IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL DEPARTMENT

SCRIPPS MEDIA, INC., d/b/a KSHB-41 Plaintiff, v. THE CITY OF MERRIAM, KANSAS Defendant.	)	Case No. 16CV5238 Chapter 60, Division 7

ORDER SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Scripps Media, Inc. (KSHB TV-41) and defendant City of Merriam, Kansas, each filed motions for summary judgment over the release of video files depicting the former city public works director's theft of fuel, which were recorded by another employee without city direction. KSHB TV-41 sought the files through an open records request and the city denied the same, contending the video files, placed in an employee personnel file, were personnel records and subject to an exemption from disclosure. The Court finds otherwise.

Defendant filed its motion for summary judgment (Doc. 6), and after an extension, plaintiff both opposed defendant's motion and filed its own motion for summary judgment. Doc. 24. Defendant filed its reply and corresponding opposition to plaintiff's motion. Doc. 26. Plaintiff filed its own reply brief. Doc. 29. On April 7, 2017, the parties, through counsel, presented oral argument, and the Court took the matter under advisement. After consideration of the parties' briefs and arguments, the Court finds that plaintiff's motion for summary judgment should be **GRANTED**, and defendant's motion for summary judgment should be **DENIED**, for the reasons set forth below.

I. STATEMENT OF UNCONTROVERTED FACTS

1. Merriam Public Works foreman, Randy Fine, made video recordings of (now former) Merriam Public Works Director Randall Carroll; Fine believed Carroll was stealing fuel from the city. At the time, both Carroll and Fine were city employees. Carroll was Fine's supervisor.

2. Fine did not work for the human relations department and decided, on his own, to record the video because he suspected Carroll of stealing fuel from the public works yard.

3. On or about August 31, 2015, Fine gave a thumb drive containing the videos to Chris Engel, who, at the time, was Merriam Assistant City Administrator. Engel did not supervise Fine or Carroll but he did supervise the Human Resources Department.

4. Fine still has copies of the videos on his home computer.

5. The city eventually used the videos as part of a personnel investigation into Carroll.

6. As a department head, Carroll could only be terminated by the Merriam City Council. On September 3, 2015, the City Council unanimously voted to terminate Carroll's employment. The videos were a factor in the decision although the council never viewed them.

7. After Fine provided Engel with the thumb drive containing the videos, either the city chief of police or another official asked the Johnson County Sheriff to conduct a criminal investigation.

8. As a part of the Sheriff's criminal investigation, deputies interviewed Fine. But Fine was not interviewed by Phil Lammers, Carroll's supervisor, or Sari Maple, the city's human resources director.

9. The City provided the videos to the Sheriff's Office for its investigation.

10. As a result of the Sheriff's Office's criminal investigation, Carroll was charged in a criminal complaint on December 21, 2015, with two felony counts: official misconduct and theft.

11. The affidavit in support of probable cause recites the results of the Sheriff's Office's criminal investigation, including the contents of the videos recorded by Fine.

12. On May 19, 2016, Carroll pled guilty to felony official misconduct. Carroll was placed on probation for 18 months, conditioned upon him paying the city $850 in restitution.

13. On December 22, 2015, Engel burned the videos onto three CDs and asked that the CDs be placed in Carroll's personnel file. The CDs containing the videos were not placed in Carroll's file until after his termination. These videos remain in Carroll's personnel file.

14. Chapter 9 of the Employee Handbook of Merriam, Kansas is titled "Employee Personnel Records," and it contains the following:

> Each employee will have an official personnel file maintained by the Human Resources Department. In each employee's file, records regarding position pay, and other employee status actions will be retained. Other items that may be contained in the file are written notes of explanations, grievances filed, employee forms for taxes and retirement applications. The file may contain disciplinary actions, awards received, training records, and performance reviews.

15. The city's human resource director, Sari Maple, is certified professional by the Society of Human Resource Management ("SHRM"). SHRM is a professional organization of human resource ("HR") professionals. The city uses some SHRM guidelines in its HR function. Its published guidelines suggest keeping investigation records apart from the "basic personnel file."

16. Investigative records on employees who may or may not be disciplined, excluding termination, are sometimes placed in an employee's personnel file personnel file.

17. The city has a policy and practice of placing investigative materials in an employee's personnel file if that investigation leads to the employee's termination.

18. On July 28, 2016, Anderson Alcock, an employee of KSHB, made a Kansas Open Records Request under the Kansas Open Records Act ("KORA") to the City, seeking the 19 videos recorded by Fine.

19. On July 29, 2016, the city responded by invoking an exemption to the request, invoking K.S.A. 45-221(a)(4), and contending that they were part of Mr. Carroll's personnel file and not subject to disclosure.[1]

II. STANDARD OF REVIEW

Kansas' standard on summary judgment is well-established.

> 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.

Bank v. Parish, 298 Kan. 755, 759, 317 P.3d 750 (2014) (*quoting O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012)).

An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000). If there is a disputed fact, however resolved, that could not affect the judgment, it does not present a genuine issue of material fact. *Id.*

[1] During oral argument, the city's counsel admitted the records were public records.

III. DISCUSSION

Plaintiff seeks a declaratory judgment that the requested video recording is not a personnel record. Plaintiff also seeks an injunction, ordering defendant to provide it with copies of the requested videos. In addition, plaintiff seeks attorneys' fees and costs.

An action for declaratory judgment may be maintained only for the purpose of determining and declaring fixed legal rights where it will accomplish some useful purpose; it cannot be invoked merely to try issues and determine questions that are uncertain and hypothetical. *Department of Revenue v. Dow Chemical Co.*, 231 Kan. 37, 642 P.2d 104 (1982).

The function of a declaratory judgment action is to provide a speedy and flexible method for determining the rights and obligations of parties in cases of actual controversy where this is actual antagonistic assertion and denial of right. *Bd. Of Cnty. Comm'rs of Reno Cnty. v. Asset Mgmt and Mktg. LLC*, 28 Kan. App. 2d 501, 405, 18 P.3d 286 (2001). An actual controversy involves a right claimed by one party and denied by the other. *Tomlinson v. Ocwen Loan Serving, LLC*, 2015 WL 7843957, at * 6 (D. Kan. Dec. 3, 2015). The question of whether an actual controversy exists often "is one of degree, and the entertainment of the action rests within the discretion of the trial court." *Wichita Computer & Supply, Inc. v. Mulvane State Bank*, 15 Kan. App. 2d 258, 260, 805 P.2d 1255, *rev. denied* 248 Kan. 999 (1991).

A party cannot pursue a declaratory judgment if there is no genuine legal dispute at hand. *Merryfield v. Jordan*, 281 P.3d 598, 2012 WL 3171872, at *2 (Kan. App. Aug. 3, 2012). That is, one person or entity cannot sue another person or entity simply out of curiosity as to how the law would apply to their relationship or how the law might address some set of hypothetical circumstances that could overtake them in the indeterminate future. *Id.* Declaratory relief is not meant to settle abstract questions; it is limited to correcting errors injuriously affecting the party

seeking it. *In re Estate of Keller*, 273 Kan. 981, 984 (2002). Declaratory relief is generally not available to a party unless that party has been in some way injured or aggrieved. *Id.*

Meanwhile, an injunction is an order to do or refrain from doing a certain act. *State ex rel. Stephan v. Pepsi-Cola General Bottles, Inc.*, 232 Kan. 843, 844, 659 P.2d 213 (1983) (citing K.S.A. 60-901). The granting of an injunction is equitable in nature and involves the exercise of judicial discretion. *Friess v. Quest Cherokee, L.L.C.*, 42 Kan. App. 2d 60, 63, 209 P.3d 722 (2009). A mandatory injunction is an extraordinary remedy used to effectuate full and complete justice by commanding the performance of a positive act. *Id.* (quoting *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 242, 787 P.2d 716 (1990)).

There are four elements that a movant must prove to obtain injunctive relief: (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Friess*, 42 Kan. App. 2d at 64 (quoting *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986). While these four elements are more commonly use to evaluate preventive injunctions, their use in mandatory injunctions is proper. *Id.*

In addition to these four requirements, a clear legal right must have been violated. *See Prophet v. Builders, Inc.*, 204 Kan. 268, 273 462 P.2d 122 (1969) ("A party seeking a mandatory injunction must clearly be entitled to such relief before it will be rendered."); *see also Shaw v. Tampa Elec. Co.*, 949 So.2d 1066, 1069 (Fla. Dist. Ct. App. 2007) ("A mandatory injunction is proper where a clear legal right has been violated. . ."); *Second on Second Café, Inc. v. Hing Sing Grading, Inc.*, 65 A.D.3d 255, 264, 884 N.Y.S.2d 353 (N.Y. App. Div. 2009) ("[S]uch relief will

be granted only where the right [thereto] is clearly established."); *Legakis v Loumpos*, 40 So.3d 901, 903 (Fla. Ct. App. 2010) ("A mandatory injunction is proper where a clear legal right has been violated. . ."). Because an injunction is an equitable remedy, equitable principles apply to the decision of whether to grant a mandatory injunction. *Wietharn*, 246 Kan. at 242.

Both declaratory and injunctive relief are proper remedies here. The Kansas Open Records Act ("KORA") was intended to ensure public confidence in its government by increasing access to government and its decision-making processes. *Data Tree, LLC v. Meek*, 279 Kan. 445, 454, 109 P.3d 1226 (2005). KORA declares that it shall "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." *Id.*

KORA defines a public record as any "recorded information," regardless of form, characteristics, that is made, maintained or kept in the possession of any public agency. K.S.A. 45-217(f)(1). It applies to documents, computer files, and tape recordings. *Id.* As noted earlier, supra at n. 1, defendant concedes the videos are public records.

Defendant argues, however, that the videos are exempt pursuant to K.S.A. 45-221(a)(4), which reads in relevant part:

> (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:
> …
> (4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contacts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.

As both parties have pointed out, Kansas case law does not provide much guidance as to what personnel records include. An inquiry into other jurisdictions is necessary. The personnel record exemption is intended to address the reasonable expectation of privacy that a person has in

his or her personnel records. *Maryland Dept. of State Police v. Maryland State Conference of NAACP Branches*, 190 Md. App. 359, 368, 988 A.2d 1075 (2010) (emphasizing that personnel records must directly pertain to employment and the ability of an employee to perform a job); *see also* State Departments; Public Officers and Employees; Open Public Meetings—Authorized Subjects for Discussion in Closed Executive Sessions; Personnel Matters; Prospective Employees, Kan. Atty Gen. Op. No. 96-61 (1996) ("Commentators have said that the purpose of this provision is to protect the privacy of employees, save personal reputations, and to encourage qualified people to select and remain in the employ of government.").

Personnel records include documents which contain highly personal information, such as work-place evaluations, past criminal convictions, and employment-related disciplinary matters. *Providence Journal Co. v. Kane*, 577 A.2d 661, 663 (R.I. 1990). *See also ACLU Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School Dist.*, 818 N.W.2d 231, 235 (Iowa 2012) ("We concluded that performance evaluations contained in an employee's confidential personnel file were exempt from disclosure under the Act. . .").

Other courts outline what are typically the contents of a personnel file. *See Copley Press, Inc. v. Board of Educ. For Peoria School Dist. No. 150*, 359 Ill. App. 3d 321, 324-25, 834 N.E.2d 558 (2005) ("Given its plain and ordinary meaning, a 'personnel file' can reasonably be expected to include documents such as a resume or application, an employment contract, policies signed by the employee, payroll information, emergency contact information, training records, performance evaluations and disciplinary records."); *Pawtucket Teachers Alliance Local No. 920, AFT, AFL-CIO v. Brady*, 445 A.2d 556, 559 (R.I. 1989) ("In determining whether documents constitute a personnel file, we examine the report in light of the particular circumstances of each case.

Generally, we consider whether the report in issue possesses attributes ordinarily found in personnel files.").

When in question, the definition of "personnel records" should be narrowly construed. *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 913 P.2d 21 (1996) ("Because it is not obvious that the administrative review is a personnel record or personnel information, a narrow construction of the exemptions causes us to conclude that the administrative review is not a personnel record, personnel information generally, or a performance evaluation specifically.").

The Arkansas Supreme Court noted that its "Attorney General has defined 'employee evaluation or job performance records' as follows:

> [A]ny records that were created by or at the behest of the employer and that detail the performance or lack of performance of the employee in question with regard to a specific incident or incidents are properly classified as employee evaluation or job performance records. The record must also have been created for the purpose of evaluating an employee. The exemption promotes candor in a supervisor's evaluation of an employee's performance with a view toward correcting any deficiencies."

Thomas v. Hall, 2012 Ark. 66, 399 S.W.3d 387, 392 (2012). The *Thomas* court emphasized that the Arkansas Open Records statute was intended to encompass reports "compiled by *supervisors*". *Id.* at 392. (emphasis in original). The disclosure exemption includes not only the formal evaluation, but also the incident reports, supervisors' memos, and transcripts of investigations that contribute to that formal evaluation. *Id.* The court, quoting the Arkansas Attorney General, said:

> If a record was routinely created as a regular administrative practice and was not created as part of an investigation of the employee, it does not constitute an employee evaluation/job performance record. Moreover, the fact that a previously created record is later used in an internal investigation of an employee *does not transform the record into an employee evaluation/job performance record.*

Id. at 393 (emphasis in original). The court reiterated this by noting "the fact that an investigation later ensued does not transform the initial report into an exempt document." *Id.* at 396. Additionally, a record does not constitute an employee evaluation/job performance if the employer

did not request creation of the record or as a result of a decision to investigate or evaluate the employee. *Id.* at 393. Ultimately, the court found that the use-of-force reports at issue in this case did not constitute employee-evaluation or job performance records and were subject to disclosure. *Id.* at 396.

A Washington court deviated from many other decisions to find that certain performance evaluations should be disclosed. *DeLong v. Parmelee*, 157 Wash. App. 119, 160, 236 P.3d 936 (2010). "Evaluations of public employees that contain specific instances of misconduct are subject to public disclosure." *Id.* (quoting *Spokane Research & Def. Fund v. City of Spokane*, 99 Wash. App. 452, 456, 994 P.2d 267 (2000)). But evaluations that do not contain specific instances of misconduct are exempt because both the supervisor and the employee reasonably expect those evaluations to remain confidential and the disclosure of that information would be offensive to a reasonable person and of small public concern. *Id.* Most courts recognize a strong public interest in disclosure of official misconduct. The *DeLong* court found that this interest overrides the employee's privacy interest in its performance evaluations.

While Massachusetts exempts "personnel file or information" from the broad definition of "public record" its statute does not define "personnel file or information." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 5, 787 N.E.2d 602 (2003). Prior Massachusetts decisions suggest that the term is neither rigid nor precise and that the determination is case-specific. *Id.* While the precise contours of the legislative term 'personnel file or information' may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination employment decisions regarding an employee. *Id.* When analyzing potential personnel records, the relevant inquiry is the content of the record at issue, not the label assigned

to it. A custodian's designation of materials as "personnel file or information," for purposes of the Public Records Act, is not dispositive of the point, and neither is the custodian's placement of the material in a repository called "personnel file." *Id.*

An Oregon court concluded that a police officer's investigative report regarding misuse of property and thefts at a local school district was not exempt from disclosure. *Oregonian Pub. Co. v. Portland School Dist. No. 1J*, 329 Or. 393, 987 P.2d 480 (1999). In *Oregonian*, the court noted that a comparable statute, ORS 324.850(8), "does not. . . authorize the district to exempt a public record from disclosure by placing it in a district personnel file and claiming an exemption based on the report's title or location, rather than its content. In light of the 'strong and enduring policy that public records and governmental activities be open to the public,' noted by this court in *Jordan v. MVD*, 308 Or. 433, 438, 781 P.2d 1203 (1989), and in other cases, the legislature clearly did not intend such a result." *Id.* at 402. The court stated that the investigation report compiled by the police did not recommend any employment decision regarding the individual school district employees who were the subject of the investigation. *Id.* The school district, despite labeling the investigation as a "Personnel Investigation," had to disclose the investigation report. *Id.* The label had no bearing on the disclosure requirement.

Here, the city resists disclosure of the employee theft videos even though they were not created by any particular city. Rather, the file materials showed up through the voluntary efforts of another city employee who suspected the theft. In this case, the witness was a video recorder. Such a silent witness, of a public property, ensures no expectation of privacy of any employee engaged in such conduct.[2] At the time that Fine created the videos they recorded an area of public

[2] During oral argument, the city's counsel tacitly conceded that disclosure of the video recordings would invigorate the entire controversy again for Carroll who has receded from public view and has been punished for the misconduct. Any lingering privacy concern for Carroll, however, is misplaced. Carroll never had any privacy interest in precluding any recordings of his misconduct. Nor does the city have an interest in protecting the same.

property where there was no expectation of privacy. *See Thompson v. Johnson County Community College*, 930 F. Supp. 501, 507 (D. Kan. 1996), *affirmed*, 108 F.3d 1388 (10th Cir. 1997) (holding no reasonable expectation of privacy from silent video set up to monitor gun possession by security personnel in locker room area where anyone had access to the same).

The videos showed Carroll stealing fuel and were not a city investigative report or disciplinary recommendation. They are not even criminal investigation records, although they were used by the Sheriff's Office. *See* K.S.A. 45-221(a)(10) (noting that criminal the investigation records exemption are those of the investigative agency itself). Any resulting recommendation to terminate occurred independent of Fine's intent to record the conduct. They were not coordinated. Plaintiff is not seeking the disclosure of any disciplinary or other documents regarding the recommendation to terminate.

By placing the videos in Carroll's personnel file they are not transformed into personnel records that are exempt personnel records. Nor does the city's policy of labeling the videos as a personnel record make it so.

Other jurisdictions have stated that the purpose of their state's personnel records exemption is to respect a person's privacy interest in their personnel file. However, public's right to know how public funds are spent may outweigh specific privacy interests. *State ex rel. Stephan v. Harder*, 230 Kan. 573, 583, 641 P.2d 366 (1982) (ordering confidential physician and patient names associated with publicly funded abortions deleted while the records otherwise found not to be exempt because of alleged privacy interests). The exemptions in KORA were not intended to cover up specific acts of misconduct and prevent public disclosure of the same. A public official has no discretion to withhold such public records. *Id.* at 584-85.

Finally, to promote the purposes of KORA, any exemptions must be narrowly construed if any questions exist as whether disclosure is proper. Narrowly construing K.S.A. 45-221(a)(4), there is no interpretation that would preclude the release of the videos. Coupling this narrow interpretation with the persuasive case law from other jurisdictions and the stated purposes of KORA and the Open Records Acts in other jurisdictions, it is clear that these videos are not exempt from disclosure.

Plaintiff seeks attorneys' fees in addition to the declaratory and injunctive disposition of this case, arguing that the city's position is in bad faith. In any action under KORA, the court shall award costs and a reasonable sum as an attorney's fee for services rendered in such action, including proceedings on appeal, to be recovered and collected by the plaintiff if the court finds that the agency's denial of access to the public record was not in good faith and without a reasonable basis in fact or law. K.S.A. 45-222(d).

Attorneys' fees will not be awarded in an open records case where both parties have legitimate interests. *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. Ct. App. 1992) (noting that there were clearly legitimate competing interests on all sides of the case). "A public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Open Records Act. . . *In other words, a technical violation of the Act is not enough; the existence of bad faith is required.*" *Com., Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 882 (Ky. Ct. App. 2012) (*quoting Bowling v. Lexington Fayette Urban County Gov't*, 172 S.W.3d 333, 343) (Ky. 2005)) (emphasis in original).

Here, plaintiff has not demonstrated defendant's bad faith. Plaintiff cites to affidavits it alleges were intentionally misleading; however, the Court disagrees that their intent was to

mislead. Both parties conceded and attempted to analogize to other types of cases to argue what constitutes a personnel record under KORA because of inadequate Kansas case law. Defendant maintained an interest in protecting what it believed to be employee personnel records. The fact that this Court disagrees does not by establish bad faith. Plaintiff is not entitled to attorneys' fees, and both parties shall bear their own costs.

IV. CONCLUSION

The videos at issue are not personnel records, but they are public records and subject to disclosure without exemption. Accordingly, plaintiff's motion for summary judgment is hereby **GRANTED**, while defendant's motion for summary judgment is hereby **DENIED**, with both parties bearing their own costs. The Court declares that the videos shot by Fine are not personnel records under K.S.A. 54-221(a)(4); therefore, these videos are open public records and should be produced copies to plaintiff forthwith.

IT IS SO ORDERED.

4/18/17 /s/ David W. Hauber

Date DISTRICT COURT JUDGE, Div. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH