

“I have reviewed the courtroom notes and Zoom recording from August 11, 2023. From the recording, it would appear the majority of the incident took place prior to Court beginning, in the Chambers/Robing Room area. When Court did begin at approximately 9:15 a.m., at approximately 9:40 a.m., the zoom recording you will hear Judge Viar asking the courtroom clerk, ‘is the chief back there?’”

The warrants themselves show that from 8:57 a.m. to 9:05 a.m., the four warrants were brought to Judge Robson’s chambers by staff from the county attorney’s office.

Judge Robson communicated that she had a conflict and referred the warrants to Judge Viar. Judge Viar did not sign the warrant for the home of Pam Maag. Judge Viar signed the remaining three warrants at the times indicated:

1. The home of Eric Meyer and his mother, Joanne Meyer at 8:57 a.m.;
2. The Marion County Record Newspaper offices at 9:00 a.m.;
3. The home of Ruth Herbel at 9:05 a.m.;

On May 30, 2024, Chief Cody offered the following explanation to the CBI agents, through counsel, to questions posed by the CBI Agent regarding the circumstances at the time the search warrants were signed.

- Counsel said that Chief Cody thought he had signed the warrants and then turned them around and then Judge Viar signed them. It was described as “a brief meeting” but it was clear to Chief Cody that Judge Viar had reviewed the documents prior to the warrants being signed.
- While Cody remembers signing them in judge’s chambers in front of her, counsel relayed that “he also recognizes his memory isn’t perfect because of the multiple drafts and versions that the law enforcement team was circulating.”
- Chief Cody also recalled that he initially signed the warrants before emailing them. He remembered a couple of “technical issues on the warrants, for example one of them had the wrong address.” Chief Cody said they had to

correct these issues. He remembered having to print the warrants several times and ultimately shredding the drafts that had errors.

- According to counsel, Chief Cody “knows that he signed them on August 10 when the law enforcement team was done editing and circulating the warrants. He remembered signing them again in front of Judge Viar.” But again, “he admits he isn’t perfect on remembering all the details of if he specifically signed them again on the judge’s desk in chambers.”
- Finally, counsel added, “His memory is that he did sign them in front of the judge. He has a clear memory of answering a few questions from the judge before she signed them and he thought he signed them in front of her at that time.”

Mr. Ensey told investigators that he recalled seeing Chief Cody coming down the courthouse stairs as Mr. Ensey was walking up the stairs for one of the hearings on the 11th. Chief Cody informed Mr. Ensey that he got three of the four warrants signed. Mr. Ensey was not aware why the judge, District Magistrate Judge Viar, did not sign the search warrant for Mrs. Maag’s residence. Mr. Ensey clarified that he never spoke to Judge Viar about the matter. Mr. Ensey acknowledged that he later heard that District Judge Susan Robson had recused herself from reviewing or signing the warrants. Mr. Ensey did not know why and did not recall who told him that.

On July 9, 2024, Judge Viar was interviewed by the specially appointed prosecutors in the presence of her attorney. Judge Viar is a magistrate judge in the 8th Judicial District (Dickinson, Geary, Marion, and Morris counties) having been appointed in 2022. She recalled that on August 11, 2023, she was in the visiting judge’s chambers in the Marion County Courthouse when she heard the voice of Judge Susan Robson, a District

Court Judge in Marion. Judge Robson walked into Judge Viar's chambers with a man that Judge Viar did not recall having ever met, Marion Chief of Police, Gideon Cody.

Judge Robson said Chief Cody had a number of warrants that needed reviewed and handed the documents to Judge Viar. Judge Robson told Judge Viar that she (Judge Robson) had a conflict, so she was asking Judge Viar to review the matter. Judge Viar specifically recalled Judge Robson also made the statement, "the KBI is involved." Judge Viar interpreted the comment as having been directed at Chief Cody, which Judge Viar took to have been Judge Robson's effort to confirm this understanding. Judge Viar did not recall exactly how Chief Cody reacted (by words or gesture), but it was clear to her that Chief Cody confirmed the KBI was involved.

Judge Viar asked if the warrants were "timely," meaning whether there was any urgency to the warrants. Chief Cody responded that he had officers standing by to serve the warrants. She told him she would need some time to review them and excused the Chief so she could read alone. She ultimately signed three of the four warrants.

Judge Viar recalled that a staff member pointed out that Chief Cody had signed the warrant applications but that his signature had not been notarized. Because Judge Viar had already signed the three search warrants, she held on to all the documents and told staff to alert her when Chief Cody returned for the warrants. At some point later that morning while she was in court, she recalled being notified that Chief Cody had returned to her chambers. She recalled stepping off the bench and approaching Chief Cody in chambers. She told him she signed three of the four warrants. As to the warrant she did not sign, regarding Pamela Maag's residence, Chief Cody asked her if she saw the reference to the email in the affidavit. She responded that she did not recall a reference to email. She said he began to read the document and could not find the reference either.

Chief Cody said he might come back.

Judge Viar swore Chief Cody to the search warrant applications he had already signed. She asked him if the signature on each application was his and he acknowledged that he signed each of the applications documents. She then swore him to each, indicating with her own signature.

At 10:01 a.m., Officer Hudlin sent a copy of the 3 signed search warrants to Agent Leeds, Detective Christner, and an employee of the KDOR, Chad Burr.

At 10:50 a.m., Chief Cody is recorded on his body-worn camera entering the residence of Ruth Herbel, where officers were already present executing the search warrant. At 10:54 a.m., Chief Cody told Mrs. Herbel, "I actually have KBI who is assisting us with this, and their computer forensics division is going to do most of the downloads. And I'm not saying nothing bad about the KBI but you know how slow they can be."

At 10:57 a.m., Chief Cody told Mrs. Herbel, "I explain it to people like this, especially the KBI guy, is uh, it is a felony. . ."

Later that morning, Chief Cody and several officers arrived at the Marion County Record where they found journalists Deb Gruver and Phyllis Zorn seated at the back door of the business. Ms. Gruver later explained to CBI investigators, that she initially assumed there may have been a bomb threat until Chief Cody handed her,

". . . the piece of paper. I barely can read it. When he, I saw a search warrant, and I said well I need to call Eric, and so I start to try to call Eric [Meyer], and he tells me I can't call anyone which I was like what, and then he, I kept trying' cause I'm very stubborn and I know my rights, and he,- um he reached over, um, and very aggressively yanked the phone out of my hand so much so that I filed a report that day about, you know, what happened to my hand. I filed, filed a report with Zach."

The "Report of Property and Money Recovered" from the Marion County Record, dated August 11, 2023, at 10:56 a.m. and signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Deb Gruver Cell phone
2. Phyllis Tower Thermaltake Case
4. Phyllis Phone
5. Eric Tower Coolermaster
6. Server Tower Antel case
7. KDOR Record
8. Deb Gruver Thermaltake Tower
9. Western Digital External Hard drive

On August 11th, 2023, Officer Hudlin assisted in the execution of the search warrant at Ruth Herbel residence. The "Report of Property and Money Recovered" from the home of Ruth Herbel dated August 11, 2023, at 12:10 p.m. and signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Ruth Iphone
2. HP G71
3. HP G71 charger

At 1:20 pm Officer Hudlin assisted in the execution of the search warrant at Eric and Joan Meyer's residence. The "Report of Property and Money Recovered" from the home of Eric Meyer dated August 11, 2023, signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Eric Phone
2. Eric Laptop
3. Living room desk top
4. Router
5. External hard drive
6. KDOR Record "Kari Newell"

Between 2:01 p.m. and 2:24 pm, Chad Burr, with KDOR exchanged e-mails with Chief Cody and Officer Hudlin in which Agent Leeds was cc'd. This series of e-mails concerned inbound IP information with the KDOR website.

11th: It appears this was in response to a voicemail left for Mr. Burr by Chief Cody on the

“Hey Chad this is uh Chief Gideon Cody I work out of Marion Kansas, call me back at 816-██████████, 816-██████████, this is pertaining to a DPPA violation, I guess there's a hole if you guys' system and people are able to access, um...I'll give you more details on it, and it's, it's, it's grown into a monster, thank you.”

CBI Agent Zamora also asked Officer Hudlin about Chief Cody's seizure of journalist Deb Gruver's cellphone as he entered the Marion County Record to execute the warrant. Officer Hudlin was asked specifically under what authority law enforcement was authorized to seize her phone. CBI Agent Zamora pointed out first, that there was no reference to Ms. Gruver or her cell phone in either the warrant application or the search warrant issued for the Marion County Record, and, second, that Ms. Gruver was sitting outside the Marion County Record building at the time Chief Cody seized her phone, preparing to “call Eric.” Officer Hudlin believed the warrant allowed for the collection of “all media.” Officer Hudlin did acknowledge there was no officer safety issue that would justify taking Ms. Gruver's phone.

Saturday, August 12, 2023

On August 12, 2023, Chief Cody sent an e-mail to SAC Popejoy. The email contains statements regarding items seized. Chief Cody then thanked the KBI for “standing behind” him. In an e-mail to Joel Ensey the county attorney, sent the same day, Chief Cody wrote that the KBI was coming Monday to assume the case.

At 1:59 pm, Chief Cody sent the following email to County Attorney Ensey, “Joel, KBI just called. They told me the[y] are 100 percent behind me and we did things exactly as it should have been done. They reached out to me. I didn't call. Their number 2 will be calling me.”

A text message Chief Cody sent to Mr. Ensey on August 12, 2023, at 2:40 p.m., repeated much of what he put in the earlier email to Mr. Ensey, “Joel, KBI just called. They told me the[y] are 100 percent behind me and we did things exactly as it should have been done. They reached out to me. I didn’t call. Their number 2 will be calling me.”

At 2:40 PM, Mr. Ensey responded, “Okay thank you.” Chief Cody then responded, “They want to use an independent lab not affiliated with government for forensic and they appear to be taking this case over. I will let you know.”

At 3:18 p.m., on August 12, 2023, Chief Cody sent a lengthy email to SAC Popejoy in which he described what he and the officers in Marion had done on the 11th. Contained in the email was the following statement regarding Eric Meyer: “It also should be noted, Eric made spontaneous utterances numerous times that he is guilty of the charges on the search warrant (possess but he never disseminated it).” As will be discussed below, the body camera video of Mr. Meyer’s conduct during the execution of the warrants did not in fact reflect any admissions of guilt on the part of Mr. Meyer.

When interviewed by CBI Investigators, SAC Popejoy denied having made any comment about the KBI “standing behind” Chief Cody.

“I probably called him and said what, what’s going on, but at no point did I say everything that you did is, uh, okay, and I called Todd that day as well, uh, and said what in the world is going on, so, no, that is not an accurate representation.”

SAC Popejoy added, “When I found out that . . . they ran off and did the search warrants, without us even able to open the initial investigation, no. There is, there is not anything that I’m gonna say that we’re a hundred percent behind you.” SAC Popejoy said, “he had to live in fantasy land to get that picture.”

Agent Leeds described having received a call from Robert Jacobs, the Assistant Director of the Kansas Bureau of Investigations, who informed Agent Leeds of the growing

public interest in the execution of the search warrants on Friday, August 11th. Because Agent Leeds was off work at the funeral Friday, he had not seen any news coverage. Agent Leeds asked for direction and was told to stop everything.

At 5:56p.m., Chief Cody had the following text exchange with Officer Hudlin:

Gideon
8/12/2023, 5:56 PM

Don t delete any messages. We need them for our files. Even the hateful ones

ZH Zach Hudlin
8/12/2023, 5:57 PM

Ok.

At 6:19 p.m., County Attorney Ensey responded to Chief Cody's earlier emails informing Chief Cody he would need additional warrants signed by a District Court Judge to search any electronic items he had already seized.

Sunday, August 13, 2023

At 9:12 a.m., Chief Cody responded to Attorney Ensey's email:

"Good advice . . . KBI is coming out Monday and I believe (hopefully) they will rescue me from this case. I will pass this on."

SAC Popejoy told CBI investigators that on Sunday the 13th, Chief Cody called her. She stepped outside and spoke to him.

"Sunday, [Chief Cody] calls me, and I had to step out of the church service, and he said well, I really wish you--this is a mess—I really wish you guys would take this over, and . . . and I said well, it's a little f----n' late for that now."

She said that Chief Cody told her, "Todd [Leeds] knew I was doing this" to which she remembered responding, "I don't think [so] because I didn't know what was going on."

Later that afternoon, Chief Cody sent a short series of texts to SAC Popejoy listing the email address to which he had sent information. In the final exchange at 4:31 p.m.,

SAC Popejoy told Chief Cody, "I know you feel like you're out in a limb, but there are amazing minds working behind the scenes to help you and support you. We're here with you, so hang in there with us."

Monday, August 14, 2023

Mr. Ensey spent the weekend preparing for a jury trial that had been scheduled to begin on Monday the 14th. He had several conversations with other Kansas prosecutors Saturday August 12th and Sunday August 13th. When his trial resolved Monday, August 14, Mr. Ensey told CBI he then read the warrants in detail. He said his reaction was, "it's not good."

Monday the 14th was also the first time SAC Popejoy read the warrants in detail. When asked by investigators of her impression of the warrants, SAC Popejoy said she was "shocked, angry, disappointed, [in] disbelief."

According to a press release emailed by the Marion County Sheriff Soyez on Monday, August 14, at 11:27 a.m., the Kansas Bureau of Investigations was to take over the investigation and all communications were to be directed to the KBI:



8/14/2023

The Kansas Bureau of Investigation is leading the investigation regarding the Marion County Record case.

Any questions regarding the case need to be forwarded to Melissa Underwood, with the Kansas Bureau of Investigations.

Jeffrey T. Soyez Sheriff

The e-mailed press release makes it clear that from the standpoint of the Marion County Sheriff, the investigation had been turned over to the KBI.

For his part, Chief Cody issued his own release that morning, which read,

Jeff Soyez

From: Jeff Soyez
Sent: Thursday, August 17, 2023 3:28 PM
To: 'jkuhlman@wcrf.com'
Subject: FW: Public Statement

Email from Chief Cody that I requested showing me his press release.

Jeffrey T. Soyez
Marion County Sheriff
202 South 4th
Marion, KS. 66861
Office# (620) 382-2144
Cell# (620) 381-4027

From: Gideon Cody <GCody@marionks.net>
Sent: Monday, August 14, 2023 7:23 AM
To: Jeff Soyez <JSoyez@marioncoks.net>
Subject: Public Statement

As much as I would like to give everyone details on a criminal investigation I cannot. I believe when the rest of the story is available to the public, the judicial system that is being questioned will be vindicated.

I appreciate all the assistance from all the State and Local investigators along with the entire judicial process thus far.

Speaking in generalities, the federal Privacy Protection Act, 42 U.S.C. §§ 2000aa-2000aa-12, does protect journalists from most searches of newsrooms by federal and state law enforcement officials. It is true that in most cases, it requires police to use subpoenas, rather than search warrants, to search the premises of journalists unless they themselves are suspects in the offense that is the subject of the search.

The Act requires criminal investigators to get a subpoena instead of a search warrant when seeking "work product materials" and "documentary materials" from the press, **except** in certain limited circumstances, including: **(1) when there is reason to believe the journalist is taking part in the underlying wrongdoing.**

The Marion Kansas Police Department believes it is the fundamental duty of the police is to ensure the safety, security, and well-being of all members of the public. This commitment must remain steadfast and unbiased, unaffected by political or media influences, in order to uphold the principles of justice, equal protection, and the rule of law for everyone in the community. The victim asks that we do all the law allows to ensure justice is served. The Marion Kansas Police Department will nothing less.

COURTESY OF
LUNA SHARK MEDIA

Mr. Ensey later shared with CBI Agents personal notes he had emailed to himself. These included a conversation he had with SAC Popejoy on August 14th. According to Mr. Ensey, both he and SAC Popejoy had understood the KBI was going to have taken the lead role in the investigation, but for Chief Cody “jumping the gun” (Mr. Ensey’s phrase). SAC Popejoy had told Mr. Ensey that she had understood the KBI would get warrants for IP addresses of any devices that accessed the KDOR website to get access to Ms. Newell’s record, and this would be accomplished before any other steps would be taken. Mr. Ensey said that he had arrived at the same conclusion based on his conversation on Wednesday the 9th with Agent Leeds.

On Monday, August 14th, Special Agent in Charge (SAC) Bethanie Popejoy inquired and received messages and e-mails from Agent Leeds. Agent Leeds explained to her why he had responded the way he did when Officer Hudlin’s sent him the email with the warrant for the Meyer’s residence attached on August 10, 2023:

“On Thursday night at 5:27 p.m. I emailed him back ‘thank you, Did you guys execute this today?’ because I was confused as to why he was sending me an unsigned SW with no words in the email.”

Tuesday, August 15, 2023

Chief Cody sent e-mails to KBI SAC Popejoy on August 15, 2023, at 12:59 p.m. asserting that Mr. Meyer had “confessed” to certain acts. This assertion appears to have been based on information provided by Officer Eric Mercer, a part time Marion Police Officer and fire investigator, who was working as an agency assist, in his capacity as a State Fire Marshall.

Officer Mercer was present in the Meyer residence during the execution of the warrant. He generated a report that attributed certain statements to Mr. Meyer who was in the residence on the phone speaking to who Officer Mercer believed to be his (Mr.

Meyer's) lawyer while officers were serving the warrant. In his report, Officer Mercer wrote that Mr. Meyer named Phyllis Zorn as the person who accessed the KDOR website to obtain Ms. Newell's driving record.

On June 5, 2024, CBI Agent Zamora contacted Officer Mercer. Agent Zamora read Officer Mercer his (Mercer's) report in which he wrote that during the execution of the search warrant on his house, Eric Meyer was on the phone and said, "We admit to KSA 21-6107 Identity Theft and 21-5839 Unlawful acts with Computers, we signed into state web site, Phyllis Zorn registered under her own name." Agent Zamora had watched Officer Mercer's body worn camera video and told Officer Mercer that Mr. Myer never said those words. Agent Zamora told Officer Mercer that Mr. Meyer actually said, "The allegation is that we violated, KSA 21-6107 Identity theft and 21-5839 Unlawful acts concerning computers..." Investigator Chris Mercer acknowledged that he did not review his body camera video to double check the quote prior to writing his report.

At 3:32 p.m., on August 15th, Detective Christner emailed Chief Cody a draft of a probable cause affidavit regarding Eric Meyer.

By Tuesday August 15th, Joel Ensey had determined that law enforcement needed to return the items seized: "Because at that point in time I had made the determination that all this stuff has got to go back and, [SAC Popejoy] was going to be coming down doing that after-action, kind of who, who, what, when, where kind of thing." Mr. Ensey prepared motions to return the items seized from the search warrants on August 11th. Judge Ben Sexton, the Chief District Judge for the Eighth Judicial District, called Mr. Ensey and told Mr. Ensey to send the release of property to him for review.

On Tuesday, August 15th, Mr. Ensey issued the following press release,

On Monday, August 14, 2023, I reviewed in detail the warrant applications made Friday August 11, 2023 to search various locations in Marion County including

the office of the Marion County Record. The affidavits, which I am asking the court to release, established probable cause to believe that an employee of the newspaper may have committed the crime of K.S.A. 21-5839, Unlawful acts concerning computers. Upon further review however, I have come to the conclusion that insufficient evidence exists to establish a legally sufficient nexus between this alleged crime and the places searched and the items seized. As a result, I have submitted a proposed order asking the court to release the evidence seized warrants. I have asked local law enforcement to return the material seized to the owners of the property.

On Tuesday August 15th, 2023, four days after the search warrants were executed, Det. Christner of the Marion County Sheriff's Office sent an e-mail to Chief Cody at 5:11 pm in which he acknowledged,

"I have a [sic] pc for herbel attached. With the information I have, I am not sure it fits any of the crimes we have discussed except the US fed code. Maybe there is something I am missing."

This is an ostensible reference to the search warrant executed at Marion city council member, Ruth Herbel's residence.

SAC Popejoy told investigators that the interaction between her agency and Chief Cody declined over this period of time:

"Well, so then it became, um, getting Cody being victimized. His character was being assassinated, so on Monday, in the middle of all of the other, um, turmoil that was falling out from all of this, he's, he's calling, and he's sending, um, uh, sending me emails and sending things, and he wants, he wants us to speak to his character . . . I'm in constant contact, at this point, with the PIO [KBI's Public Information Officer], who is just drowning in media outrage, and I said, I, I call her, and I said Melissa, this is what this guy's wanting to do, and she said we're not doing that . . . so I sent him back some correspondence and said look, we are just, this is just, this doesn't have anything to do with the investigation, . . . Um, ev, everything I asked him or told him to do he, just, uh, he was just a rabid squirrel in a cage and just off doing his own thing, and then, well I really feel like you guys are abandoning me. I said I don't know what else to do for you. I, I don't know. You, you haven't done anything that I've asked you to do, and you've run off without us. [Chief Cody said] Well, Todd knew. I said Todd did not know. Todd had a funeral. The county attorney was gone the day that you prepared this, and wasn't in a place where he could approve this. I, I don't know what else we're 'gonna be able to do for you."

Wednesday August 16, 2023

Chief Cody sent proposed charging affidavits to Mr. Ensey. At 10:30 a.m., he sent the affidavits to SAC Popejoy and Agent Leeds, and cc'd Detective Christner. These affidavits explained the facts that he believed supported probable cause to charge Ruth Herbel, Eric Meyer and Phyllis Zorn with various felonies including alleged violations of federal law². SAC Popejoy confirmed the email she received was addressed to her, Agent Todd Leeds and Marion County Sheriff's Detective Christner.

SAC Popejoy called Chief Cody to find why he had sent these documents, and Chief Cody responded that he had sent the documents to the County Attorney's office.

There was no explanation as to why Chief Cody prepared charging affidavits for an investigation that had been turned over to the K.B.I.

At a meeting later that morning, Sheriff Soyez and Chief Cody learned that County Attorney Ensey intended to rescind the warrants and release the items seized back to Ruth Herbel, Eric Meyer and the Marion County Record (Meyer, Gruver, Zorn, et.al.,)

August 21, 2023

KBI Special Agent Todd Leeds emailed Ted Smith, legal counsel for the KDOR, at 10:50 a.m. Agent Leeds identified himself and asked the following,

"My legal question is actually very straight forward:

1. Is it a violation of the law for someone to access another's Kansas driver's license information via the States KDOR public access website (yes or no)
2. If this is in fact a violation of a Kansas State Statute, could you please tell me what it is (i.e., this would be a violation of K.S.A. 21-???? (a)(1)??"

² Chief Cody specifically referenced 18 US code 2722(a), Procurement For Unlawful Purposes.² 18 U.S. code 2722 is a federal statute. Violations of federal law are prosecuted by the United States Attorney's Office in federal district court. Federal Rules allow for application for a federal warrant by a "federal law enforcement officer" or "attorney for the government." There are no provisions for enforcement of federal laws by a local state law enforcement agency. The United States Attorney's Office for the District of Kansas does not intake "direct adoptions" by state law enforcement agencies. Meaning, local police do not file cases in federal district court.

Thirty-nine minutes later, at 11:29 a.m., Mr. Smith responded to Agent Leeds' inquiry as follows (identifying himself as "TES" in his answer):

1. Your Question: Is it a violation of the law for someone to access another's Kansas driver's license information via the States KDOR public access website. (yes or no): TES Answer: no – if the requestor has name, date of birth, address, and driver's license number information from a difference source, KDOR will provide non-confidential information regarding driving accidents, driving record history, and driver driving status. The information provided by the requestor must match the KDOR system, in order for the service to output the driver status information..
 - a. There are different types of record requests that can be made from KDOR's public access website. There is a free service that requires the requestor know required data fields, associated with personal information, that will result in KDOR providing non-personal information.
 - b. There is another service for requesting driver record information when the requestor does not have the required name, date of birth, dl number, current address information, that requires further certifications (and payment of a fee) by the requestor that he or she is requesting the information in manner that conforms with K.S.A. 45-215 et seq., K.S.A. 74-2012(c), and 18 U.S.C. Sections. 2721(b) and 2725(3).
 - c. I have attached a pdf with test dummy information that you can use to explore the scope and utility of the KDOR free driver's license status check service. Please do not distribute this test data to the public or media, it is provided to assist you in your investigation.
2. Your Question: If this is in fact a violation of a Kansas State Statue, could you please tell me what it is. (i.e. this would be a violation of K.S.A. 21-???? (a) (1)?? TES Answer: See Response to 1, I don't have sufficient information about the nature of the request of KDOR to answer your question.

August 29, 2023

On August 29, 2023, the 8th Judicial District's Chief Administrative Judge Ben Sexton, signed a document entitled "Order re Disposition of Seized Data and Photos," which ordered the Marion County Sheriff to provide counsel for the Marion County Record a forensic copy of all data seized from the Record's computers and then to physically destroy all backup copies of the material in the possession of the Marion County Sheriff.

September 29, 2023

On September 29th, 2023, Marion City Administrator, Brogan Jones attended a conference in Wichita, Kansas. During the conference he received several calls from attorneys for the city. It was brought to his attention that after the execution of the

search warrants, Chief Cody had instructed Kari Newell to delete text messages sent between Chief Cody and Ms. Newell. Chief Cody was put on administrative leave that day, September 29th, 2023, by the Mayor. Chief Cody subsequently resigned on October 2, 2023.

November 8, 2023

On November 8, 2023, Kansas Bureau of Investigations Director Tony Mattivi, directed correspondence to the Colorado Bureau of Investigations (CBI) seeking their assistance in the investigation of the search warrants that were sought and served in Marion County on August 11th, 2023. In doing so, he stated:

There are allegations of Chief Cody misrepresenting facts that led to receiving a search warrant for 117 South 3rd Street (Marion County Record), [REDACTED] Eric Meyer and Joana Meyers's Residence). And [REDACTED] (Ruth Herbel's Residence).

Additionally, Debbie Gruver complained Chief Cody took her phone forcefully enough from her to hurt her finger(s). Compounding that allegation from Gruver is the question of whether Chief Cody had legal grounds to seize the electronic device given the premise and scope for the search warrant at 117 S. 3rd St. (she was outside the business). Also, there are further allegation of MPD destroying evidence related to missing pages of a written statement provided by Kari Newell.

November 15, 2023

On November 15, 2023, Colorado Bureau of Investigations (CBI) Agents John Zamora and Michael Struwe were sworn in by Kansas Attorney General, Kris Kobach, as temporary KBI agents to perform their investigation.

November 16, 2023

November 16th, 2023, CBI Agents Zamora and Struwe first travelled to Marion County, Kansas to begin in-person interviews with relevant parties.

LEGAL ANALYSIS OF THE SEACRH WARRANTS

The applications for the three warrants signed on the morning of August 11, 2023 were made public in August of 2023.

Mr. Ensey's decision to return the items seized during the execution of the warrants was influenced by analysis provided to Mr. Ensey by a group of Kansas Prosecutors, including the two special prosecutors herein, which was emailed to Mr. Ensey on the morning of Tuesday, August 15, 2023. That analysis is summarized below:

The office of the Marion County Record

The affidavit/application alleged violations of identity theft and computer crime. The affidavit set forth facts to suggest that Phyllis Zorn accessed the KDOR document by asserting false information on the KDOR website. As has been discussed and will be explored in more detail below, subsequent investigation revealed that this conclusion was not accurate. Setting aside for the moment what would later be learned about the manner in which the KDOR web site functioned and how Ms. Zorn actually accessed Ms. Newell's driving record. On its face, the affidavit could support a colorable claim that Phyllis Zorn committed the crime commonly referred to as Computer Crime, in violation of KSA 21-5839 (to wit: "knowingly and without authorization access . . . a computer, computer system, computer network or any other property.") However, there was no information in the warrant application to establish whether Ms. Zorn utilized a computer located in her home, at the newspaper offices, or used her cell phone or perhaps, some other device in some other location to access the KDOR website. No inquisition subpoena was issued to establish the specific IP address utilized for the ostensible download from the KDOR

webpage.³ First learning the IP (Internet Protocol) address may have helped identify the device or location for a device used to access the KDOR website.

Case law demands that law enforcement establish a “nexus” in their warrant application to explain the link between the facts presented to establish evidence of a crime and the facts presented regarding the location of the evidence. See, e.g., *State v. Bottom*, 40 Kan. App. 2d 155, 165 (2008) (“[T]he trial court must ultimately find a nexus between the place to be searched, the property to be seized, and the criminal conduct.”); *United States v. Skarda*, 845 F.3d 370, 376 (8th Cir. 2016) (“[P]robable cause requires ‘evidence of a nexus between the contraband and the place to be searched.’”) (quoting *United States v. Tellez*, 217 F.3d 547, 550 [8th Cir. 2000]; *United States v. Abernathy*, 843 F.3d 243, 252-53 (6th Cir. 2016).

The home of Eric and Joanne Meyer

The application alleged violations of identity theft and computer crime. The application attributed a statement to Mr. Meyer that he allegedly confessed that Phyllis Zorn had obtained the KDOR record. This assertion was based on a story published by Mr. Meyer in the Marion Record on August 9, 2023: “*Restaurateur accuses paper, councilwoman.*”⁴ Even if Mr. Meyer’s explanation in the article were tantamount to an implicit acknowledgment that Ms. Zorn had accessed the information from the KDOR, the warrant application offered no probable cause to suggest that the fruits or instrumentalities of any crime would be located within the residence of Ms. Zorn’s

³ As will be discussed below, the information relied upon was based on an incomplete understanding of the manner in which the KDOR website worked. Further analysis revealed that the “colorable” violation of the law did not in fact occur.

⁴ Mr. Meyer’s article read as follows: “After verifying that the information was accurate and had been obtained, as the source claimed, from a public website, the Record decided not to publish it.”

employer, Mr. Meyer. The only effort made to establish a nexus to Mr. Meyer's home was the affiant's conclusory statement that Mr. Meyer "is known to work from home."

The Fourth Amendment to the US Constitution protects the "*right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*" The phrase "is known to work from home" was insufficient to establish with particularity that the fruits or instrumentalities of a crime would be in the Meyer residence.

The home of Ruth Herbel

The affidavit/application alleged violations of identity theft and official misconduct. First, no effort was made to establish in the application that Mrs. Herbel downloaded the material in her capacity as a council member. As such, any reliance on the crime of official misconduct was unsupported by factual basis. As to identity theft, a colorable effort is made to establish that *someone* illegally obtained the KDOR records, but the only facts set forth in this application are that Phyllis Zorn may have done so. The only suggestion that Mrs. Herbel committed a crime was that she shared the document. No effort was made in the application to establish that Mrs. Herbel herself obtained the document from KDOR. The search warrant lacked probable cause as to Mrs. Herbel and established no nexus to suggest why law enforcement thought the fruits or instrumentalities of a crime would be found in her home.

The home of Pam Maag

Though this warrant was not signed, the following analysis is offered. The application alleged a violation of identity theft. This warrant was based solely on

innuendo, namely that Mrs. Maag, who was married to a former highway patrolman, forwarded the KDOR document to another. No effort was made in the warrant application to establish that Mrs. Maag downloaded the document, where she might have done this or by what means. No effort was made to explain why the affiant believed the fruits or instrumentalities of a crime would be found within her home or in digital devices in her home. The affidavit was silent as to issues of venue.

Each of the warrants contained the following language:

“Having evidence under oath before me from which I find there is probable cause to believe that an offense against the laws of the State of Kansas, including but not limited to violations of [various crimes listed] has been committed and that certain contraband, fruits, instrumentalities and evidence of such offenses, to wit:”

After which, the warrants set forth a list of evidence or descriptions of types of evidence that law enforcement is permitted to seize, including #2:

“Digital communication devices allowing access to the Internet or to cellular digital networks which were or have been used to access the Kansas Department of Revenue website.”

This broad language – “digital communication devices” – may have provided the colorable basis for law enforcement to seize any “digital communication device,” but the warrants would not have withstood appellate review due to their lack of particularity and the inability to establish a sufficient nexus.

In addition, the warrant for the Marion County Record and, arguably, the home of Eric Meyer, were insufficient to overcome additional protections afforded to the press by virtue of the Kansas Shield law, K.S.A. 60-485, and, under federal law, the Privacy protection Act, 42 USC §§ 2000aa-2000aa-12.

ANALYSIS OF POTENTIAL CRIMES

I. Was it a crime for someone other than Kari Newell to obtain of copy of her driving record from the KDOR website?

Facts:

A. KDOR's Website

In August of 2023, the Kansas Department of Revenue (KDOR) maintained a website through which members of the public were able to access their personal driving record. Subsequent investigation established that there were two methods of accessing the information by way of the KDOR website.

The first method was for a person who did not possess the requisite information – driver's license number, full name, and date of birth—of the driver in question. In such a situation, the system would not provide the information without assurances (communicated by marking one of 13 options, "A" through "M") that the person seeking the information needed the information for official reasons. For example, the "C" box states, *"I work for or am acting on behalf of a government agency and am requesting this information to fulfill the functions of that agency."* This means of access also required the payment of a small fee.

The second way that driver's records were accessible was for situations in which an individual was already in possession of the driver's required identifying information: the driver's full name, driver's license number, and date of birth. The person seeking the records (requestor) with this information would enter the information, then agree to the following:

I will use the information requested in a manner that is specifically authorized by Kansas law and is related to the operation of a motor vehicle or public safety. (See section VI on the front of this form).

In April of 2024, the attorney for KDOR, Ted Smith, clarified that there is no

section VI on the front of the form. A “requestor may see the reference to section VI and checkbox, but the requestor will not have an explanation of what section VI represents, if using the online, free status check process. The Section VI language is left over from earlier versions of the service and is a tool to discourage bots from web scraping the DL status check service.” The requestor accessing the KDOR website using this method in August of 2023 would then have been allowed access to the driving record of the driver whose information was entered, free of charge.

Summarized—what the subsequent investigation clarified was that in its effort to make driver’s records more easily accessible to the public, the KDOR’s website did not distinguish between drivers who sought their own driving records, from the actions of a third party who possessed (for any reason) that driver’s personal information. As such, driver John Doe could access his own driving record, but so could Jane Doe if she knew the personal information of driver John Doe. In the latter situation, Jane Doe could access the driving record of John Doe without being required to first (falsely) identify herself as John Doe, or falsely identifying her motives, or paying a fee.

B. Marion Police Department’s Investigation

On August 7, 2023 Officer Zach Hudlin, called the KDOR during the Marion Police Department’s investigation. A representative from the KDOR spoke to Officer Hudlin on a recorded call that day. The representative explained to Officer Hudlin the KDOR system had an issue that “we don’t want.” She said the KDOR was “trying to fix” this issue because, “anybody can pull it up.” She added, “We didn’t realize how insecure it was.”

The KDOR employee explained to Officer Hudlin that someone used the name Phyllis Zorn to access the KDOR web page to obtain the driving record of Kari Newell. The employee was also able to determine that three minutes later, someone using the

name Kari Newell accessed the KDOR web page and again accessed Ms. Newell's driving record.

In response to this information, Officer Hudlin told her that her answers would "create work." Taken in the context of what then unfolded over the next several days, it is clear that Officer Hudlin reached the erroneous conclusion from his conversation with the KDOR representative that Ms. Zorn had to have falsified her identity and motives in order to access Ms. Newell's driving record. It is difficult to ascertain whether Officer Hudlin's conclusions were the product of confirmation bias, a hurried investigation or simply a misunderstanding of what the KDOR representative was trying to explain. What is clear is that Officer Hudlin reacted to this conversation as though the KDOR representative had provided the investigation with dispositive factual confirmation that Ms. Zorn had committed a crime. Officer Hudlin's interview with CBI Agents confirms he held that misunderstanding. That Officer Hudlin then shared his perception with Chief Cody, is equally clear.

The August 8, 2023, email sent by Chief Cody to County Attorney Ensey provides contemporaneous insight into the conclusions that Officer Hudlin and Chief Cody had apparently reached:

"The Police Department initially believed this to be a mail theft situation. After further investigation it was revealed the DOR record could be obtained online due to 'a hole in the system, we are currently working on.' DOR confirms this was only downloaded by a reporter working for the Marion Record. This would require falsely clicking on the reason for [sic] download on the DOR website. The reasoning for downloading another person's DOR record are as follows." The email then contains what appears to be a screen shot of the KDOR website with items "A" through "M" which respectively provide separate justifications (ex: A: I am requesting my own record; B: I have written consent from the individual to whom the requested information pertains, to obtain records on their behalf.") Item "C" is marked (a fill-in-the-blank was filled in): "I work for or am acting on behalf of a government agency and am requesting this information to fulfill the functions of that agency."

Prior to the issuance of the warrant, Ms. Zorn was not interviewed by Chief Cody or any member of the Marion Police Department. No effort was made to open an inquisition pursuant to K.S.A. 22-3101⁵ in order to issue subpoenas to either KDOR or the internet provider utilized by Ms. Zorn personally, or at the Marion County Record, to better ascertain the circumstances through which Ms. Zorn interacted with the KDOR website.

When Ms. Zorn was interviewed by agents with the Colorado Bureau of Investigations, she explained the following:

- First, that a copy of Ms. Newell's driving record had been provided to the Marion County Record on or about August 2, 2023, by Pam Maag. Mrs. Maag ostensibly sent the document in an effort to publicize Ms. Newell's driving record prior to the Marion city council's Monday, August 7, 2023, vote regarding Ms. Newell's liquor/catering license.
- Second, that Eric Meyer, the editor of the Marion County Record, directed Ms. Zorn to confirm the validity of the document that Mrs. Maag had sent to the newspaper. On August 4, 2023, Ms. Zorn did as instructed by going to KDOR's public website. She entered her own name, Phyllis Zorn, as was later confirmed by KDOR personnel. Then, because Ms. Newell's personal identifying information was contained in the driving record sent to the newspaper, Ms. Zorn had the requisite information necessary to input and then view Ms. Newell's driving record.

⁵ K.S.A. 22-3101 (a) reads, "If the attorney general, an assistant attorney general, the county attorney or the district attorney of any county is informed or has knowledge of any alleged violation of the laws of Kansas, such person may apply to a district judge to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law. Upon the filing of the application, the judge with whom it is filed, on the written praecipe of such attorney, shall issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation. Such subpoenas shall be served and returned as subpoenas for witnesses in criminal cases in the district court."

- Third, Ms. Zorn relayed that after closing out of the KDOR website, it occurred to her that she ought to have printed a copy of the record for her editor, Mr. Meyer. She quickly logged back on to the KDOR website. When the dialog box/search box opened, the name “Kari Newell” auto-populated with the personal information. On April 26, 2024, CBI Agent Zamora contacted KDOR to inquire whether a dialog box/ search box on their website would have auto-populate the last name searched from a given computer in August of 2023. The KDOR confirmed that in August of 2023, this would in fact occur, verifying Ms. Zorn’s account.

The Marion Police Department did recognize the need for outside assistance early on in this investigation, as evidenced by their decision to contact the Kansas Bureau of Investigation. Agent Todd Leeds arrived in Marion, Kansas on August 9, 2023, to meet with Chief Cody, Sheriff Soyez and others. Chief Cody relayed the information gathered at that point, including their conclusion that Ms. Zorn had illegally accessed KDOR website to obtain Ms. Newell’s driving record.

As set forth in the factual summary above, Agent Leeds told Chief Cody he was to go on bereavement leave to attend a family funeral Friday, August 11, and that he would “review the information Chief Cody had provided him in this case, and that he would get back with Cody the following week once he had spoken to the KBI Computer Crimes Unit to discuss the best course of action for this investigation.”

Agent Leeds sent an email to Chief Cody on August 10, 2023, at 11:28 a.m. which read: “Chief Cody, I have opened up case number for KBI 23-533 for the State.”

During his subsequent interview, Detective Christner told CBI Agents that KBI Agent Leeds made the comment during the August 9, 2023, law enforcement meeting in

Marion that, once something is on the internet, “it’s there forever” or words to that effect. Det. Christner disagreed with Agent Leeds’s statement based upon his own understanding of the volatility of digital evidence. Det. Christner did not believe Agent Leeds adequately grasped the impermanent nature of the digital evidence and communicated his concerns verbally to Chief Cody.

For his part, Chief Cody appeared to have understood the KBI would be involved, but perceived the KBI’s response as slow. The morning of August 11, 2023, during the execution of the warrant on the home of Ruth Herbel, Chief Cody told Mrs. Herbel, “I actually have KBI who is assisting us with this, and their computer forensics division is going to do most of the downloads. And I’m not saying nothing bad about the KBI but you know how slow they can be.” While explaining to Mrs. Herbel why he believed she had committed a felony by possessing and then sharing Ms. Newell’s driving record with Brogan Jones, Chief Cody told her, “I explain it to people like this, especially the KBI guy ...”

Det. Christner also recalled Sheriff Soyez saying Ms. Newell would likely “go after” law enforcement in a civil suit if law enforcement did nothing about the people who shared her driving record.

Whether the decision not to wait on the KBI, or to conduct any additional investigation prior to submitting the warrants to Judge Viar on August 11, 2023, was based on a lack of confidence in Agent Leeds’s appreciation for the perceived volatile nature of the digital evidence, a perception that the KBI moved too slow, or simply a desire to move forward without delay is not clear. No written communication has been provided that details the line of thought inside the Marion Police Department in this regard. What is clear, however, is that the Marion Police Department chose not to wait on

additional work by the KBI’s “computer team” and chose instead to move forward with the preparation of search warrant applications and, ultimately, with the execution of the warrants on August 11, 2023.

Conclusion: As will be addressed with respect to each person who possessed or shared Ms. Newell’s driving record, the facts do not support the finding that crimes were committed as defined by Kansas law.

1. Was it a crime for Ryan Newell to (a) obtain Kari Newell’s driving record from KDOR or to share it with Pam Maag?

Mr. Newell knew his ex-wife’s personal information from their time together. With that information, he was able to obtain her record using the KDOR website without misstating his identity, or his motives.

A violation of K.S.A. 21-5839, **Unlawful Acts Concerning Computers**, requires the following:

- (a) (1) *knowingly and without authorization* (emphasis added), . . . copy . . . a computer, computer system, computer network, or any other property.
- (2) use a computer . . . for the purpose of devising or executing a scheme or artifice *with the intent to defraud* (emphasis added) or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation;
- (3) *knowingly exceed the limits of authorization* (emphasis added) and . . . copy a computer, computer system, computer network or other property.
- ...
- (5) *knowingly and without authorization* (emphasis added), access . . . any computer system.

Whether the KDOR website should have allowed unfettered access to a driver’s record to anyone with the requisite information is immaterial to this analysis—even if that level of access was beyond what the KDOR intended. Ted Smith, counsel for KDOR later confirmed with CBI investigators that KDOR did not consider accessing the information a crime “because it’s status information.”

Put another way, Mr. Smith's explanation unravels the central argument that buttressed Chief Cody's conclusion that crimes had been committed by people whom he assumed must have illegally obtained Kari Newell's personal identifying information from the KDOR website or somewhere else. Ryan Newell already had Ms. Newell's personal information. After he shared the KDOR record with Mrs. Maag, who in turn shared it with Mrs. Herbel (who shared it with Brogan Jones) and Ms. Zorn, any one of them could have used that information to access to Ms. Newell's driving record from the free portal, which only showed the status of Ms. Newell's driving privileges. No new personal identifying information was obtained by Ryan Newell via the KDOR site that he did not already possess.

There is nothing in the investigation to suggest that Mr. Newell knew, or had reason to believe, that he was acting beyond the scope of what the KDOR website authorized. Through the free portion of the site, he did not have to falsify his name or motives to access Ms. Newell's driving record.

A violation of K.S.A. 21-6101, **Breach of Privacy**, is knowingly and without lawful authority:

- (1) *Intercepting*, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication;
- (2) *divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it* (emphasis added).

Similarly, since Mr. Newell (or others discussed below) did not illegally intercept or obtain the message from KDOR, his choice to divulge the driving record to others did not constitute breach of privacy. Had Mr. Newell (or others discussed below) physically intercepted mail containing the driving record KDOR sent to Ms. Newell, a violation of the

Breach of Privacy Statute could exist. Downloading a copy of the letter from the KDOR's free website is not covered by the Breach of Privacy statute.

K.S.A. 21-6103, **Criminal False Communication**, is the communication of "information [the sender] knows to be false, . . ." There is no suggestion that Ms. Newell's driving record was inaccurate or in any way contained false information, nor is there any evidence Mr. Newell should have had reason to believe it to be false. This statute has no application to these facts.

K.S.A. 21-6105, **Unjustifiably Exposing A Convicted or Charged Person**, pertains to a person "*charged or convicted of a felony.*" Ms. Newell's driving record contained evidence of a misdemeanor traffic violation, not a felony. As such, this statute has no application to these facts.

K.S.A. 21-6107, **Identity Theft**, is defined as follows:

- (a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, *with the intent to:*
 - (1) Defraud that person, or anyone else, in order to receive any benefit; or

The phrase, "intent to defraud" is defined in K.S.A. 21-5111(o) as, "*an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.*"

Mr. Newell knew his ex-wife's personal identifying information and used it to obtain a copy of her driving record. There is no evidence that he utilized this information in order to deceive anyone, or induce someone to "assume, create, transfer, alter or terminate a right, obligation or power with reference to property."

Receiving "any benefit" alone is insufficient to trigger the statute. Evidence would be required to establish that Mr. Newell intended to receive the benefit as a result of

having defrauded another. Mr. Newell did not have to defraud (deceive) anyone to obtain Ms. Newell's driving record because he already possessed the necessary information to access the record by virtue of his relationship with his ex-wife.

Conclusion: there is insufficient evidence to establish that Ryan Newell committed a violation of a Kansas criminal statute when he obtained Kari Newell's driver's record from the KDOR website. He used information he already possessed to get a copy of her driver's record which showed the status of her driving privileges, as was permitted by the KDOR.

Similarly, there is insufficient evidence to establish that Ryan Newell committed a crime under the laws of the state of Kansas by sharing Kari Newell's driver's record with Pam Maag. There is no evidence that he defrauded anyone by misrepresenting the facts or details of Ms. Newell's driving record or that he shared it with the intent to defraud his ex-wife or to misrepresent her.

2. **Was it a crime for Pam Maag to send Kari Newell's driving record to Phyllis Zorn or Ruth Herbel?**

There is no evidence to establish that Mrs. Maag committed a violation of any of the following statutes: Breach of privacy, in violation of K.S.A. 21-6101 (which applies to intercepted communication or knowingly divulging illegally obtained information); criminal false communication in violation of K.S.A. 21-6103 (which concerns information the sender knows to be false); or Unjustifiably Exposing a Convicted Person or Charged person (which concerns felonies).

Mrs. Maag was sent a copy of Ms. Newell's driving record by someone she could reasonably expect to have lawful access to such record. She did not access the KDOR website to obtain a copy, or falsify her identity or her motives to any entity to obtain the document. Likewise, Mrs. Maag did not alter or in some way falsify Ms. Newell's driving

record, nor did she attempt to defraud Ms. Newell or others when she forwarded the records to Ms. Zorn.

Mrs. Maag sent Ms. Newell's driving record to the newspaper to point out that Ms. Newell had been driving without a license since she moved to Marion.

Conclusion: Unless Mrs. Maag shared Ms. Newell's driving record (and the personal identifying information it contained), knowing it had been illegally obtained or with the intent to defraud Ms. Newell or others or with the intent to "misrepresent" her in order to subject her to "economic or bodily harm," there is no crime defined by Kansas statute that criminalizes that behavior. Pam Maag committed no crime under the laws of the state of Kansas by sending Phyllis Zorn or Ruth Herbel a copy (obtained from Ryan Newell) of Kari Newell's driver's record.

3. **Was it a crime for Ruth Herbel to send Kari Newell's driving record to Brogan Jones?**

Consistent with the analysis of Pam Maag's conduct set forth above, Mrs. Herbel obtained the driving record when it was emailed to her by a third party (Pam Maag). Mrs. Herbel committed no crime by receiving the driving record. Mrs. Herbel then sent it to Marion City Administrator, Brogan Jones, with the observation, "We need to look at this." Over the course of the next several days, she followed up with multiple emails to Mr. Jones containing her ongoing assessment as to which possible state statutes might serve as the basis for the city council to deny Ms. Newell's application for a liquor license.

The fact that she forwarded the driving record within the context of her role as a city council member could implicate K.S.A. 21-6002, **Official Misconduct**, which states in relevant part,

(a) Official misconduct is any of the following acts committed by a public officer or employee in the officer or employee's public capacity or under color of the officer or employee's office or employment: [...]

(3) using confidential information acquired in the course of and related to the officer's or employee's office or employment for the private benefit or gain of the officer or employee or another or to intentionally cause harm to another (emphasis added);

However, the investigation has established Ms. Newell's driving record was not confidential (it was publicly available "status" information, as discussed above) and Mrs. Herbel did not obtain the record in the course of her city council position (she received it from Ms. Maag). Her further distribution to Mr. Jones indicates her interest in sharing it with him was consistent with her obligations as a city council member contemporaneous with a topic on their upcoming agenda.

Conclusion: Contemporaneous emails sent by Mrs. Herbel to Mr. Jones make it clear that Mrs. Herbel believed Ms. Newell's driving record was relevant to the vote pending before the city council. Kansas statutes, case law and administrative regulations all support the conclusion that the subject of zoning related to Ms. Newell's liquor license was properly before the city council. Mrs. Herbel committed no crime under the laws of the state of Kansas by sending Brogan Jones a copy (obtained from Pam Maag) of Kari Newell's driver's record.

4. Was it a crime for Brogan Jones to send Kari Newell's driving record to members of the city council in anticipation of their vote on the liquor license?

Mr. Jones was provided a copy of Ms. Newell's driving record by Ruth Herbel on August 4, 2023. His initial reaction to the matter was to tell the Mayor that "We as a city need to stay out of this 'hear say' or whatever else you want to call it." When the matter was later brought to his attention on August 7, 2023, by Chief Cody, he shared the document with the city council, ahead of the council taking up the issue of Ms. Newell's application for a caterer/ liquor license.

Conclusion: Mr. Jones legally came into possession of the driving record and then had a legitimate reason to share the information with members of the Marion City Council. There is no evidence he thought the information was false or that he harbored an intent to defraud Ms. Newell. As city administrator, it was appropriate under the Kansas Open Records Act (KORA) for him to share with the entire council a document relevant to a topic on the meeting agenda. Mr. Jones committed no crime under the laws of the state of Kansas by sharing a copy of Ms. Newell's driver's record with the city council.

5. **Was it a crime for Phyllis Zorn To Obtain Ms. Newell's Driver's License Record From The KDOR?**

Ms. Zorn had been provided a copy of Ms. Newell's driving record by Pam Maag. Ms. Zorn did not access the KDOR website to obtain the copy Mrs. Maag sent to her, she did not falsify either her identity or her motivation to any entity in order to obtain the confirmatory documentation, and there is no allegation that the information contained in the driving record of Ms. Newell was inaccurate or false in any way.

Once in possession of the KDOR driving record sent by Mrs. Maag, as has been explained in detail above, Ms. Newell's driving records would then have been accessible to Ms. Zorn—as they would to anyone in possession of any driver's personal identifying information—through the KDOR website, free of charge. That Ms. Zorn accessed the website in order to confirm the accuracy of the document before her editor, Mr. Meyer, decided whether to proceed with a story based on said records, did not constitute a crime.

As has been explained above, what seems to have been the driving factor in the decision by Chief Cody to pursue a search warrant, was a mistaken conclusion gleaned from three phone calls totaling 27:57 minutes (with 11:55 in hold time) between Officer Hudlin and the representative from KDOR. His conclusion that, because the name "Kari Newell" was entered into the KDOR website three minutes after Phyllis Zorn's name, the

only explanation was Ms. Zorn must have falsely identified herself as Kari Newell. This conclusion was based on a misunderstanding of how the KDOR website functioned.

Because a search warrant requires an evidentiary foundation, law enforcement officers may not rely on conclusory assertions or opinions unmoored from specific factual representations. The facts need not be in a form admissible at trial—hearsay and other secondhand information may suffice, if the overall circumstances demonstrate reliability. But judicial officers cannot provide the independent check contemplated in the Fourth Amendment if they are asked to review conclusions rather than facts.

State v. Althaus, 49 Kan. App. 2d 210, Syl. 9 (2013).

Other than this single phone call, no additional investigation was done. Marion law enforcement officials made no effort to open an inquisition under K.S.A. 22-3101 to seek information regarding the IP address of any parties who allegedly used their respective internet provider to access the KDOR's website.

Likewise, no effort was made to speak to Mr. Newell, Mrs. Maag, Mrs. Herbel, Mr. Meyer or Ms. Zorn before seeking and executing the warrants. While law enforcement may have held concerns as to the volatility of the digital information, KDOR had the information in their own database—as had been expressed to Officer Hudlin by the KDOR representative on August 7, 2023.

On August 8, 2023, at 3:51 p.m., Detective Christner had sent Chief Cody an email regarding the potential effectiveness of sending a preservation letter to the Marion Record's internet provider:

Chief Cody,

I was able to get a preservation made on Ms. Herbel's email account. However on the Marion record domain is hosted by a small hosing company out of Wisconsin. I can send a preservation request letter, but there is no legal authority behind such request and they may notify the Marion Record if I do so. My advice is if you have the PC for a search warrant is that we just write that and skip a preservation. I am unable to do a yahoo preservation as of yet, as I do not have the token with me to sign in. As for the city of Marion, do you believe the Mr. Jones will delete the email?