dr. Hall, has the right and obligation under KORA to produce records upon request, and the University's performance of those duties is the exercise of its own institutional right to academic freedom. The Intervenor's motion should be granted, judgment should be entered for the University, and the records should be produced.

Respectfully submitted,

UNIVERSITY OF KANSAS

/s/ Michael C. Leitch
Michael C. Leitch, KS Bar #19588
Associate General Counsel and
Special Assistant Attorney General
1450 Jayhawk Boulevard
245 Strong Hall
Lawrence, Kansas 66045
Tel: (785) 864-3276
Fax: (785) 864-4617
mleitch@ku.edu

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent via electronic mail on May 26, 2015 to:

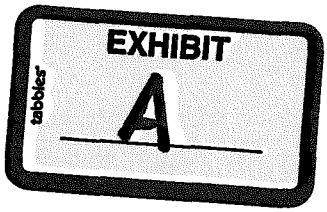
Curtis L. Tideman
Lathrop & Gage LLP
10851 Mastin Boulevard
Building 82, Suite 1000
Overland Park, Kansas 66210-1669
ctideman@lathropgage.com
Attorney for Plaintiff

David J. Brown
1040 New Hampshire, Suite 14
Lawrence, Kansas 66044
djbrown@davidbrownlaw.com
Attorney for Intervenor

/s/ Michael C. Leitch
Counsel for Defendant

INFORMATION TECHNOLOGY POLICY[1]

Acceptable Use of Electronic Information Resources



PURPOSE:

This policy outlines the expectations for the use of electronic information resources at the University of Kansas.

APPLIES TO:

This policy applies to faculty, staff, students, official university affiliates, and any other individuals who use University electronic information resources. This policy applies to all units on the KU Lawrence and Edwards campuses or under the administrative oversight of the Lawrence campus. Residents of student housing and other on-campus housing of the KU-Lawrence campus should refer to the *ResNet Responsible Use Agreement*(http://www.resnet.ku.edu/datauseragreement.jsp[2]) for additional responsibilities relevant to their use of electronic resources in the residential housing environment.

CAMPUS:

Lawrence, Edwards, Parsons, Juniper Gardens, Yoder, Topeka

POLICY STATEMENT:

The University of Kansas provides electronic information resources to faculty, staff, students, official university affiliates, and others in support of the education, research, and public service mission of the University.

The University encourages civil discourse, tolerance, and respect for all individuals, as creating an inclusive, open environment is vital to our success as an academic community. Use of electronic information resources should meet these same expectations.

Responsibilities of Users

Users of electronic systems have the following responsibilities:

I. Access to information resources is granted with the expectation that resources will be used in an ethical and lawful manner. Users will employ electronic information resources consistent with the requirements of federal, state and local law and University and Kansas Board of Regents policies. Users are responsible for using resources appropriately to maintain the integrity of the electronic information resources, and where appropriate, the privacy, confidentiality, and/or security of the electronic information.

II. Individuals should not give out, loan, share, or otherwise allow anyone else to use the access privileges granted to them. Access to secured information resources is provided only with proper authorization.

III. Users are responsible for all activities that occur while using information resources assigned to them, and shall respect the intended use of these resources.

IV. Users may not attempt to circumvent login procedures on any computer system or otherwise attempt to gain unauthorized access. This is not an acceptable use of information resources and may be a crime under federal, state or local law.

V. All users shall use electronic information resources in a manner that does not in any way interfere with, compromise, or harm the performance, functionality, or integrity of the University's electronic information resources. This shall include the adherence to University standards regarding software updates and protections, data handling, and other policies and procedures enacted by the University.

VI. Users will respect network capacity as a shared resource and therefore may not perform operations that degrade network performance for other users. Users may not send spam, chain letters, mail bombs, and or engage in other activities that infringe on the rights and/or productivity of other users.

VII. Users should respect the rights of copyright owners and, when appropriate, obtain permission from owners before using or copying protected material, including but not limited to, music, movies, software, documents, images, or multimedia objects. The University licenses most databases, electronic journals, and other forms of information content under contracts that define who may use the content and what may be done with it. In general, only University registered students, faculty, and staff may use these resources; unaffiliated users may use these resources within library buildings. Systematic or excessive downloading or printing of content is not permitted, including downloading or printing of whole journal issues. See Library Databases: Terms and Conditions of Use (http://www.lib.ku.edu/electro/terms.shtml[3]) for additional information.

VIII. Incidental personal use of electronic information resources, including email, is permitted provided that this use does not interfere with University operations, violate University or Regents policies, create an inappropriate atmosphere for employees in violation of law or University or Regents policy, generate incremental identifiable costs to the University, and/or negatively impact the user's job performance.

A. Except in a purely incidental way, university resources may not be used in external activities unless written approval has been received in advance from the institutions chief executive officer or his/her designee. Such permission shall be granted only when the use of university resources is determined to further the mission of the institution. When such permission is granted, the user will make arrangements for reimbursement of the University for customarily price-able institutional materials, facilities or services used in the external activity. Such use may never be authorized if it violates the Regents policy on Sales of Products and Services. (Please refer to the Conflict of Interest & Time Policy[4].)

B. Users may not use electronic information resources for commercial purposes, for personal financial gain, or to solicit support for outside organizations not otherwise authorized to use University facilities.

C. Individuals may use electronic resources to exchange ideas and opinions, including those dealing with political issues. The latter is generally considered an incidental use of electronic resources. However, University electronic resources (including email) may not be used to support partisan political candidates, party fundraising, or causes. Registered student and campus organizations such as the College Republicans or the KU Young Democrats may use their membership listservs to notify members of meetings, speeches, and /or rallies. Faculty members may use electronic systems for course-related discussions of political topics. For additional information on this topic see Political Activity: Kansas Statutes and Board of Regents/University Policies[5].

IX. Representing oneself as someone else, without previous written authorization, is not considered responsible use of electronic information resources.

X. Electronic resources may not be used to engage in any illegal, threatening, harassing, or bullying conduct, including cyber-harassment or cyber-bullying, nor may they be used in a deliberately

destructive manner.

Responsibilities of the University

Because University electronic information resources are state-owned and maintained, the University has the responsibility to monitor, audit, and assure the proper use of those resources. Although the University supports a climate of trust and respect and does not ordinarily read, monitor or screen individual user's routine use of electronic information resources, it must monitor systems for misuse. The University, therefore, cannot guarantee the confidentiality, privacy, or security of data, email, or other information transmitted or stored on its electronic information. When University officials believe a user may be using electronic information resources in a way that may violate University or Regents policies or federal, state or local law, or the user is engaged in activities inconsistent with the user's University responsibilities, then system administrators may monitor the activities and inspect and record the files of such users(s) on their computers and networks, including word processing equipment, personal computers, workstations, mainframes, minicomputers, and associated peripherals and software.

Reporting Irresponsible Use of Electronic Information Resources

All users and units have the responsibility to report any discovered unauthorized access attempts or other improper usage of KU information resources. If you observe, or have reported to you, a security or abuse problem with any University information resource, including violations of this policy, notify the Information Technology (IT) Customer Service Center (864-8080; itcsc@ku.edu[6]). The Customer Service Center will notify the KU IT Security Officer, who will coordinate the technical and administrative response to such incidents. The KU IT Security Officer leads a Computer Incident Response Team (CIRT), responsible for the identification, containment, eradication, and recovery of all devices during an incident. CIRT members will work with departmental technical liaisons to ensure effective response time and communication. The CIRT is responsible for coordinating evidence gathering and documentation, and for seeking advice from representatives from the Provost and Executive Vice Chancellor's Office, General Counsel's Office, Public Affairs, and others as required by the particular incident.

Reports of all apparent IT policy violations will be forwarded by the KU IT Security Officer to the Chief Information Officer for disposition according to standard procedures and University policies on violation of policy.

CONSEQUENCES:

Use of University electronic information resources contrary to this policy, University or Regents policies, or applicable federal, state or local law is prohibited and may subject the user to disciplinary action including, but not limited to, suspension of the user's access to the electronic information resources. Users also should be aware of other possible consequences under University or Regents policies and federal, state, or local laws, particularly those related to computer crime and copyright violation.

Additionally, students could be subject to disciplinary action under the Code of Student Rights and Responsibilities[7].

Recourse/Appeals

If a department or individual feels that actions taken under this policy have been inappropriate, a review of the decision may be requested. The review will be conducted by the Provost and Executive Vice Chancellor. If, after the review, there is still a disagreement with the decision, appeals should be directed through the

existing procedures established for employees and students.

CONTACT:

Chief Information Officer
345 Strong Hall
1450 Jayhawk Blvd
Lawrence, KS 66045
(785) 864-4999
kucio@ku.edu[8]

APPROVED BY:

Chief Information Officer

APPROVED ON:

Friday, September 15, 2006

EFFECTIVE ON:

Tuesday, October 17, 2006

REVIEW CYCLE:

Annual (As Needed)

DEFINITIONS:

Electronic information resources include any hardware or software intended for the storage, transmission and use of information as well as the digital content files that may be stored, transmitted, or used with hardware or software. This definition includes electronic mail, voice systems, local databases, externally accessed databases, CD-ROM, DVD, video, recorded magnetic media, digital movie or photographic files, or other digitized information. This also includes any wire, radio, electromagnetic, photo-optical, photo-electronic or other facility used in transmitting electronic communications, and any computer facilities or related electronic equipment that electronically stores such communications.

KEYWORDS:

Responsible use, Acceptable use, Incidental use, Personal use, Access privileges, Copyright, Licenses, Monitoring

REVIEW, APPROVAL & CHANGE HISTORY:

10/29/2014: Replaced outdated web reference in the introductory section of the Policy Statement and replaced with updated text. Changes reviewed by Chancellor's Office, Public Affairs, and IT. Final changes approved by Bob Lim, CIO.

Updated on 9/11/2007 to reflect NTS/IT reorganization of responsibilities; updated June 22, 2012 to current organizational structure and titles.

Information Access & Technology Categories: *Information Technology*

Links on this page:

1. https://policy.ku.edu/taxonomy/term/21
2. http://www.resnet.ku.edu/datauseragreement.jsp
3. http://www.lib.ku.edu/electro/terms.shtml
4. http://policy.drupal.ku.edu/provost/commitment-of-time-conflict-of-interest
5. http://policy.drupal.ku.edu/provost/political-activity-KS-statutes
6. itcsc@ku.edu
7. https://policy.ku.edu/student-affairs/student-rights-responsibilities-code
8. kucio@ku.edu
9. https://policy.ku.edu/comment/reply/56#comment-form

Contact Policy Library

policy@ku.edu
785.864.9600
Strong Hall, Room 115
1450 Jayhawk Boulevard
University of Kansas
Lawrence, KS 66045